

# PROHIBITING CHILD-PARENT VISITATION AFTER PARENTAL RIGHTS ARE TERMINATED BY TRIAL IN NEW YORK: A DENIAL OF PARENTAL DUE PROCESS

*Rachel Turetsky*<sup>†</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	2234
I. THE HISTORICAL SHIFT FROM CLOSED TO OPEN ADOPTIONS .....	2235
II. THE NEW YORK STATUTORY SCHEME FOR ADOPTION AND VISITATION IN CHILD PROTECTIVE PROCEEDINGS .....	2239
A. <i>New York Statutes Governing Abuse and Neglect Proceedings</i> .....	2239
B. <i>New York Statutes Governing Termination of Parental Rights</i> .....	2242
C. <i>The New York Court of Appeals Decision in In re Hailey ZZ</i> .....	2244
III. CONSTITUTIONAL DUE PROCESS RIGHTS FOR PARENTS .....	2250
A. <i>Parental Custody of Children Is a Fundamental Liberty Interest Protected by Due Process</i> .....	2250
B. <i>The New York Statutory Scheme Is Violative of Parental Constitutional Due Process Rights: Statutory Revision Is Necessary to Support the Interests of the Parent</i> .....	2254
IV. THE NEW YORK STATUTORY SCHEME IS BASED ON MISGUIDED POLICY: STATUTORY REVISION IS NECESSARY TO SUPPORT THE BEST INTERESTS OF THE CHILD.....	2261
V. PROPOSED STATUTE FOR POST-TERMINATION VISITATION IN NEW YORK.....	2264
A. <i>Proposal for Legislative Action in New York Following the In re Hailey ZZ. Decision</i> .....	2264
B. <i>Proposal for Statutory Amendment to Permit Post-Termination</i>	

---

<sup>†</sup> Associate Editor, *Cardozo Law Review*. J.D. Candidate, Benjamin N. Cardozo School of Law (June 2017); B.A., Columbia University, 2011; B.A., Jewish Theological Seminary, 2011. I would like to thank Professor Ed Stein for his thoughtful feedback and guidance throughout the writing of this Note. Thank you to the entire *Cardozo Law Review* team for your hard work and expertise in preparing this Note for publication. And a special thank you to my family, especially Justin, for encouraging me throughout law school. All mistakes are my own.

<i>Visitation</i> .....	2265
C. <i>Practical Implications</i> .....	2268
CONCLUSION.....	2270

## INTRODUCTION

In New York City, a mother is facing termination of parental rights proceedings for her five-year-old son placed in the city's foster care system.<sup>1</sup> The city maintains she permanently neglected her son because during the two years he was in foster care, she failed to demonstrate ongoing sobriety. As such, the foster care agency moves to terminate her rights to free her son for adoption. However, she has maintained ongoing contact with her son and visits him regularly at the agency. There are never any concerns about her sobriety when she is visiting with her son. She thinks she has a chance of winning at trial because the agency has not been working with her as it should have. Despite this, she voluntarily surrenders her rights to her son on the condition she is to have ongoing contact with him after her rights are terminated and after he is adopted. Her son's foster mother is his pre-adoptive resource, and she is willing to let the mother and child visit after the adoption because both parents have developed a positive relationship while the child has been in foster care. The family court judge approves the visitation conditions accompanying the mother's surrender as in the best interests of the child.

Imagine the same mother. This time, however, the mother exercises her right to a trial on the termination of her rights, and her attorney presses the agency about the lack of assistance they provided to help the mother obtain proper drug treatment and stable housing. The mother ends up losing the trial, and her rights are terminated. She petitions the court to grant her contact with her son, arguing it would be in his best interests. The judge denies her request on the basis that in New York, post-termination visitation is only allowed after a parent surrenders her rights, not after a trial. In the first scenario, the mother who gave up her parental rights without a trial was able to craft and preserve some relationship with her son. In the second, the same mother who exercised her right to a trial was completely precluded from having any contact with her son.

---

<sup>1</sup> This is a hypothetical situation based on cases the author has encountered while working in the New York City Family Court system as a foster care caseworker and subsequently as a legal intern with organizations representing parents in child protective proceedings.

In 2012, The New York Court of Appeals addressed the state of post-termination visitation in New York and held that a parent is not entitled to post-termination contact after a trial because the Legislature did not explicitly authorize the courts to order such contact.<sup>2</sup> This Note will argue that even if the Court of Appeals correctly decided the previous case, *In re Hailey ZZ.*, the statutory framework governing terminations is in need of a legislative fix. Post-termination contact should be available as an option following a trial as well as following a surrender, given that it must be approved by the family court judge as “in the best interests of the child” regardless.

Part I of this Note will discuss the historical shift from closed to open adoptions in the United States and what states currently permit it by statute. Part II will closely examine New York statutes and case law regarding child protective proceedings, termination of parental rights, and post-termination visitation. Part III will argue that the due process rights of parents demand a change to the current statutory scheme in New York. Part IV will provide a policy rationale for amending the statute. Finally, Part V will propose a legislative amendment to the existing statutory scheme for protecting the rights of parents and children in the termination process. The proposed legislative amendment will allow the family court to approve an agreement made between a biological and adoptive parent for the biological parent to have contact with her child after that parent’s rights are terminated by trial. In addition, the amendment will permit a family court judge to order post-termination contact when agreement between the parties is not possible. In both instances, the court will be guided by the best interests of the child.

## I. THE HISTORICAL SHIFT FROM CLOSED TO OPEN ADOPTIONS

In the past few decades, adoption practices in the United States have moved from being closed and secretive to more transparent processes, referred to as open adoption.<sup>3</sup> Historically, adoption was

---

<sup>2</sup> *In re Hailey ZZ.*, 972 N.E.2d 87, 97 (N.Y. 2012).

<sup>3</sup> Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 312 (2012). Open adoption outside of the foster care context means that the birth and adoptive families have some sort of contact prior to the adoption and/or ongoing contact after the adoption. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, OPENNESS IN ADOPTION: BUILDING RELATIONSHIPS BETWEEN ADOPTIVE AND BIRTH FAMILIES 2–3 (2013) [hereinafter U.S. DEP’T OF HEALTH & HUMAN SERVS., OPENNESS IN ADOPTION], [https://www.childwelfare.gov/pubPDFs/f\\_openadopt.pdf](https://www.childwelfare.gov/pubPDFs/f_openadopt.pdf) (describing the spectrum of adoption options as including confidential or closed adoptions, semi-open or mediated adoptions, and open adoptions).

viewed as marking a total break from a child's biological family, and both the biological and adoptive parents knew little about one another.<sup>4</sup> In fact, children often did not learn that they were adopted until they reached adulthood.<sup>5</sup> The policy objectives behind total severance were to advance the well being of the adoptive child and to secure the adoptive parents' parental control.<sup>6</sup> The prevalent belief was that a lack of openness would assist all parties with adapting to the adoption.<sup>7</sup> However, the secrecy often led to confusion and a sense of shame among adoptees, and it precluded them from obtaining vital information about their pasts, such as medical records.<sup>8</sup>

In the 1970s, adult adoptees began to push back against the closed adoption system, and they demanded information about their birth families.<sup>9</sup> At the same time, birth mothers also began to connect and mobilize in an effort to obtain information about the children they gave up for adoption.<sup>10</sup> In addition, there was considerable decline in the number of infants available for adoption, which was attributable to abortion decriminalization, the newly available contraceptive pill, and a reduction in stigma for unwed mothers.<sup>11</sup> This resulted in a push by biological mothers for more control in the adoption process, leading to the open adoption framework, which included biological mothers choosing the adoptive parents and ensuring contact after adoption.<sup>12</sup>

These early post-adoption agreements were not legally enforceable given that adoption is a legal status governed by statute, and the statutes all provided for closed, not open, adoptions.<sup>13</sup> However, starting in the

---

<sup>4</sup> Sanger, *supra* note 3, at 312.

<sup>5</sup> Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 324 (2008).

<sup>6</sup> Sanger, *supra* note 3, at 316.

<sup>7</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., OPENNESS IN ADOPTION, *supra* note 3, at 3. The prevalent belief was that adoptive parents and adopted children "needed to bond . . . without the interference" of a biological parent, and that any contact with birth relatives would be confusing for the child. In addition, refraining from contact was thought to assist the biological parent in mourning the loss of the child and moving on. Maldonado, *supra* note 5, at 324.

<sup>8</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., OPENNESS IN ADOPTION, *supra* note 3, at 3.

<sup>9</sup> Sanger, *supra* note 3, at 313.

<sup>10</sup> *Id.* at 314. This time period marked a "cultural rethinking of closed adoption." *Id.* at 313.

<sup>11</sup> *Id.* at 314. To demonstrate the demand, Sanger quotes a 1989 statement by the National Committee for Adoption that over "a million couples are chasing the 30,000 white infants available in the country each year." *Id.*

<sup>12</sup> *Id.* at 315. In addition, this push by biological mothers was bolstered by social science literature at the time "suggesting that openness in adoption might be in children's best interests." Maldonado, *supra* note 5, at 325.

<sup>13</sup> Sanger, *supra* note 3, at 315. In New York, for instance, the statutes governing adoption for foster children only allowed for closed adoptions until 2005, with the addition of a voluntary surrender statute that provided for post-adoption contact. N.Y. SOC. SERV. LAW § 383-c (McKinney 2011) (as amended by Act of Aug. 23, 2005, ch. 3, sec. 41, § 383-c, 2005 N.Y. Laws. 35, 59-62).

1980s, courts began to reassess the non-enforceability of post-adoption contact agreements.<sup>14</sup> Subsequently, many states revised their statutory schemes regarding open adoption and added specific provisions for post-adoption visitation.<sup>15</sup> In fact, in the United States today, the majority of states have adoption statutes that provide for enforceable contact after the adoption.<sup>16</sup> Within the states that statutorily provide for contact after adoption, the majority allow for contact after parental rights are involuntarily terminated by a trial and after parental rights are relinquished voluntarily in a surrender.<sup>17</sup> New York is among the small minority of states that only allow parties to enter into contracts for post-termination visitation if the parent voluntarily gives up her rights.<sup>18</sup>

---

<sup>14</sup> Sanger, *supra* note 3, at 316.

<sup>15</sup> *Id.* at 319.

<sup>16</sup> Approximately twenty-eight states and the District of Columbia have statutes that allow for written and enforceable agreements for contact after the finalization of an adoption. The states that permit enforceable contracts are: Alaska, Arizona, California, Connecticut, Florida, Georgia, Indiana (for children over age two), Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire (enforceable agreements only in relation to children in the custody of the Department of Health and Human Services), New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont (stepparent adoptions only), Virginia, Washington, West Virginia, and Wisconsin (stepparent and relative adoptions only). U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2 (2014) [hereinafter U.S. DEP'T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT], <https://www.childwelfare.gov/pubPDFs/cooperative.pdf>. Six additional states have statutes that address post adoption contact, but they do not provide for enforceable agreements; the states are Missouri, North Carolina, Ohio, South Carolina, South Dakota, and Tennessee. *Id.* at 3; *see also* Leigh Gaddie, Comment, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 502 (2009) (noting that while all states have not adopted statutory language supporting post-adoption visitation agreements between a child and birth relatives, no state has statutory language that explicitly prohibits it).

<sup>17</sup> Of the thirty-four states and the District of Columbia that have statutes providing for post adoption contact (this number includes the twenty-eight states in which contracts for contact are enforceable and the six states in which contracts are not enforceable), twenty-five states and the District of Columbia permit contracts for post adoption contact for a parent who has her rights involuntarily terminated; these states are Arizona, California, Florida, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. U.S. DEP'T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT, *supra* note 16, at 5, 6, 9, 10, 11, 15, 16, 17, 18, 20, 21, 22, 24, 26, 28, 30, 31, 33, 34, 35, 36, 37, 40, 41, 42, 43. Vermont and Wisconsin are excluded from this list because their statutes only apply to stepparent and relative adoptions, so they are not relevant to termination of parental rights of a child in foster care who is adopted by a non-relative. *Id.* at 38, 43.

<sup>18</sup> Alaska, Connecticut, Indiana, Montana, New York, Ohio, and South Dakota only permit contracts for post adoption contact for a parent who voluntarily gives up her rights. *Id.* at 4, 8, 12, 20, 27, 29, 35.

Accordingly, the open adoption process is currently widespread in practice and accepted within society.<sup>19</sup> Post-adoption visitation provides a clear benefit for the biological parent giving up her child for adoption, because without it, the biological parent would be a “stranger at law” to her child.<sup>20</sup> The adoptive parent also benefits by being able to support her child’s development and connection to his family.<sup>21</sup> The child benefits by having access to information about his past without feeling guilt or betrayal towards his adoptive family and by having an extended family network and system of support.<sup>22</sup> Accordingly, open adoption rests on the notion that preservation of the biological ties assists in making the creation of the new adoptive ties possible.<sup>23</sup>

Among states resistant to authorizing open adoption schemes, there is a fear that allowing post-adoption contact will make pre-adoptive parents less willing to adopt because providing biological parents some ongoing rights threatens the cohesion of the new, adoptive family.<sup>24</sup> Some states also view giving parents rights after adoption as contravening adoption laws, which rest on the notion that a biological parent’s rights are terminated.<sup>25</sup>

Within the foster care context, open adoption becomes more complex, and fears regarding biological parent interference may be more pronounced because most children have relationships with their biological parents prior to adoption.<sup>26</sup> Most of the children adopted from the foster care system are older and have lived with their biological

---

<sup>19</sup> Sanger, *supra* note 3, at 321. Another key factor continuing the trend towards openness is the ease of finding family through the Internet and social media. Accordingly, choosing openness may provide adoptive parents with more control over communications. U.S. DEP’T OF HEALTH & HUMAN SERVS., OPENNESS IN ADOPTION, *supra* note 3, at 4.

<sup>20</sup> Sanger, *supra* note 3, at 322.

<sup>21</sup> *Id.*

<sup>22</sup> Gaddie, *supra* note 16, at 510–11.

<sup>23</sup> Sanger, *supra* note 3, at 323. The fact a mother is able to arrange for contact after the adoption assists in some cases in driving the adoption forward. *Id.* at 323–24. Accordingly, Sanger describes the post adoption contact agreements as both creating and preserving parent-child relationships. *Id.* at 323.

<sup>24</sup> Gaddie, *supra* note 16, at 507; see also Dawn J. Post et al., *Are You Still My Family? Post-Adoption Sibling Visitation*, 43 CAP. U. L. REV. 307, 331–32 (2015) (discussing fears surrounding post-adoption sibling visitation, but the sentiment is applicable to, and arguably even more pronounced, when it comes to permitting post-adoption contact with a biological parent).

<sup>25</sup> Gaddie, *supra* note 16, at 507.

<sup>26</sup> See Cynthia R. Mabry, *The Psychological and Emotional Ties that Bind Biological and Adoptive Families: Whether Court-Ordered Postadoption Contact Is in an Adopted Child’s Best Interest*, 42 CAP. U. L. REV. 285, 288 (2014). In New York, the average age at adoption is 7.4 years old. This is above the national average, which is 6.2 years old. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, AGE AT ADOPTION FINALIZATION: OCTOBER 1, 2013 TO SEPTEMBER 30, 2014 (FY 2014) (2015), [https://www.acf.hhs.gov/sites/default/files/cb/final\\_age2014.pdf](https://www.acf.hhs.gov/sites/default/files/cb/final_age2014.pdf).

parents prior to being placed in foster care.<sup>27</sup> In fact, across the United States, the percentage of open adoption agreements for children from foster care is less than half of the percentage of open adoption agreements for private adoptions.<sup>28</sup> However, visitation is often found to be in the best interests of the child within the foster care context as well.<sup>29</sup>

## II. THE NEW YORK STATUTORY SCHEME FOR ADOPTION AND VISITATION IN CHILD PROTECTIVE PROCEEDINGS

### A. *New York Statutes Governing Abuse and Neglect Proceedings*

Child protective proceedings in New York Family Courts are governed by a complex statutory framework of state and federal laws.<sup>30</sup> The primary aim of the proceedings is to ensure the safety and well-being of the children involved.<sup>31</sup> For children removed from their

---

<sup>27</sup> Even for children placed in foster care at a very young age, they likely had relationships with their biological parents stemming from ongoing visitation while in foster care, prior to the adoption. Mabry, *supra* note 26, at 288. For example, the visitation policy for the New York City Administration for Children's Services specifies that it is critical for children in foster care to have frequent and consistent visitation when safe to do so. N.Y.C. ADMIN. FOR CHILDREN'S SERVS., DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED DURING VISITS FOR FAMILIES WITH CHILDREN IN FOSTER CARE (2013), <http://www.mohavecourts.com/courtadmin/Infantandtoddler/2016Presenters/CFRNY/NYC%20ACS%20Visiting%20Guidelines.pdf>.

<sup>28</sup> SHARON VANDIVERE, KARIM MALM & LAURA RADEL, U.S. DEP'T OF HEALTH & HUMAN SERV., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 45 (2009), <https://aspe.hhs.gov/system/files/pdf/75911/index.pdf> ("Pre-adoption agreements and post-adoption contact are most common among children adopted privately from within the United States. Specifically, 67 percent of privately adopted U.S. children have pre-adoption agreements compared with 32 percent of children adopted from foster care. . . . Similarly, over two-thirds of privately adopted U.S. children (68 percent) have had contact with their birth families following the adoption, as have almost two-fifths of children adopted from foster care (39 percent).").

<sup>29</sup> In addition to the benefits of open adoption for children of all ages, for an older child, maintaining contact with biological parents may lessen feelings of abandonment. Gaddie, *supra* note 16, at 511; see also Mabry, *supra* note 26; Kristina V. Foehrkolb, Comment, *When the Child's Best Interest Calls for It: Post-Adoption Contact by Court Order in Maryland*, 71 MD. L. REV. 490 (2012); Alexis T. Williams, Note, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609 (2008).

<sup>30</sup> State laws governing proceedings include the Family Court Act, the Domestic Relations Law, the Social Services Law, and the New York Civil Practice Laws and Rules. See N.Y. FAM. CT. ACT (McKinney 2008–2010); N.Y. DOM. REL. LAW (McKinney 2010); N.Y. SOC. SERV. LAW (McKinney 2003, 2010); N.Y. C.P.L.R. (McKinney 1981, 2003, 2005–2008, 2010, 2012–2014). Notable federal laws governing proceedings include the Adoption and Safe Families Act of 1997 (ASFA). 42 U.S.C. §§ 673b, 678, 679b (2012).

<sup>31</sup> Article 10 of the New York Family Court Act governs child protective proceedings, and section 1011 outlines the purpose of Article 10:

biological families and placed in foster care, the goal of the proceedings becomes achieving permanency for the children.<sup>32</sup> Policymakers, judges, and child welfare scholars widely agree that permanency means getting a child out of foster care and into a stable home, because foster care is intended to be a temporary solution.<sup>33</sup> However, some scholars believe that the best method of achieving permanency is to preserve a child's connection to his biological family and community of origin, while others place more of an emphasis on quickly freeing a child for adoption and achieving permanency by legal placement in a new family.<sup>34</sup>

Child protective proceedings are generally initiated when a child protective agency<sup>35</sup> files a petition against a parent or a person legally responsible for the care of a child alleging abuse or neglect.<sup>36</sup> The court

---

This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

N.Y. FAM. CT. ACT § 1011 (McKinney 2010).

<sup>32</sup> *Id.* §§ 1086–1087, 1089.

<sup>33</sup> *In re Joyce T.*, 478 N.E.2d 1306, 1312 (N.Y. 1985) (describing foster care as “a temporary way station to adoption or return to the natural parents, not the purposeful objective for a permanent way of life”); *see also* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 106 (2002). Dorothy Roberts describes “[t]he goal of permanency” as “a pillar of current child welfare philosophy.” *Id.* She explains that concerns surrounding children achieving permanency rest on the idea that the instability of foster care is damaging to a child's psychological and social development. *Id.* While stability could be achieved by a quick return home, the prevailing thinking is that the longer a child remains in care, he becomes attached to his alternate caregiver, and placement in a new, permanent home emerges as the preferred permanency goal. *Id.* at 106–07. Her view, contrary to the federal legislation guiding national child welfare policy, is that in this “conflict between reunification and permanency efforts,” permanency should prevail as the most pressing objective. *Id.* at 107.

<sup>34</sup> ROBERTS, *supra* note 33, at 104–72 (providing a detailed analysis of both positions and arguing that a failure to support family preservation and a push by federal legislation, specifically ASFA, to have children adopted instead is harmful to children and perpetuates a racist, overly-punitive and protective child welfare system); *see also* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129 (2001) (arguing that ASFA has made children less safe and has perpetuated a framework that targets and severs poor family ties rather than strengthening and preserving families). On the other side, Harvard professor Elizabeth Bartholet argues that parenting is more about bonding than blood ties. ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 1–6 (1999).

<sup>35</sup> In New York City, the child protective body is the Administration for Children's Services (ACS), which covers all five boroughs. *See About ACS*, N.Y.C. ADMIN. FOR CHILD. SERVICES, <http://www1.nyc.gov/site/acs/about/about.page> (last visited Feb. 13, 2016). In the rest of the state, the child protective bodies are individual county departments of social services. *See Local Social Services Districts*, N.Y. ST. OFF. CHILD. AND FAM. SERVICES, <http://ocfs.ny.gov/main/localdss.asp> (last visited Feb. 13, 2016).

<sup>36</sup> FAM. CT. ACT § 1031(d) (“[T]he petition shall allege facts sufficient to establish that the return of the child to the care and custody of his parent or other person legally responsible for his care would place the child in imminent danger of becoming an abused or neglected child.”).



may direct the temporary removal of a child from the care of his parents or persons legally responsible for his care and place the child in foster care as a result of the allegations.<sup>37</sup> While the child is placed in foster care, the court conducts a bifurcated trial, which begins with a fact-finding hearing on the allegations of abuse and neglect in the petition.<sup>38</sup> As an alternative to a fact-finding trial, a parent may settle by entering an admission or consent under section 1051 of the Family Court Act.<sup>39</sup> Subsequent to the fact-finding hearing, the court conducts a dispositional hearing and may enter a dispositional order for the child's continued placement in foster care.<sup>40</sup> If the court makes such an order, hearings are conducted on an ongoing basis to assess the child's well-

---

A "neglected child" is defined as a child under the age of eighteen "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care." *Id.* § 1012(f)(i). Failure to meet needs for food, clothing, shelter, education, or medical care despite being financially able to do so renders a parent neglectful. *Id.* § 1012(f)(i)(A). It is also neglect for a parent to use or allow excessive corporal punishment or to misuse drugs or alcohol to the point of losing self-control over her actions. *Id.* § 1012(f)(i)(B). A parent may also be alleged neglectful for abandoning her child. *Id.* § 1012(f)(ii). An "abused child" is defined as a child under the age of eighteen whose parent or person legally responsible for his care "inflicts or allows to be inflicted . . . physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ." *Id.* § 1012(e)(i). A child is also abused if the parent or person legally responsible "creates or allows to be created a substantial risk of physical injury" as outlined above. *Id.* § 1012(e)(ii). Additionally, a child is abused if a parent or person legally responsible commits or allows to be committed a sex offense against the child. *Id.* § 1012(e)(iii); N.Y. PENAL LAW § 130.00 (McKinney 2009).

<sup>37</sup> FAM. CT. ACT. section 1027 sets out a framework for a hearing to be held "no later than the next court day after the filing of a petition to determine whether the child's interests require protection, including whether the child should be returned to the parent or other person legally responsible." *Id.* § 1027(a)(i). Following a hearing, "if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child" and may remand the child with the local commissioner of social services. *Id.* § 1027(b)(i)-(b)(i)(A). A child may be removed prior to the filing of the petition on an emergency basis. *Id.* § 1024; *see also id.* § 1022. If the court determines that remaining at home would pose no imminent risk to the child's life or health, the court will deny the application for removal of the child or direct the immediate return of the child. *See id.* §§ 1027, 1028

<sup>38</sup> If a parent wins at fact-finding, which is to say the allegations in the petition cannot be proven, the case is dismissed as to the parent without any finding of abuse or neglect. *See id.* § 1044 (definition of fact-finding hearing). The evidentiary standard at a fact-finding hearing for abuse and neglect allegations is "preponderance of evidence." *Id.* § 1046(b)(i). For allegations of severe or repeated abuse, the standard is "clear and convincing evidence." *Id.* § 1046(b)(ii).

<sup>39</sup> *Id.* § 1051(a). In an admission, the parent accepts the allegations of abuse or neglect and receives a finding of abuse or neglect, while in a submission, the parent does not admit to the allegations but yields to the court's jurisdiction and obtains a finding of abuse or neglect. *See id.* § 1051(f).

<sup>40</sup> *Id.* §§ 1052(a)(iii), 1055(a)(i); *see also id.* § 1045 (defining dispositional hearing). In a dispositional hearing, the court determines what placement would be in the "best interests of the child." *Id.* § 1052(b)(i)(A).

being and plans for achieving permanency.<sup>41</sup> In working to achieve permanency, the foster care agency must make reasonable efforts to return the child to his home.<sup>42</sup>

### B. *New York Statutes Governing Termination of Parental Rights*

After a child has remained in foster care for a significant amount of time, the foster care agency must file a petition to terminate the parent's rights.<sup>43</sup> The filing of this petition initiates a new line of proceedings in Family Court.<sup>44</sup> An agency must petition for termination of parental rights on one of several statutory grounds, which include abandonment,<sup>45</sup> mental illness or mental retardation,<sup>46</sup> permanent neglect,<sup>47</sup> and severe or repeated abuse.<sup>48</sup> This Note will focus on

---

<sup>41</sup> Article 10-a of the Family Court Act governs permanency hearings for children placed out of their homes, which occur at six-month intervals. *Id.* § 1089(a)(2). The purpose of Article 10-a is "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives." *Id.* § 1086. There are a number of "permanency goals" available, but at the beginning stages of a case, the goal listed for children is generally "return to the parent or parents." *Id.* § 1089(c)(1)(i); *see also* N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2010) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home.").

<sup>42</sup> FAM. CT. ACT § 1089(c)(4)(i) (social services agency must report on services provided to the family in an effort to eliminate need for ongoing placement). Reasonable efforts may be excused in some circumstances upon motion of the social services agency, such as when a parent was convicted of murder in the first or second degree and the victim was another child of the parent. *Id.* § 1039-b.

<sup>43</sup> An agency is required to file the petition after a child has remained in care for fifteen out of the last twenty-two months. 42 U.S.C. § 675(5)(E) (2012); SOC. SERV. § 384-b(3)(l)(i). The New York statute provides for exceptions to this timeframe when a compelling reason exists as to why filing would not be in the best interest of the child, such as when an agency has not provided to a parent the services needed for the safe return of the child. *Id.* § 384-b(3)(l)(i).

<sup>44</sup> The termination case is under a new docket number that runs concurrently to the neglect and abuse proceedings. While a termination of parental rights proceeding progresses, the court continues to hold permanency hearings on the abuse and neglect docket to assess how the child is doing in care and what steps the family and agency have taken towards permanency. *Id.* § 384-b(3)(a)-(f).

<sup>45</sup> *Id.* § 384-b(4)(b) (noting that parental rights can only be terminated for grounds specified in the statute, including if "[t]he parent or parents . . . abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court").

<sup>46</sup> *Id.* § 384-b(4)(c) (stating the condition must "presently and for the foreseeable future" prevent a parent from providing "proper and adequate care" for a child who has been in care for at least one year prior to the filing of the petition). The parent's condition must place the child "in danger of becoming a neglected child" if returned to the parent's care. *Id.* § 384-b(6)(a)-(b).

<sup>47</sup> *Id.* § 384-b(4)(d). A parent permanently neglects her child if, for a specified amount of time, she fails "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." *Id.* § 384-b(7)(a).

<sup>48</sup> *Id.* § 384-b(4)(e). An order granting guardianship and custody may also be granted if both parents of a child are dead and there is no lawfully appointed guardian. *Id.* § 384-b(4)(a).

termination due to permanent neglect, mental illness, and mental retardation. As opposed to abandonment and severe or repeated abuse, these grounds are ones in which parents are more likely to be found statutorily unfit yet still able to maintain relationships with their children.<sup>49</sup>

As with abuse and neglect trials, termination proceedings on permanent neglect grounds are bifurcated trials.<sup>50</sup> In order to prevail in terminating a parent's rights, an agency must first prove parental unfitness in a fact-finding trial.<sup>51</sup> Then, at a dispositional hearing, the court determines whether termination of parental rights would be in the best interests of the child.<sup>52</sup> In contrast, there is no right to a dispositional hearing following termination on grounds of mental illness or mental retardation.<sup>53</sup> The court has discretion to order a dispositional hearing following termination based on mental illness or retardation, but it is not required to do so.<sup>54</sup>

The only other option for a parent instead of a trial is to voluntarily surrender her parental rights.<sup>55</sup> A parent may choose to surrender her

---

<sup>49</sup> See, e.g., *In re Kyshawn F.*, 944 N.Y.S.2d 184 (App. Div. 2012) (affirming finding that mother permanently neglected her disabled son, but modifying the order of disposition to provide for visitation between them due to his emotional attachment to her); *In re Selena C.*, 909 N.Y.S.2d 84 (App. Div. 2010) (affirming finding that the mother was statutorily unfit by reason of mental illness but remanding to determine if visitation was in the best interests of the child); *In re Kahlil S.*, 830 N.Y.S.2d 625, 626–27 (App. Div. 2006) (affirming finding that the mother was statutorily unfit by reason of mental illness but remanding to determine if visitation was in the best interests of the child); *In re Corinthian Marie S.*, 746 N.Y.S.2d 606 (App. Div. 2002) (affirming finding that the mother was statutorily unfit by reason of mental retardation, and affirming order for two supervised visits per year as well as “exchange correspondence and cards with the children on birthdays and holidays”).

<sup>50</sup> N.Y. FAM. CT. ACT § 625 (McKinney 2009) (sequence of hearings). Article 6 of the Family Court Act contains provisions specific to termination proceedings on the grounds of permanent neglect. *Id.* § 611 (explaining purpose of Article 6).

<sup>51</sup> *Id.* § 622. For the grounds of permanent neglect, in addition to showing the parent's inability to safely parent, the agency must prove that it undertook “diligent efforts” to “assist, develop and encourage a meaningful relationship between the parent and child.” N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2010). For severe or repeated abuse, “diligent efforts” are also required, and they include “efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child.” *Id.* § 384-b(8)(a)(iv), (8)(b)(iii). The evidentiary standard for all termination grounds is “clear and convincing proof.” *Id.* § 384-b(3)(g)(i); FAM. CT. ACT § 622 (explaining the evidentiary standard for showing permanent neglect).

<sup>52</sup> *Id.* § 623 (definition of dispositional hearing in permanent neglect cases); *Id.* § 631 (options available to a court upon disposition). One option available to the court is to issue a suspended judgment, which provides the parent with an extension of time to plan for reunification. *Id.* § 633. At disposition, the court has discretion to condition orders. *Id.* § 634.

<sup>53</sup> See *In re Joyce T.*, 478 N.E.2d 1306, 1311–13 (N.Y. 1985).

<sup>54</sup> *Id.* at 1311.

<sup>55</sup> Following a parent's surrender, the foster care agency has guardianship and custody of the child. SOC. SERV. § 383-c; see also FAM. CT. ACT § 1055(a) (enforcement of surrender

rights and free her child for adoption without any conditions, leaving the foster care agency to identify the adoptive resource, totally severing any contact between the parent and child.<sup>56</sup> Alternatively, a parent may surrender with conditions and specify who is to adopt her child and arrange for contact and visitation with the child following the adoption.<sup>57</sup> The adoption proceedings are initiated by yet another petition<sup>58</sup> and may occur months after the termination of parental rights has been completed.<sup>59</sup> However, if a parent's rights are terminated involuntarily, there is no opportunity for the child and parent to have visitation during what is frequently an extended period of time before the adoption occurs. In fact, sometimes adoption never happens, and children who are freed for adoption linger in the system without any legal parent until they age out of foster care.<sup>60</sup>

C. *The New York Court of Appeals Decision in In re Hailey ZZ.*

In 2012, the New York Court of Appeals decided *In re Hailey ZZ.*, in which it addressed a split in the Appellate Division surrounding the authority of courts to order post-termination visitation.<sup>61</sup> The Court

---

contract prior to adoption); N.Y. DOM. REL. LAW § 112-b (McKinney 2010) (enforcement of surrender contract following adoption).

<sup>56</sup> SOC. SERV. § 383-c.

<sup>57</sup> *Id.* § 383-c; DOM. REL. § 112-b. The identified adoptive resource must be a certified foster parent and a resource approved by the agency. SOC. SERV. LAW § 383-c(2)(a). The written agreement for visitation reflects conditions agreed upon by all the parties and must be approved by the judge as in the best interests of the child. *Id.* § 383-c(2)(b).

<sup>58</sup> DOM. REL. § 112.

<sup>59</sup> This is true for both surrenders and termination by trial. Social Services Law section 383-c treats the court's approval of a surrender as the moment of terminating a parent's rights even though the agency only initiates the adoption process in court following the surrender. SOC. SERV. § 383-c. According to recent statistics, the average time between termination of parental rights and adoption finalization in New York is 14.7 months. This is above the national average, which is twelve months. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, TIME BETWEEN TERMINATION OF PARENTAL RIGHTS (TPR) AND ADOPTION FINALIZATION: OCTOBER 1, 2013 TO SEPTEMBER 30, 2014 (FY 2014) (2015) [hereinafter U.S. DEP'T OF HEALTH & HUMAN SERVS., TIME BETWEEN TERMINATION], <https://www.acf.hhs.gov/sites/default/files/cb/tpr2014.pdf>.

<sup>60</sup> Children age out when they reach the maximum age set by the state to receive foster care services. See Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging out*, 17 CUNY L. REV. 145, 147-48 (2013). In most states, including New York, children may remain eligible for foster care services until age 21. *Id.* at 153; see also FAM CT. ACT § 1087. Children who age out without legal parents are deemed "legal orphans." See Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 325-30 (2010) (discussing statistics of legal orphans in the United States and the dire outcomes for children who remain in the foster care system without a legal parent until adulthood).

<sup>61</sup> *In re Hailey ZZ.*, 972 N.E.2d 87, 88 (N.Y. 2012).

held that New York courts lacked this authority following the termination of parental rights by trial, pursuant to Social Services Law section 384-b,<sup>62</sup> and could only order visits following a voluntary surrender of rights, pursuant to Social Services Law section 383-c.<sup>63</sup> Social Services Law section 384-b only provides for the termination of a parent's rights by a trial in Family Court,<sup>64</sup> whereas Social Services Law section 383-c creates an option for a parent to voluntarily surrender parental rights with court approval without having a trial.<sup>65</sup>

At the time of the *Hailey ZZ.* decision, two of four Appellate Divisions allowed for post-termination contact,<sup>66</sup> and the Court reviewed the split among the divisions in detail.<sup>67</sup> The Fourth Department held in *In re Kahlil S.*<sup>68</sup> that family courts were authorized to award post-termination visitation where the parent's rights were terminated by trial and grounded its decision in section 634 of the Family Court Act.<sup>69</sup> The Second Department held that post-termination contact was a possibility when a parent's rights were terminated on the basis of mental illness,<sup>70</sup> mental retardation,<sup>71</sup> and permanent neglect,<sup>72</sup>

---

<sup>62</sup> SOC. SERV. § 384-b.

<sup>63</sup> *In re Hailey ZZ.*, 972 N.E.2d at 95–97. One justice filed a dissenting opinion. *Id.* at 97 (Pigott, J., dissenting). For more information about the New York statute governing a voluntary surrender of parental rights, see SOC. SERV. § 383-c.

<sup>64</sup> This section of the Social Services Law sets forth the statutory grounds for termination by trial, which include abandonment, mental illness or mental retardation, permanent neglect, and severe or repeated abuse. SOC. SERV. § 384-b.

<sup>65</sup> This section of the Social Services Law allows a parent to sign a written surrender agreement that designates a particular person or persons who will adopt the child, and it also allows for the agreement to specify terms and conditions for contact between the child and the child's parent or parents. SOC. SERV. § 383-c(2)(b). The court reviews the written surrender agreement and approves it if it is in the best interests of the child. *Id.*

<sup>66</sup> The Fourth Department and the Second Department permitted the practice, whereas the First and Third Departments did not. *In re Hailey ZZ.*, 972 N.E.2d at 92–95.

<sup>67</sup> *Id.*

<sup>68</sup> 830 N.Y.S.2d 625 (App. Div. 2006). Since deciding *In re Kahlil S.*, the Fourth Department has continued to affirm that the Family Court may make a determination as to whether continued contact with a parent is in the child's best interest. *See, e.g., In re Lashawnda G.*, 938 N.Y.S.2d 696 (App. Div. 2012) (determining that visitation between a father and child would not be in the child's best interests because the father was serving a lengthy prison sentence, had minimal prior contact with his son, and his son became agitated when travelling to the prison); *In re Samantha K.*, 872 N.Y.S.2d 813 (App. Div. 2009) (affirming termination of the father's parental rights based upon a finding of permanent neglect, while allowing the father to retain visitation rights as in the best interests of the child); *In re Bert M.*, 856 N.Y.S.2d 758 (App. Div. 2008) (affirming the termination of parents' rights on grounds of permanent neglect, but remanding to consider whether visitation would be in the best interests of the children).

<sup>69</sup> *In re Hailey ZZ.*, 972 N.E.2d at 92–93; *see* N.Y. FAM. CT. ACT § 634 (McKinney 2009) (“The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner *on such conditions, if any, as it deems proper.*” (emphasis added)).

<sup>70</sup> *In re Selena C.*, 909 N.Y.S.2d 84 (App. Div. 2010) (remanding case for a hearing on visitation).

but not on the basis of abandonment.<sup>73</sup> In contrast, the First Department took the position that post-termination visitation where the parent's rights were terminated by trial was not permitted.<sup>74</sup> Similarly, the Third Department maintained that Family Court could not direct post-termination contact after the parent's rights were terminated by trial.<sup>75</sup>

The facts of *Hailey ZZ.*, which arose in the Third Department, present an especially interesting scenario because Hailey's father's rights were terminated by trial and her mother's by surrender, with great differences in their visitation plans.<sup>76</sup> Hailey was born in 2007 and initially resided with both her birth parents until her father was sentenced to a five to fifteen year prison sentence in early 2008.<sup>77</sup> In that same year, Hailey and her half-sister were removed from their mother's care and placed in foster care.<sup>78</sup> In 2010, the Department of Social Services filed termination of parental rights petitions against both parents on the grounds that they permanently neglected Hailey.<sup>79</sup> Hailey's mother executed a surrender of her parental rights and signed a post-adoption visitation agreement.<sup>80</sup> Hailey's father, however,

---

<sup>71</sup> *In re* Corinthian Marie S., 746 N.Y.S.2d 606 (App. Div. 2002) (affirming order for visitation and exchange of letters).

<sup>72</sup> *In re* Kyshawn F., 944 N.Y.S.2d 184 (App. Div. 2012) (ordering visitation between mother and her disabled son).

<sup>73</sup> *In re* Lovell Raeshawn McC., 764 N.Y.S.2d 714 (App. Div. 2003). In *In re Lovell*, the Appellate Division reversed a family court order that provided for biweekly visitation between the child, her parents, and a sibling following termination of parental rights on grounds of abandonment. *Id.* at 715. The parents failed to communicate with the child for six months prior to the filing of the termination petition. *Id.* The Court affirmed the finding that it would be in the best interests of the three-and-a-half-year-old child to be adopted by her foster mother, with whom she had been residing since she was two weeks old. *Id.* at 716.

<sup>74</sup> See, e.g., *In re* April S., 762 N.Y.S.2d 380 (App. Div. 2003) (holding that the Family Court lacked statutory authority to order post-adoption visitation); *In re* Cheyanne M., 753 N.Y.S.2d 360 (App. Div. 2002) (holding that "open adoption" is only permitted with a surrender of parental rights, not following a termination proceeding).

<sup>75</sup> See, e.g., *In re* Xionia VV., 911 N.Y.S.2d 511 (App. Div. 2010) (holding that Family Court lacked authority to grant post-termination visitation in an adversarial proceeding); *In re* James X., 830 N.Y.S.2d 608 (App. Div. 2007); *In re* Jessi W., 798 N.Y.S.2d 193 (App. Div. 2005); *In re* Rita VV., 619 N.Y.S.2d 218 (App. Div. 1994).

<sup>76</sup> *In re* Hailey ZZ., 972 N.E.2d 87, 88–90 (N.Y. 2012), *aff'g* 85 A.D.3d 1265 (N.Y. App. Div. 2011).

<sup>77</sup> *Id.* at 88.

<sup>78</sup> *Id.* Hailey's mother came to the attention of the Department of Social Services (DSS) because Hailey's father was worried that her mother was not taking appropriate care of her. *Id.* at 97–98 (Pigott, J., dissenting). Due to his concerns, Hailey's father asked one of his sisters to file for custody of Hailey, and this prompted DSS involvement. *Id.* at 98.

<sup>79</sup> *Id.* at 88 (majority opinion).

<sup>80</sup> *Id.*

proceeded to trial, and he lost.<sup>81</sup> The trial court determined that the agency made diligent efforts to assist him in planning for reunification, but he failed to plan for Hailey's return.<sup>82</sup> Accordingly, the Court determined it was in Hailey's best interests to be freed in order to achieve permanency through adoption.<sup>83</sup> Hailey's father requested continuing visitation with his daughter, and the trial court denied this request, noting a lack of precedent in the Third Department and maintaining it would be against Hailey's best interests.<sup>84</sup> The Appellate Division affirmed, and the Court of Appeals reaffirmed the decision.<sup>85</sup>

In determining that there was no statutory basis for a court to exercise its discretion to order visitation after termination of parental rights by trial, the majority rejected the father's argument that section 634 of the Family Court Act authorized such action, which was the position taken by the Fourth Department.<sup>86</sup> The majority held that the only statutory support for ordering visitation was pursuant to Social Service Law section 383-c, which authorized a surrender of parental rights.<sup>87</sup>

To the majority, the idea of open adoption was inconsistent with the view embodied by state statute that adoption severs all parental

---

<sup>81</sup> *Id.* at 88–89. Hailey's father indicated during cross-examination that he would have signed over his rights if he was offered more visitation with Hailey, but because of the few hours he was offered—two hours annually—he was dissuaded from surrendering and entering into any agreement for visitation. *Id.* at 99 (Pigott, J., dissenting).

<sup>82</sup> *Id.* at 88–89 (majority opinion).

<sup>83</sup> *Id.* at 89. While the trial court acknowledged that the father maintained contact with Hailey and DSS and participated in programming in prison, the judge held the father's efforts to be insufficient. *Id.* The decision focused on the fact the father would be released from prison at earliest the following year (2011), and at latest approximately eight years later (2018), and that once out, he would need to obtain housing and possibly do additional services. *Id.* The judge indicated that Hailey “need[ed] to achieve permanency” because she had been in foster care for twenty months. *Id.* (alteration in original). The judge further concluded that all of the resources the father put forth to care for Hailey were unsuitable, including his father, two sisters, and his girlfriend. *Id.* In contrast, the dissent in the Court of Appeals decision argued that based on the evidence presented, the agency did not make the requisite efforts to support the relationship between the father and Hailey, and the father properly planned for his daughter. *Id.* at 97–99 (Pigott, J., dissenting).

<sup>84</sup> *Id.* at 89–90 (majority opinion). In making its best interest determination, the court maintained that Hailey lacked an “emotional or lasting connection” with her father due to the limited time they spent together while he was incarcerated. In addition, the court was concerned about potential adoptive resources being receptive to ongoing visitation. *Id.*

<sup>85</sup> *Id.* at 90. The New York Court of Appeals affirmed both the grounds for termination of the father's parental rights, including the fact that the agency made diligent efforts to foster the relationship between the father and Hailey, as well as non-authorization of post-termination visitation. *Id.*

<sup>86</sup> *Id.* at 95–97. The father argued that if it was in the best interests of his child for post-termination visitation, the court must order it. *Id.* at 96.

<sup>87</sup> *Id.* at 96.

rights and responsibilities over the child.<sup>88</sup> They indicated that while an adoptive parent is free to permit contact between the biological parent and the child, judicially requiring such contact could threaten the adoptive family.<sup>89</sup> Finally, the majority maintained that it was the role of the Legislature to determine if and how open adoptions should be established.<sup>90</sup>

In contrast, the dissenting opinion maintained that the hearing court has the discretion to order visitation following a termination by trial.<sup>91</sup> In making this point, Justice Pigott stressed the importance of allowing for flexibility in judicial decisions surrounding family law matters, and noted that the fundamental determinations a Family Court judge makes, those determining the best interests of a child, are based on discretion.<sup>92</sup> Like the Fourth Department, the dissent grounded this discretionary authority in Family Court Act section 634.<sup>93</sup> The dissent pointed out that in the six years since the Fourth Department decided *Kahlil*, the Legislature had not taken any action to curb the judicial imposition of post-termination contact.<sup>94</sup>

The dissent also pointed out that the Fourth Department frequently considered court-sanctioned post-termination contact when a parent could not care for her child due to the parent's mental disability or mental illness, but there was an emotional connection between the parent and the child.<sup>95</sup> In those situations, it was not the parent's fault she could not parent adequately.<sup>96</sup> Similarly, the Fourth Department often considered post-termination contact when the child was disabled.<sup>97</sup> The dissent concluded that as a matter of logic and policy, it did not make sense to prevent a court from ordering visitation when it would be in a child's best interests only because the parent did not

---

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (“[I]t is the Legislature that more appropriately should be called upon to balance the critical social policy choices and the delicate issues of family relations involved in such a determination.” (quoting *In re Gregory B.*, 542 N.E.2d 1052, 1059 (N.Y. 1989))).

<sup>91</sup> *In re Hailey ZZ.*, 972 N.E.2d at 97 (Pigott, J., dissenting). The lone dissenting justice, Justice Pigott, also maintained that Hailey's father should not have had his rights terminated on the basis of the evidence presented at trial; he argued there was no support in the record for the lower court's finding that the Department of Social Services made the requisite “diligent efforts” to support the relationship between the father and Hailey. *Id.* at 97–101.

<sup>92</sup> *Id.* at 102 (“I would prefer to sanction, rather than restrict, the hearing court's exercise of discretion.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*



surrender her rights.<sup>98</sup> The Department of Social Services did not dispute that the best interests of certain children may be served by continued visitation.<sup>99</sup>

Since the Court of Appeals handed down the *Hailey ZZ.* decision, New York family courts have consistently cited to *Hailey ZZ.* in striking down visitation plans after a parent's rights were terminated by trial,<sup>100</sup> and courts have even applied *Hailey ZZ.* retroactively.<sup>101</sup> In one instance, the court declined to permit a mother's request for a gradual cessation of visitation between her and her daughter; upon declining this request, the court abruptly severed all contact between the mother and daughter following the termination proceeding.<sup>102</sup>

The *Hailey ZZ.* decision did not discuss due process concerns. This concern was raised by Hailey's father on appeal, but the majority's decision relegated all discussion to a footnote,<sup>103</sup> and the dissent did not broach the issue. Hailey's father argued that a parent who exercises his due process right to a hearing is punished by being precluded from receiving visitation.<sup>104</sup> In response, the majority maintained that the

---

<sup>98</sup> *Id.* at 103. The dissent notes it is "patently unfair" that Hailey's mother, who did not express interest in planning for her child's return, got visitation but Hailey's father, who worked to plan for his child while incarcerated, was denied visitation. *Id.*

<sup>99</sup> *Id.* at 102–03. In the instant case, "[n]either DSS nor Hailey's own attorney . . . argues with much conviction that visitation would not be in Hailey's best interests." *Id.* at 103.

<sup>100</sup> See, e.g., *In re D'Elyn Delilah W.*, 21 N.Y.S.2d 881 (App. Div. 2016) (refusing to modify dispositional visitation order for mother whose rights were terminated due to permanent neglect); *In re Thaddeus Jacob C.*, 962 N.Y.S.2d 106, 107 (App. Div. 2013) (denying post-termination visitation to a mother whose rights were terminated due to her mental illness); *In re James J.*, 948 N.Y.S.2d 203, 207 (App. Div. 2012) (refusing to consider post-termination contact for father whose parental rights were terminated on grounds of permanent neglect); *In re Mekhi Kahalil G.*, 953 N.Y.S.2d 621, 623 (App. Div. 2012) (declining to review a father's petition for post-termination contact).

<sup>101</sup> See, e.g., *In re Elsa R.*, 956 N.Y.S.2d 767, 768 (App. Div. 2012) (reversing lower court's order of post-termination visitation).

<sup>102</sup> *In re Jada G.*, 977 N.Y.S.2d 642 (App. Div. 2014) (denying the mother's request for a "therapeutic 'winding down'" of visitation).

<sup>103</sup> *In re Hailey ZZ.*, 972 N.E.2d 87, 94 n.8 (N.Y. 2012).

<sup>104</sup> *Id.* The due process argument had been raised previously by a parent who was denied visitation after a contested proceeding. See *In re Carrie B. v. Josephine B.*, 916 N.Y.S.2d 275, 278 (App. Div. 2011). In *In re Carrie B.*, the respondent mother similarly argued that she was unfairly penalized for exercising her right to contest the claim that she permanently neglected her children and for refusing to voluntarily surrender her parental rights. *Id.* However, unlike *In re Hailey ZZ.*, the mother defaulted on the termination; she didn't refuse to surrender or challenge the permanent neglect allegations in court. *Id.* Given that fact, the court declined to address her constitutional challenge. *Id.* at 278–79. Additionally, in *In re April S.* a parent argued that permitting open adoption under Social Services Law section 383-c, but not under Social Services Law section 384-c, was unconstitutional, but the Court declined to rule on the issue. *In re April S.*, 762 N.Y.S.2d 380 (App. Div. 2003). The constitutional argument has also been raised following *In re Hailey ZZ.* See *In re Jayden QQ.*, 964 N.Y.S.2d 280, 282 (App. Div. 2013). In *In re Jayden QQ.*, the father argued that Family Court Act section 1039-b was unconstitutional because it allowed a court to excuse an agency from making reasonable efforts

Legislature was not increasing punishment and was simply making a policy choice that the conditional relief of post-termination visitation would benefit children after a surrender of rights but not after an adversarial process.<sup>105</sup> In the subsequent Section, this Note will argue that the due process argument raised by Hailey's father has merit and requires a change to New York's current statutory structure governing termination proceedings.<sup>106</sup> Additionally, this Note will argue that the statute is based on misguided policy because post-termination visitation may benefit children after termination by trial, not only after a surrender of rights.

### III. CONSTITUTIONAL DUE PROCESS RIGHTS FOR PARENTS

#### A. *Parental Custody of Children Is a Fundamental Liberty Interest Protected by Due Process*

The Supreme Court has recognized that parents have a fundamental right to custody of their children.<sup>107</sup> In *Santosky v. Kramer*, the Court articulated the well-established principle that a parent's interest in "companionship, care, custody, and management of" her child surpasses the importance of any property interest.<sup>108</sup> The

---

to reunite a child and parent if the parent previously had his rights involuntarily terminated; on the other hand, the statute was not applicable if the parent surrendered his rights and had post-termination contact with the child. *Id.* The court dismissed the father's claims, and, citing *In re Hailey ZZ.*, maintained that differentiating between the two classes of parents was permissible because of the legislative policy judgment underlying the decision that post-termination contact was appropriate for only the parent who surrenders her rights. *In re Jayden QQ.*, 964 N.Y.S.2d at 282-83.

<sup>105</sup> *In re Hailey ZZ.*, 972 N.E.2d at 94 n.8.

<sup>106</sup> This Note proposes a legislative fix to the statute. Another option not explored in this Note would be to bring a federal lawsuit to remedy the constitutional violations of the statutory scheme.

<sup>107</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981). The *Santosky* decision was decided 5-4, and the dissent agreed with the majority's characterization of the fundamental interest of parents in their relationship with their children. *Santosky*, 455 U.S. at 774 (Rehnquist, J., dissenting). The Court has recognized that this liberty interest in custody of children extends to unmarried fathers and that they require due process prior to termination of parental rights. See *Stanley v. Illinois*, 405 U.S. 645 (1972). In contrast, the Court has not recognized a liberty interest for foster families. See *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977) (declining to decide whether or not foster families' interest in custody was protected as a liberty interest under the due process clause).

<sup>108</sup> *Santosky*, 455 U.S. at 758-59 (1982) (quoting *Lassiter*, 452 U.S. at 27). It is interesting to note that a parent's right to custody of her child was only deemed a fundamental liberty interest by the Supreme Court in 1982. However, when considered in light of the United States' historical treatment of the fundamental right to procreate, it is less surprising. See, e.g., *Skinner*

importance of a parent's interest in her child demands deference and protection.<sup>109</sup> Consequently, when the government moves to terminate parental rights, procedural and substantive due process must be met.<sup>110</sup>

Since a parent's right to custody of her child is a fundamental right,<sup>111</sup> substantive due process<sup>112</sup> demands that the government prove that terminating custody is required to bring about a compelling objective.<sup>113</sup> The state has an interest in preventing abuse or neglect of children by unfit parents.<sup>114</sup> Accordingly, given that the state has a reason to terminate parental rights, an analysis of post-termination visitation will center on procedural due process rights.<sup>115</sup>

---

v. Oklahoma, 316 US 535 (1942) (invalidating state law that provided for compulsory sterilization of individuals with multiple felony convictions for certain crimes); *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the government's ability to involuntarily sterilize the mentally retarded).

<sup>109</sup> Only a "powerful countervailing interest" can interfere with the right. *Lassiter*, 452 U.S. at 27 (1981) (quoting *Stanley*, 405 U.S. at 651).

<sup>110</sup> The Due Process Clause holds that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; see *Santosky*, 455 U.S. at 754 ("[T]he State . . . must provide the parents with fundamentally fair procedures."); see, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 106 (1996) (holding due process was violated by a requirement that parents pay a filing fee to appeal the permanent termination of custody). However, the Court has held that the government does not need to automatically provide an attorney to indigent parents at parental termination proceedings. *Lassiter*, 452 U.S. at 31–32.

<sup>111</sup> *Santosky*, 455 U.S. at 753.

<sup>112</sup> In broad terms, substantive due process asks whether the state has an adequate reason for taking away a person's life, liberty, or property as protected by the Fourteenth Amendment. See Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

<sup>113</sup> Because the parental right to custody of a child is a fundamental right, the state is held to a high level of scrutiny and can only deprive a parent of her liberty interest in her child if it has a compelling purpose. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" (alteration in original) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–863 (1977) (Stewart, J., concurring))); *Stanley*, 405 U.S. at 658 (1972) (requiring a hearing on parental fitness and proof of neglect before terminating an unmarried father's rights to his child). The *Stanley* court explained that the Due Process Clause mandates a hearing because "[t]he State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father." *Id.* at 657–58. Essentially, without a showing of parental unfitness, the state would not have a compelling goal for terminating Stanley's parental rights. See *id.*

<sup>114</sup> The two theories that justify the state's intervention into the family unit are the state's police power and *parens patriae*. In these roles, the state is authorized and obligated to ensure the safety of its citizens and prevent harm to children by their parents. See Ruth Slayco Witt, *Due Process Methodology in Parental Termination Proceedings—Santosky v. Kramer*, 32 *DEPAUL L. REV.* 159, 161–64 (1982).

<sup>115</sup> Procedural due process asks whether the state has followed proper procedures when it takes away a person's life, liberty, or property, as protected by the Fourteenth Amendment. See Chemerinsky, *supra* note 112, at 1501.

Procedural due process demands that individuals must be given notice<sup>116</sup> and the right to a hearing,<sup>117</sup> which occurs in front of an impartial decision maker<sup>118</sup> and in which evidence may be presented.<sup>119</sup> The Supreme Court has determined that the protections of procedural due process change with the circumstances at issue.<sup>120</sup> In the context of termination of parental rights, due process demands that a hearing occur to determine that the parent is unfit prior to terminating parental rights.<sup>121</sup> While due process does not guarantee every parent a lawyer in termination of parental rights cases, a parent is afforded a lawyer in certain circumstances, where the parental interests outweigh the state interests.<sup>122</sup> In New York, however, a parent has a constitutional right to counsel in a termination proceeding.<sup>123</sup>

---

<sup>116</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Court indicated that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314.

<sup>117</sup> *See Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (hearing required before termination of welfare benefits).

<sup>118</sup> *Gibson v. Berryhill*, 411 U.S. 564 (1973).

<sup>119</sup> *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932).

<sup>120</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (noting that due process is “flexible and calls for such procedural protections as the particular situation demands” (citation omitted) and providing a three tier balancing test to determine what procedures are required).

<sup>121</sup> N.Y. FAM. CT. ACT § 622 (McKinney 2009) (defining a fact-finding hearing); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972); *see also Witt, supra* note 114, at 163–64.

<sup>122</sup> *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18 (1981). The Court has held that an indigent litigant only has the right to appointed counsel when, if she loses, she may be deprived of her physical liberty. *Id.* at 27. Accordingly, in termination proceedings, when no loss of physical liberty is threatened, the right to counsel does not apply. *Id.* The Court did maintain, however, that

[i]f, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

*Id.* at 31.

<sup>123</sup> FAM. CT. ACT § 261. This provision, adopted in 1975, states that:

Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child’s society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition. The purpose of this part is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under this act.

*Id.*

In addressing claimed violations of procedural due process in termination of parental rights proceedings, the Court has applied the three-factor test from *Mathews v. Eldridge* (*Eldridge* test).<sup>124</sup> This test balances the consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>125</sup>

Following application of the *Eldridge* test, the Court held in *Santosky* that due process demands that there be clear and convincing evidence of a need to permanently sever custody.<sup>126</sup> The state is held to a higher evidentiary standard in fact-finding trials for termination of parental rights than in fact-finding trials to prove abuse and neglect.<sup>127</sup> In *Santosky*, the Court held a higher standard was required for termination of parental rights after examining the constitutionality of New York's termination of parental rights statute and determining that it violated the Due Process Clause.<sup>128</sup>

In *Santosky*, the Court maintained that the private interest was significant in a parental rights proceeding.<sup>129</sup> It noted that in such a proceeding, the state seeks to end, not simply to infringe on, a fundamental liberty interest.<sup>130</sup> This interest surpassed the state's

---

<sup>124</sup> *Santosky v. Kramer*, 455 U.S. 745, 758–68 (1982) (challenging the standard of proof); *Lassiter*, 452 U.S. at 27–32 (challenge to provision of counsel to parent). The use of the *Mathews* factors in analyzing fundamental parental rights is not without criticism. See *Lassiter*, 452 U.S. at 59–60 (Stevens, J., dissenting). For a compelling analysis of the problems inherent in the *Santosky* Court's application of the *Eldridge* test, see Witt, *supra* note 114, at 178–80, 184. Witt argues that “the *Eldridge* test insufficiently protects the parents’ fundamental liberty interest because it embodies the view that the purpose of procedural protections is to enhance efficiency and minimize cost.” *Id.* at 180.

<sup>125</sup> *Mathews*, 424 U.S. at 335.

<sup>126</sup> *Santosky*, 455 U.S. at 753–54 (“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”).

<sup>127</sup> *Id.* at 768–69 (holding a state must prove the need for termination by “clear and convincing evidence” because use of a “fair preponderance of the evidence” standard in such proceedings violates due process). In contrast, in abuse and neglect proceedings in New York, the standard of proof in a fact-finding hearing is “preponderance of the evidence.” FAM. CT. ACT § 1046(b)(i). Only for severe or repeated abuse is the evidentiary standard “clear and convincing evidence.” *Id.* § 1046(b)(ii).

<sup>128</sup> *Santosky*, 455 U.S. at 747–48.

<sup>129</sup> *Id.* at 758 (“[T]he private interest affected is commanding.”). The court also determined that the risk of error from using the current evidentiary standard was “substantial,” while the government interest favoring the standard was “comparatively slight.” *Id.*

<sup>130</sup> *Id.* at 759 (“Once affirmed on appeal, a New York decision terminating parental rights is final and irrevocable. . . . Few forms of state action are both so severe and so irreversible.”).

interests of supporting the welfare of children and streamlining court proceedings.<sup>131</sup>

Similarly, New York courts have applied the *Eldridge* test to cases dealing with parental rights.<sup>132</sup> For example, in one case dealing with an adoption in the private context, a mother who initially consented to the adoption of her child quickly revoked her consent, but the court held that despite her being a fit parent, the best interests of the child were served by the child's adoption.<sup>133</sup> In applying the *Eldridge* test, the court determined that the state's interest in maintaining the integrity of the adoption process was substantial and outweighed the mother's interest.<sup>134</sup>

B. *The New York Statutory Scheme Is Violative of Parental Constitutional Due Process Rights: Statutory Revision Is Necessary to Support the Interests of the Parent*

Following the line of cases applying the *Eldridge* test<sup>135</sup> to procedures affecting parental rights, this Section will examine the statutory options provided for post-termination visitation and will argue that putting in place procedures to allow for visitation after a trial, thereby preserving the due process rights of parents, would actually further the state's interests. The *Eldridge* test is applicable to the New York statutory scheme governing post-termination visitation because the moment of procedural unfairness is prior to the termination of parental rights, when the parent retains rights to her child.

An analysis of the first factor, the private interest affected by governmental action,<sup>136</sup> is fairly straightforward in the context of termination of parental rights proceedings because it has been explicitly

---

<sup>131</sup> *Id.* at 766–67. The state's interests are described as “a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. . . . As *parens patriae*, the State's goal is to provide the child with a permanent home.” *Id.* The majority noted that the *parens patriae* interest does not arise until after the natural parent has been found unfit. *Id.* at 767 n.17. The dissent disputes this. *Id.* at 790 n.16 (Rehnquist, J., dissenting). In fact, the dissent maintains that a parent's right to rear her child does not outweigh the “interests of the child and the State in a stable, nurturing homelife.” *Id.* at 790–91.

<sup>132</sup> See, e.g., *In re Daniel C.*, 453 N.Y.S.2d 572 (Sur. Ct. 1982), *aff'd*, 472 N.Y.S.2d 666 (App. Div. 1984), *aff'd sub nom. In re Adoption of Daniel C.*, 473 N.E.2d 31 (N.Y. 1984).

<sup>133</sup> *In re Daniel C.*, 453 N.Y.S.2d at 578–79.

<sup>134</sup> *Id.* at 577.

<sup>135</sup> *Mathews*, 424 U.S. at 335 (outlining the three-part *Eldridge* test).

<sup>136</sup> *Id.*

laid out in previous decisions as being a fundamental liberty right.<sup>137</sup> The parental rights over a child clearly encompass a parent's interest in maintaining a relationship with her child,<sup>138</sup> which can only be accomplished by some sort of ongoing contact or visitation. It is clear that following a fact-finding trial on termination of parental rights, or following a non-conditional surrender of parental rights, a parent no longer retains any legal interest in her child.<sup>139</sup> Accordingly, denying a parent visitation after termination would not infringe on a parent's due process rights. However, the procedural injustice is prior to termination, when a parent is faced with the option of surrendering parental rights without a hearing to obtain post-termination contact or having a hearing and losing any right to contact.<sup>140</sup> As such, the statutory framework appears to impose an unfair procedure for depriving a parent of a fundamental interest.

The second *Eldridge* test factor considers the risk of an erroneous deprivation of an individual's interest through the procedures used.<sup>141</sup> Here, the right is a parent's right to a relationship with her child, and the only procedure provided for by statute to preserve this right is a surrender of parental rights.<sup>142</sup> A parent may have a chance to win at trial, but if she goes to trial and loses, she forfeits the opportunity for court enforced contact with her child.<sup>143</sup> Parents are not automatically conferred contact rights by conditionally surrendering custody because a court always has to approve contact as in the best interest of the

---

<sup>137</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Dep't of Soc. Services of Durham Cty.*, 452 U.S. 18, 27 (1981).

<sup>138</sup> *Santosky*, 455 U.S. at 758–59. The right is described as “a natural parent's desire for and right to the *companionship*, care, custody, and management of his or her children.” *Id.* at 758 (emphasis added) (internal quotations omitted).

<sup>139</sup> N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 2010); *Santosky*, 455 U.S. at 749; *In re Hailey ZZ.*, 972 N.E.2d 87, 96 (N.Y. 2012). *But see* LaShanda Taylor Adams, (*Re-*)*Grasping the Opportunity Interest: Lehr v. Robertson and the Terminated Parent*, 25 KAN. J.L. & PUB. POL'Y 31, 32 (2015) (“[T]erminated parents retain an opportunity interest in their un-adopted biological children and cannot be prohibited from ‘re-grasping’ that interest.”). Adams quotes the Supreme Court in *Lehr v. Robertson* to support the lasting impact of biology: “the actions of judges neither create nor sever genetic bonds.” *Id.* at 37 (quoting *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)). Adams argues that permitting post-termination visitation is a sign of recognition by states of the lasting parental interest that is not severed by termination of parental rights. Adams, *supra* at 37–38.

<sup>140</sup> The right of a parent obtained as a result of a court approved post-adoption arrangement is contractual, not a parental right, since the parental rights are terminated in the proceedings. Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 11–12 (2010).

<sup>141</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>142</sup> N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2010).

<sup>143</sup> See, e.g., *In re Hailey ZZ.*, 972 N.E.2d at 89–90; *In re D'Elyn Delilah W.*, 21 N.Y.S.3d 881 (N.Y. App. Div. 2016).

child,<sup>144</sup> but, in termination proceedings, there is no opportunity for a best interests analysis by the court in regard to visitation.<sup>145</sup> As such, there are cases in which a parent may be found statutorily unfit following a trial, yet the parent and child would benefit from continued contact.<sup>146</sup> The method of termination, surrender or trial, is not indicative of a child's attachment to his parent.<sup>147</sup> In a way, it may even be counter-indicative of a parent's attachment to child. Accordingly, a parent's interest in a relationship with her child is at risk of erroneous deprivation because the statutory scheme creates a blanket prohibition on post-termination contact after a trial.<sup>148</sup>

The final *Eldridge* test factor considers the governmental interest in maintaining the procedure.<sup>149</sup> Social Services Law section 384-b plainly expresses the intent of the Legislature and the state's interests when

---

<sup>144</sup> SOC SERV. § 383-c(2)(b); *In re Rebecca O.*, 847 N.Y.S.2d 610, 611 (App. Div. 2007) (explaining that Social Services Law § 383-c does not confer an automatic right to visitation, but it does give the biological parent standing to petition the court to enforce the surrender instrument). In *In re Rebecca O.*, a mother surrendered her rights on the condition she receive four visits with her daughter a year as well as communication through letters, cards, and picture, but the agency and then adoptive mother did not permit the contact. *Id.* The Appellate Division affirmed the Family Court's determination that enforcement of the contact was in the child's best interest. *Id.* at 612.

<sup>145</sup> Following the fact-finding portion of the termination hearing, where a parent may be deemed statutorily unfit to parent, the Judge holds a dispositional hearing to consider if termination of parental rights is in the best interests of the child. N.Y. FAM. CT. ACT § 631 (McKinney 2009) (dispositional hearing standard for permanency neglect trials); *In re Joyce T.*, 478 N.E.2d 1306, 1311 (N.Y. 1985) (discretion to hold dispositional hearing in mental illness or mental retardation cases). However, the Court is precluded from considering post-termination visitation in the dispositional hearing. *In re Hailey ZZ.*, 972 N.E.2d at 88.

<sup>146</sup> See, e.g., *In re Kyshawn F.*, 944 N.Y.S.2d 184 (App. Div. 2012). The mother's rights were terminated on grounds of permanent neglect for failing to complete drug treatment programming, but the Appellate Division modified the order of disposition to allow for post-termination visitation between her and her son. *Id.* at 186. The Court noted that her son had special needs and that even the foster care agency that petitioned to terminate the mother's rights acknowledged he was "emotionally attached" to his mother. *Id.* The prohibition on post-termination contact is especially difficult to rationalize when the parent is unfit but blameless. See *In re Joyce T.*, 478 N.E.2d at 1313 (terminating parental rights on grounds of mental retardation, with the Court noting that "the painful process of severing parental rights on account of their inability to care for a child involves no wrongdoing or fault on their part. As here, parents may love their child, desire to parent her, and make extensive efforts to create a relationship with her. But . . . the parents have been convincingly shown to be wholly incapable of providing proper and adequate care for the child for the foreseeable future").

<sup>147</sup> Appell, *supra* note 140, at 9-10. Appell argues that state statutes that limit open adoption to parents who consented to the adoption and preclude parents whose parental rights were involuntarily terminated are "inconsistent with research that suggests parents who contested the termination and adoption can be successful participants in post-adoption contact." *Id.*

<sup>148</sup> See *In re Hailey ZZ.*, 972 N.E.2d at 97.

<sup>149</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").



dealing with potential termination of parental rights.<sup>150</sup> From this expression of legislative intent, it is apparent that the state is concerned with the well-being of children, and, in keeping with that goal, a legislative priority is to speed up the termination process so that children are adopted quickly and do not linger in foster care.<sup>151</sup>

An examination of legislative intent behind Social Services Law section 383-c supports the ideas expressed in Social Services Law section 384-b by focusing on expediting terminations to facilitate the adoption of children in foster care.<sup>152</sup> However, the legislative materials regarding Social Services Law section 383-c do not yield much information as to the legislative intent behind the post-termination visitation framework and why visitation is permitted for surrendering parents but not parents who have a trial.<sup>153</sup> Cases deciding issues related to Social Services Law

---

<sup>150</sup> Social Services Law section 384-b begins with a statement of legislative findings and intent. The first point stressed is that “the health and safety of children is of paramount importance.” N.Y. SOC. SERV. LAW § 384-b(1)(a)–(b) (McKinney 2010). The statute explains that it is desirable for a child to remain with birth parents “unless the best interests of the child would be thereby endangered.” *Id.* § 384-b(1)(a)(ii). Accordingly, the statute expresses the need to work first with parents to prevent a break up or to reunite the family, and then the goal shifts to finding a permanent alternative home for the child. *Id.* § 384-b(1)(a)(iii)–(iv). To prevent “protracted stays” in foster care, the statute expresses the goal of timely terminating parental rights. *Id.* § 384-b(1)(b). The statute closes with the following statement:

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the birth parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

*Id.* § 384-b(1)(b).

<sup>151</sup> *See id.* § 384-b(1)(a)–(b).

<sup>152</sup> The Sponsor’s Memorandum for the adoption of § 383-c expresses a need to clarify procedures surrounding surrenders and parents’ rights. *See* MEMORANDUM OF SENATOR MARY B. GOODHUE, S. 8426-A & Assemb. 10655-B (N.Y. 1990), *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 1990, at 249 (1990). Similarly, the Governor’s Approval Memorandum for the adoption of § 383-c explains that by providing for an extra-judicial surrender option, the law will facilitate the freeing of children for adoption, but it will also add safeguards to parental rights in the surrender process. *See* GOVERNOR’S APPROVAL MEMORANDUM, S. 8426-A & Assemb. 10655-B, *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 1990, at 250 (1990). The approval memorandum explains that the option of an extra-judicial surrender was added because it would expedite the termination process and the process of finding children permanent homes. *Id.* Legislative memoranda available regarding 1993, 1994, and 2006 amendments to section 383-c similarly stress the goal of expediting adoptions. *See* MEMORANDUM OF SENATOR STEPHAN M. SALAND, S. 4661-A & Assemb. 7190-A (N.Y. 1993), *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 1993, at 208 (1993); GOVERNOR’S APPROVAL MEMORANDUM, S. 7834-B & Assemb. 10911-A (N.Y. 1994), *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 1994, at 428 (1994); MEMORANDUM OF THE OFFICE OF COURT ADMINISTRATION, Assemb. 8655-A (N.Y. 2006), *reprinted in* NEW YORK STATE LEGISLATIVE ANNUAL 2006, at 112 (2006).

<sup>153</sup> The language permitting a conditional surrender with provisions for contact was added to Social Services Law section 383-c in 2005. *See* 2005 N.Y. Sess. Laws, ch. 3, S. 5805

section 383-c similarly indicate the lack of legislative materials speaking to intent regarding post-termination contact.<sup>154</sup> At the same time, cases acknowledge the purpose of Social Services Law section 383-c as expediting the adoption process.<sup>155</sup>

Accordingly, providing for conditional surrenders seems to fit the overall legislative goal of expediting adoptions because the process of terminating a parent's rights through surrender is generally quicker than a trial.<sup>156</sup> By providing for post-adoption contact only with a surrender, the Legislature may have purposely created an incentive for parents to surrender. If parents knew there was an option for visitation after a trial, they may be more inclined to have a trial than surrender, thereby increasing the number of trials the Family Courts would hear. However, despite knowing visitation is an option after trial, there will still be parents who do not wish to proceed with a trial because it can be a very emotionally painful process.<sup>157</sup>

In applying the *Eldridge* factors, courts balance the interests of the individual and of the state to determine if there is a constitutional

---

(McKinney). The legislative materials surrounding the 2005 amendment do not mention anything regarding why a parent who surrenders is in a position to have contact over a parent who has their rights terminated by trial. See BILL JACKET, S. 288-5805, 2005 Reg. Sess., ch. 3 (N.Y. 2005) (discussing the goal of expediting permanency for children in foster care).

<sup>154</sup> See, e.g., *In re Alexandra C.*, 157 Misc. 2d 262, 267 (N.Y. Fam. Ct. 1993) (“The legislative history of section 383-c is not particularly revealing other than a fixed focus on facilitating the freeing of foster care children for adoption and the ensuring that a parent makes a knowing and voluntary decision about surrendering a foster child for adoption. Greater flexibility was sought by the enactment for authorized agencies in relation to the process of surrendering foster children for adoption.”).

<sup>155</sup> See, e.g., *In re Ronald D., Sr. v. Doe*, 176 Misc. 2d 567, 571 (N.Y. Fam. Ct. 1998) (“The intent of Social Services Law § 383-c (2)—to permit ‘open’ or ‘conditional’ adoptions is laudatory on several grounds. More children are freed for adoption in a shorter time. It avoids, in some cases, long hearings in termination of parental rights cases and the appeals thereafter.”).

<sup>156</sup> The government publishes statistics regarding the timeliness of state adoption procedures, but it does not appear to collect data on length of time termination by surrender process takes as compared to length of time for a termination trial. See U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2010-2013: REPORT TO CONGRESS 22-25 (2016), [http://www.acf.hhs.gov/sites/default/files/cb/cwo10\\_13.pdf](http://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf). However, the problematic length of trials in New York City is well documented. See CHILDREN'S RIGHTS, THE LONG ROAD HOME: A STUDY OF CHILDREN STRANDED IN NEW YORK CITY FOSTER CARE 172 (2009), [http://www.childrensrightrights.org/wp-content/uploads/2009/11/2009-11-02\\_long\\_road\\_home\\_full\\_report\\_final.pdf](http://www.childrensrightrights.org/wp-content/uploads/2009/11/2009-11-02_long_road_home_full_report_final.pdf). In fact, a lawsuit brought against New York City in 2015 pointed to detrimental delays in the court system. See Vivian Yee, *Suit to Accuse New York City and State of Keeping Children in Foster Care Too Long*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/08/nyregion/suit-accuses-new-york-city-and-state-of-keeping-children-in-foster-care-too-long.html>. For a personal account of how long trial in Bronx Family Court can take, see N.R. Kleinfeld, *The Girls Who Haven't Come Home*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/nyregion/the-girls-who-havent-come-home.html>.

<sup>157</sup> For example, during the course of the trial, there may be discussion of a parent's drug use and relapses, or a parent's mental health diagnosis.

violation and a feasible method to alleviate the alleged violation of individual rights.<sup>158</sup> Here, in comparing the interests of parents and the interests of the state, preserving parental due process rights does not significantly burden the state, and in fact, it facilitates the state's goal in ensuring the well-being of children in foster care. While termination by trial may take longer than a surrender, thereby possibly leaving a child in foster care for a longer period, allowing for post-termination visitation supports the child's well-being and should not be taken away from the child just because the parent chose to exercise her rights.<sup>159</sup>

Providing a process to consider post-termination contact for parents who have their rights terminated by trial does not present any significant logistical or fiscal issues for the state.<sup>160</sup> For permanent neglect cases, the statutory scheme already provides for a dispositional hearing in which visitation can be considered.<sup>161</sup> For trials based on a mental illness or mental retardation cause of action, there is no automatic dispositional hearing,<sup>162</sup> but it is within the judge's discretion to hold one.<sup>163</sup> Accordingly, if a party raises the issue of post-termination contact, the judge would have the opportunity to issue orders for such contact during the dispositional phase.

If there is a pre-adoptive resource identified, and all parties can agree on a plan for contact, all that is required is the approval of the judge that the agreement is in the best interests of the child.<sup>164</sup> In fact, some courts essentially provide for this arrangement by permitting a parent to surrender after the fact-finding is completed.<sup>165</sup>

If there is a pre-adoptive resource identified and the parties cannot agree on a plan for contact, during the dispositional hearing, all sides

---

<sup>158</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 766–70 (1982) (balancing the interests of the parent against the interests of the state).

<sup>159</sup> See *supra* note 29 and accompanying text.

<sup>160</sup> *Santosky*, 455 U.S. at 767 (examining any fiscal burdens imposed on the state by virtue of new procedure).

<sup>161</sup> N.Y. FAM. CT. ACT § 623 (McKinney 2009); *Id.* § 631.

<sup>162</sup> See *In re Joyce T.*, 478 N.E.2d 1306, 1311–13 (N.Y. 1985).

<sup>163</sup> *Id.* at 1311.

<sup>164</sup> This scenario assumes that while a pre-adoptive resource was available and open to negotiating an agreement for contact with the parent, the parent wished to exercise her right to a trial on the merits of the agency's case.

<sup>165</sup> E-mail from a Staff Attorney at a legal provider of family defense in N.Y., to Rachel Turetsky, née Spencer, Student, Benjamin N. Cardozo Sch. of Law (Nov. 12, 2015, 10:51 AM) (on file with author) (representing parents in abuse, neglect, and termination of parental rights proceedings). In one scenario in Manhattan Family Court, the court approved a surrender after a fact-finding hearing, in which a parent was found to have permanently neglected her child, but prior to holding the dispositional hearing. In another case in Manhattan Family Court, the court allowed a mother the opportunity to execute a surrender to her mother, the adoptive resource, after orally ordering the termination at the dispositional hearing, but prior to signing the termination order. *Id.*

can present their requests, and the judge will make the decision as to what arrangement would best support the child's interests.<sup>166</sup> The judge may order what was proposed by the pre-adoptive resource or by the parent, or the judge may order something that balances both requests. The attorneys for the child and foster care agency may weigh in as to what terms would be in the child's best interests based on their involvement and knowledge of the family.<sup>167</sup>

If there is no pre-adoptive resource identified when the parent's rights are terminated by trial,<sup>168</sup> the judge will consider the parent's request in light of the positions of the attorneys for the child and the foster care agency on continuing contact arrangements. If it takes a long time for the child to be adopted,<sup>169</sup> or the child never gets adopted,<sup>170</sup> this scheme will provide that the child has ongoing contact with an adult family member as they remain in foster care.

---

<sup>166</sup> Massachusetts statutes permit this arrangement by providing for enforceable post-adoption contact agreements and, in the event an agreement between the parties is not feasible, allowing for equitable court-ordered, post-adoption contact. *See* MASS. GEN. LAWS ANN. ch. 210 §§ 6C, 6D (West 2016) (adoption with contact statute and provisions for enforcement); *In re Adoption of Vito*, 728 N.E.2d 292, 296 (Mass. 2000) (court's equitable authority to order post-adoption contact without agreement of all parties).

<sup>167</sup> The scenarios in which contact may not be in a child's best interests include: when past abuse leads the child to fear the birth parent, when the child experiences serious conflicts in loyalty as a result of ongoing contact, when the birth parent is incapable of or unwilling to respect the rules regarding contact, or when the birth parent does not want contact, or fails to exercise contact. Maldonado, *supra* note 5, at 329.

<sup>168</sup> An agency may file a termination proceeding without having an adoptive resource for the child. 42 U.S.C. § 675(5)(E) (2012); N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) (requiring an agency to file a petition to terminate parental rights after a child has remained in care for fifteen out of the last twenty-two months, with no requirement that an adoptive resource be identified at the time of filing). Accordingly, a parent cannot execute a conditional surrender to an identified person and work out an arrangement for contact or visitation, and a parent is likely to proceed to trial rather than fully relinquish parental rights in an unconditional surrender. In this scenario, the legislative goal of a quick adoption process is thwarted by a lack of resources for the child. To illustrate this issue, consider the facts of a case provided by an attorney practicing in a New York family court. E-mail from a Staff Attorney at a legal provider of family defense in N.Y., to Rachel Turetsky, née Spencer, Student, Benjamin N. Cardozo Sch. of Law (Mar. 10, 2017, 5:48 PM) (on file with author) (representing parents in abuse, neglect, and termination of parental rights proceedings). In the case, both parents were facing termination on grounds of permanent neglect and mental retardation. They visited regularly with their children and had a loving relationship with them. The two children had special needs, and the foster mother expressed that she was not able to adopt them. The agency insisted on proceeding with the termination and indicated it would identify adoptive resources for the children after termination of parental rights. As such, the parents would be precluded from seeking visitation and they would not even know who the adoptive parents would be. *Id.*

<sup>169</sup> The average time between termination of parental rights and adoption finalization in New York is 14.7 months. U.S. DEP'T OF HEALTH & HUMAN SERVS., TIME BETWEEN TERMINATION, *supra* note 59. This is above the national average, which is twelve months. *Id.*

<sup>170</sup> *See* Taylor, *supra* note 60, at 325–26.

IV. THE NEW YORK STATUTORY SCHEME IS BASED ON MISGUIDED  
POLICY: STATUTORY REVISION IS NECESSARY TO SUPPORT THE BEST  
INTERESTS OF THE CHILD

In addition, research supports that in many cases, some form of ongoing contact between an adopted child and his biological parent is beneficial to the child and to the child's stability within the adoptive family.<sup>171</sup> The Legislature must have recognized this by providing for ongoing contact in conditional surrenders.<sup>172</sup> Therefore, the fact that it is not permitted following trials goes against a policy of supporting the child's best interests.

In fact, taking a "best interests of the child" approach, without focusing on the rights of the parent, could also be a means to convince the Legislature that a fix to the statute is in order.<sup>173</sup> This approach has been advocated for in other states to reform their statutory schemes.<sup>174</sup> The foregoing analysis explored the best interests of the child argument within the parental rights framework. While a constitutional violation would certainly provide a basis for change, it is also possible to argue that a change is required to the statute simply based on what would be in the best interests of the child.

In addition to the research supporting ongoing contact as beneficial to the child,<sup>175</sup> there is recent research and attention on children whose adoptions disrupt and never occur,<sup>176</sup> or whose adoptions dissolve after finalization.<sup>177</sup> The dissolution of an adoption

---

<sup>171</sup> See *supra* note 29 and accompanying text; see also Appell, *supra* note 140, at 6–7 (explaining that adoptive parents who do not have contact with birth parents may be more likely to hold negative views of the birth family, which may contribute to a child's feelings of conflicting loyalty among the two families). On the other hand, some scholars maintain that the genetic tie should not be given so much weight. See Barholet, *supra* note 34, at 1–6.

<sup>172</sup> Social Services Law section 384-b(9) was amended in August 2016 to include language protecting "rights relating to contact with siblings," explicitly allowing siblings to petition for visitation after parental rights are terminated. Assemb. B. A-9759, 2015–2016 Leg. Sess. (N.Y. 2016).

<sup>173</sup> This approach may be more suited to a legislative audience. It is generally easier for people to accept harm to a parent's rights when that parent is involved with child welfare, rather than accept harm to a child involved with child welfare. However, the rights of the parents remain of critical importance and this Note seeks reinforce that notion.

<sup>174</sup> See, e.g., Foehrkolb, *supra* note 29 (focusing on Maryland).

<sup>175</sup> See *supra* note 29.

<sup>176</sup> Disruption refers to when a child is placed in a pre-adoptive home but returns to foster care or another placement prior to the legal finalization of the adoption. CHILDREN'S BUREAU, ADOPTION DISRUPTION AND DISSOLUTION 1 (2012), [https://www.childwelfare.gov/pubPDFs/s\\_disrup.pdf](https://www.childwelfare.gov/pubPDFs/s_disrup.pdf). Studies throughout the United States consistently report disruption rates that range from about ten to twenty-five percent. *Id.* at 2.

<sup>177</sup> Dissolution refers to an adoption in which the legal relationship between the adoptive parents and adoptive child is severed, either voluntarily or involuntarily, after the adoption is

after finalization is discussed as a phenomena of broken adoptions.<sup>178</sup> After a child is adopted from foster care and the adoption does not last,<sup>179</sup> that child frequently has no one to turn to, and very often reconnects with his biological family.<sup>180</sup> In exceptional cases, courts have awarded custody to biological parents after the adoption dissolves.<sup>181</sup>

In fact, for children whose adoptions disrupt and never become finalized, there is a state statute that allows for a court to reinstate parental rights after they have been terminated.<sup>182</sup> The statute implicitly requires that the child and the parent have some ongoing relationship

---

legally finalized. As a result, the child often returns to foster care. *Id.* at 1. Accurate data on the dissolution of adoptions is hard to obtain, but studies indicate that between one percent and five percent of finalized adoptions dissolve. *Id.* at 5–6.

<sup>178</sup> Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012). Since there are no federal standards for data collection to track broken adoptions, Post and Zimmerman undertook a six-month case study to examine broken adoptions and the children who return to family court in guardianship cases. *Id.* at 440–42. Anonymous surveys were provided to judges and attorneys in family court to assess the issue. *Id.* at 448.

<sup>179</sup> The majority of broken adoptions are caused by death or illness of the adoptive parent. *Id.* at 467. However, seventy percent of judges and referees responded in the surveys that they saw cases return to court after an adoption. *Id.* at 449. The majority of the cases came back to court due to abuse or neglect alleged on the part of the adoptive parent. *Id.* The other reasons children come back into care following an adoption are voluntary placements, where the adoptive parent seeks to place the child back into foster care; Persons in Need of Supervision petitions, where the adoptive parent seeks to place the child back into foster care based on the child's out of control behaviors; juvenile delinquency, where the adoptive parent supports placement of the child in a facility; and custody or guardianship, where a relative or non-relative seeks custody or guardianship of a child who was adopted but is no longer living in the adoptive home. *Id.* at 444.

<sup>180</sup> Consider this survey response from a practitioner in New York Family Court:

I think in many cases there is this fantasy about permanency that often doesn't exist. Kids still run back to their parents despite being freed or adopted, and some adoptive parents never form the bonds with their adoptive children and give up on them or return them if they create problems.

*Id.* at 448–49. In seventy-five percent of cases surveyed that involved a broken adoption, the immediate biological family members were involved in the child's life during the course of the adoption, even though legislation allowing for conditional surrenders with post-adoption contact agreements was not adopted yet. *Id.* at 477–78. Recall that the language permitting a conditional surrender with provisions for contact was added to Social Services Law section 383-c in 2005. *See* Act of Aug. 23, 2005, ch. 3, sec. 41, § 383-c, 2005 Laws. 35, 59–62).

<sup>181</sup> Post & Zimmerman, *supra* note 178, at 480–82; *see also In re Rasheed A.*, No. G19009/06, N.Y. Misc. LEXIS 5853, at \*1–2 (N.Y. Fam. Ct. July 6, 2007).

<sup>182</sup> N.Y. FAM. CT. ACT §§ 635, 636, 637 (McKinney 2009). Two or more years must have passed since the termination proceeding; both the respondent parent whose parental rights had been terminated and the child must consent to restoration; the child must be over the age of fourteen; and the child must not have been adopted. *Id.* § 635. The child, agency, or the parent whose rights were terminated can bring a petition for reinstatement. *Id.* § 636(a). New York is among the seventeen states that have enacted reinstatement of parental rights statutes since 2005. *See Adams, supra* note 139, at 41.

that spurs the reinstatement action in court.<sup>183</sup> The fact that New York does not provide for post-termination visitation after a trial is therefore in tension with the reinstatement statute and diminishes its effectiveness.<sup>184</sup> A parent may have her rights terminated by trial and then cease to have contact with her child, who instead of being adopted lingers in foster care for years.<sup>185</sup> Due to the lack of contact between them, utilizing the reinstatement statute to achieve stability for the child is not an option. The child and parent may not even know how to contact one another, and the parent may have assumed her child was adopted as planned.

Accordingly, supporting a relationship between the child and his biological family in appropriate cases furthers the best interest of the child by providing for a biological support network should the adoption dissolve or disrupt. Furthermore, supporting enforceable contact between the child and his biological family may assist in avoiding disruption or dissolution in the adoptive placement and may strengthen the relationship between the child and his adoptive family.<sup>186</sup> This is because the contact may help the child in coping with the transition to the adoptive family and managing his feelings surrounding his foster care history and the adoption process.<sup>187</sup>

---

<sup>183</sup> The statute doesn't explicitly state a requirement for an ongoing relationship between the child and parent, but the statute requires that a minimum of two years pass from the termination proceedings and the child and parent consent to the restoration of parental rights. FAM. CT. ACT § 635. Similarly, Adams explains that the reinstatement statutes are focused on the rights of the child and solving the issue of legal orphans—children who are freed for adoption but have no adoptive resources—but they implicate parental rights by implicitly recognizing continued relationships that parents have with their children after termination of parental rights. *See Adams, supra* note 139, at 42.

<sup>184</sup> Adams argues that the current reinstatement statutes, including New York's, are ineffective as written, based on several reasons, one being the lack of requirement for post-termination visitation. *See Adams, supra* note 139, at 43. She argues that post-termination visitation should be a requirement in states with reinstatement statutes, and she also argues that all states should adopt reinstatement statutes. *Id.* at 48, 53.

<sup>185</sup> For example, for each year a youth freed for adoption spends in foster care, the likelihood of his adoption is reduced by eighty percent. *See Gretta Cushing & Sarah B. Greenblatt, Vulnerability to Foster Care Drift After the Termination of Parental Rights*, 19 RES. ON SOC. WORK PRAC. 694, 700 (2009).

<sup>186</sup> *See Gaddie, supra* note 16, at 510–11; Post & Zimmerman, *supra* note 178, at 497–99 (discussing the problems adopted youth face regarding their identity when they are not provided any contact with their biological family and how the feelings of divided loyalty often contribute to the broken adoptions). Post and Zimmerman argue that supporting a foster and adoptive parent to properly address an adopted youth's need for information and contact with biological relatives is critical if the adoptions are to succeed. Post & Zimmerman, *supra* note 178, at 499. Similarly, they explain that adoptions don't sever the emotional ties a child had to his biological parent, and the psychological problems stemming from the trauma of removal often emerge in adolescence. *Id.* at 504–05.

<sup>187</sup> *Id.* at 482–83.

V. PROPOSED STATUTE FOR POST-TERMINATION VISITATION IN  
NEW YORK

A. *Proposal for Legislative Action in New York Following the In re  
Hailey ZZ. Decision*

Given that the New York Court of Appeals directly handed the issue of whether post-termination visitation is permissible over to the Legislature,<sup>188</sup> it would follow that the Legislature might have taken some action on this topic following the *In re Hailey ZZ.* decision. In fact, a bill was proposed in 2013 to allow courts to direct visitation at disposition between a parent and a child,<sup>189</sup> and another bill was recently proposed in May 2017.<sup>190</sup> The 2013 bill was referred to the Senate Committee on Children and Families, but nothing subsequently occurred.<sup>191</sup> The 2017 bill made some progress in the Senate and Assembly after being introduced late in the legislative session.<sup>192</sup> The 2013 proposal sought to amend section 634 of the Family Court Act, which provides that the court may condition dispositional orders under section 631, dealing with a permanent neglect cause of action.<sup>193</sup> The

---

<sup>188</sup> *In re Hailey ZZ.*, 972 N.E.2d 87, 97 (N.Y. 2012). Referring to post-termination contact, the Court stated, “[a]bsent legislative warrant, Family Court is not authorized to include any such condition in a dispositional order made pursuant to Social Services Law § 384-b.” *Id.*

<sup>189</sup> SPONSOR’S MEMO., S. 236–3896, Reg. Sess. (N.Y. 2013). In the Sponsor’s Memo, the only justification for the bill offered was as follows:

In June of 2012 a Court of Appeals case Matter of Hailey ZZ 19 NY3d 422 was decided. In this decision the Court eliminated from consideration in termination of parental rights the possibility of post termination visitation between the biological parents and the child in the absence of consent by the adoptive parents. It further stated that “it is the legislature that more appropriately should be called upon to balance the critical social policy choices and the delicate issues of family relations involved.”

*Id.*

<sup>190</sup> 2017 A.B. 8020, 239th Legis. Sess. (2017), 2017 NY A.B. 8020 (Westlaw); 2017 S.B. 5790, 239th Legis. Sess. (2017), 2017 NY S.B. 5790 (Westlaw).

<sup>191</sup> Bill tracking indicates that the last action, a referral to the Committee on Children and Families, occurred on January 8, 2014. 2013 S.B. 3896, 236th Legis. Sess. (2014), 2013 NY S.B. 3896 (Westlaw).

<sup>192</sup> Bill tracking indicates that the Assembly bill was introduced on May 25, 2017, laid out for discussion on June 19, 2017, and then laid aside on June 19, 2017. 2017 A.B. 8020, 239th Legis. Sess. (2017), 2017 NY A.B. 8020 (Westlaw). The Senate bill was introduced on May 1, 2017, then reported and committed to Senate Rules on June 6, 2017. 2017 S.B. 5790, 239th Legis. Sess. (2017), 2017 NY S.B. 5790 (Westlaw).

<sup>193</sup> N.Y. FAM. CT. ACT § 634 (McKinney 2009) (“The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper.”).



proposed version would clearly permit a court to order visitation when in the best interest of the child.<sup>194</sup>

B. *Proposal for Statutory Amendment to Permit Post-Termination Visitation*

The Legislature should amend the Social Services Law and Family Court Act to permit post-trial visitation in cases tried on the ground of permanent neglect as well as on the grounds of mental illness and mental retardation. This amendment differs significantly from the 2013 proposed bill because that bill was limited to allowing visitation after terminations on grounds of permanent neglect<sup>195</sup> and therefore sought to modify only the statutes pertaining to those actions, namely Article Six of the Family Court Act.<sup>196</sup> In contrast, the statutory amendment proposed in this Note would apply to section 634 of the Family Court Act, which allows for orders following termination proceedings on the ground of permanent neglect,<sup>197</sup> and also to section 384-b of the Social Services Law, which governs termination proceedings on the grounds of mental illness and mental retardation.<sup>198</sup> The 2017 proposed bill similarly applies to section 384-b of the Social Services Law in addition to section 634 of the Family Court Act.<sup>199</sup>

Additionally, the language in the 2013 bill is very general, referring to visitation only and no other forms of contact and communication.<sup>200</sup> The language of the 2017 bill refers to “visitation and/or contact.”<sup>201</sup> The statutory amendment proposed in this Note would provide even more

---

<sup>194</sup> The proposed additional language to section 634 is as follows:

Such order may include the granting of reasonable and regularly scheduled visitation to the parent or custodian of the child or visitation under the supervision of an employee of a local social services department. The granting of visitation or supervised visitation pursuant to this subdivision shall be based solely on a finding that such visitation or supervised visitation is in the best interest of the child. Nothing set forth in this subdivision shall be construed to require the court to grant visitation or supervised visitation to the parent or custodian.

S.B. 3896, 236th Leg., 2013–2014 Reg. Sess. (N.Y. 2013).

<sup>195</sup> S.B. 3896, 236th Leg., 2013–2014, Reg. Sess. (N.Y. 2013).

<sup>196</sup> FAM. CT. ACT § 611.

<sup>197</sup> *Id.* § 634.

<sup>198</sup> N.Y. SOC. SERV. LAW § 384-b (McKinney 2010).

<sup>199</sup> The bill also proposes to expand the right of post-termination visitation to siblings. 2017 A.B. 8020, 239th Legis. Sess. (2017), 2017 NY A.B. 8020 (Westlaw); 2017 S.B. 5790, 239th Legis. Sess. (2017), 2017 NY S.B. 5790 (Westlaw).

<sup>200</sup> See *supra* note 194.

<sup>201</sup> 2017 A.B. 8020, 239th Legis. Sess. (2017), 2017 NY A.B. 8020 (Westlaw); 2017 S.B. 5790, 239th Legis. Sess. (2017), 2017 NY S.B. 5790 (Westlaw).

detail and guidance to the court regarding the form and process for post-termination contact.

The statutory amendment will give courts discretion to approve arrangement for post-adoption contact as agreed upon by all parties after a fact-finding trial on grounds of permanent neglect<sup>202</sup> and mental illness or mental retardation.<sup>203</sup> The judicial discretion includes authority to issue an order for visitation as agreed upon by all parties when a pre-adoptive resource has not been identified. In addition, the statute will give courts discretion to order post-adoption contact when agreement among the parties is not possible.<sup>204</sup> In fashioning such an order, the standard will be the best interests of the child.<sup>205</sup> The proposed statute would read as follows:

Following the termination of parental rights, the court may order contact or communication between the parent and the child if such contact or communication would be in the best interests of the child. Such an order may incorporate an agreement between the parties, including a prospective adoptive parent, or may be made in the absence of an identified adoptive parent. The contact or communication may include, but is not limited to, visits, written correspondence, telephone calls, or online contact. The nature and frequency of the communication or contact must be set forth in a written order. The nature and frequency of the contact may be reviewed upon motion of any party, including an identified prospective adoptive parent. If a child is placed for adoption, the nature and frequency of the contact may be reviewed by the court prior to the finalization of the adoption.<sup>206</sup>

---

<sup>202</sup> The specific statute requiring amendment indicates that, “The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper.” FAM. CT. ACT § 634. Family Court Act section 631 governs proceedings brought under a permanent neglect cause of action. *Id.* § 631.

<sup>203</sup> SOC. SERV. § 384-b.

<sup>204</sup> See *supra* note 166 and accompanying text.

<sup>205</sup> Among the states that permit enforceable post-adoption contact agreements, the “best interests of the child” is the standard guiding a court’s approval. See Gaddie, *supra* note 16, at 504.

<sup>206</sup> This proposed statute is modeled off of the language from the Florida statute providing for post-termination contact orders as a dispositional option. See FLA. STAT. ANN. § 39.811(7)(b) (West 2012). Among the states permitting post-termination contact, the statutes largely focus on the nature of the post-termination agreements. See, e.g., CAL. FAM. CODE § 8616.5 (West 2013); GA. CODE ANN., § 19-8-27 (West 2010); LA. CHILD. CODE ANN. art. 1269.3 (2014). Florida similarly has a statute governing the substance of the post-termination visitation agreement. See FLA. STAT. ANN. § 63.0427 (West 2012). However, unlike other states, Florida has an additional statute providing for post-termination contact orders as a dispositional option, which is the type of statute proposed in this Note to address the deficiency in the New York statutory scheme. See FLA. STAT. ANN. § 39.811(7)(b). This Florida statute

This statutory language allows for flexibility in determining the type of contact and acknowledges that there may be a long gap between termination and adoption, so review prior to adoption would be appropriate.<sup>207</sup>

Factors for a court to consider in making a determination of whether or not continued contact would be in a child's best interest include the presence of an emotional bond between the child and the parent,<sup>208</sup> the wishes of the child,<sup>209</sup> evidence that contact would not be detrimental to the child's well being and would be in the child's best interest.<sup>210</sup>

This statutory amendment would align New York with the majority position taken by courts in the United States regarding who may enter into an enforceable agreement for post-adoption contact.<sup>211</sup> Limiting enforceable post-adoption contact agreements to parents who surrender their rights is currently the case in only four other states in

---

provides guidance for a proposed New York statute because it details the types of contact permitted and when the order for contact should be reviewed. *See id.*

There is limited case law surrounding the provision providing for post-termination contact by relatives in the Florida dispositional statute. There are two cases affirming the termination of parental rights but remanding for the trial court to determine appropriate ongoing contact. *See* B.K. v. Dep't of Children & Families, 166 So. 3d 866, 877 (Fla. Dist. Ct. App. 2015); *In re D.W. v. Dep't of Children & Families*, 763 So. 2d 497, 498 (Fla. Dist. Ct. App. 2000). There is also a case determining what type of post-termination contact is proper. *See* A.W. *ex rel.* B.W. v. Dep't of Children & Families, 969 So. 2d 496, 505 (Fla. Dist. Ct. App. 2007) (affirming order for mother to have written contact after termination, but not in-person contact, based on best interests of the child). Accordingly, allowing for such a dispositional option does not appear to overload the courts with litigation surrounding the visitation orders.

<sup>207</sup> *See supra* note 59 and accompanying text.

<sup>208</sup> *In re Hailey ZZ.*, 972 N.E.2d 87, 89 (N.Y. 2012); *see also In re Christina L.*, 460 S.E.2d 692, 701 (W. Va. 1995).

<sup>209</sup> *See, e.g., In re Christina L.*, 460 S.E.2d at 701. In New York, a child over the age of fourteen must consent to his adoption. *See* N.Y. DOM. REL. LAW § 111(1)(a) (McKinney 2010). Accordingly, if a child over the age of fourteen consents to his adoption but expresses wanting post-termination visitation or contact, a court should give weight to the child's position in making a best interests determination. Sixteen states and the District of Columbia have provisions to consider the wishes of the child or require the consent of the child. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT, *supra* note 16, at 3 The states differ on the age of consent; some states use the age twelve, while others use the age fourteen. *Id.*

<sup>210</sup> *In re Christina L.*, 460 S.E.2d at 701.

<sup>211</sup> In twenty-one states and the District of Columbia, enforceable contracts for post-adoption contact may be entered into by a parent who has her rights involuntarily terminated. U.S. DEP'T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT, *supra* note 16, at 5, 6, 9, 10, 11, 15, 16, 17, 18, 21, 22, 24, 26, 30, 31, 33, 36, 37, 40, 41, 42, 43 (Arizona, California, Florida, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and West Virginia).

addition to New York.<sup>212</sup> Furthermore, permitting courts to order such contact after termination has not resulted in considerable litigation.<sup>213</sup>

### C. Practical Implications

If courts have the ability to issue orders for post-termination contact or visitation after a trial, more parents may proceed to have a trial, rather than surrender their rights.<sup>214</sup> Presently, two outcomes are possible for a parent who does not wish to surrender her rights and wishes to proceed with a trial when she has a possibly winnable case.<sup>215</sup> In rare cases the petitioning child protective agency may withdraw the petition against the parent during the fact-finding hearing,<sup>216</sup> or, more commonly, the agency may offer the parent a suspended judgment during the dispositional hearing.<sup>217</sup> However, in the event that a parent is offered a suspended judgment and fails to meet the conditions imposed by the court, the parent's rights are terminated without any provisions for contact or visitation.<sup>218</sup> Accordingly, under the proposed amendment to the statute, if the parent or the child petitions the court

---

<sup>212</sup> In five states—Alaska, Connecticut, Indiana, Montana, and New York—enforceable contracts for post-adoption contact are only permitted for a parent who voluntarily gives up her rights. *Id.* at 4, 8, 12, 20, 27.

<sup>213</sup> Among the twenty-one states and the District of Columbia which allow for enforceable agreements for visitation after parental rights are terminated by trial, there is little case law surrounding post-termination visitation. For example, a Westlaw search for these states including the terms “termination of parental rights” and “post termination visitation” only yields cases regarding parental visitation after termination by trial in California, Florida, Massachusetts, Nebraska, Texas, and West Virginia, with the vast majority of cases stemming from West Virginia. *See, e.g., In re Adoption of Douglas*, 45 N.E.3d 595 (Mass. 2016); *In re Christina L.*, 460 S.E.2d at 701.

<sup>214</sup> *See supra* Part III and discussion of state interests in maintaining the current procedures.

<sup>215</sup> E-mail from Staff Attorney, *supra* note 165.

<sup>216</sup> For example, an evaluation conducted on a client facing termination on grounds of mental illness may indicate that the parent would be able to parent safely in the foreseeable future, or the agency realizes it cannot prove that the parent failed to plan for the child for a period of a year as required for a termination on grounds on permanent neglect. Email from Staff Attorney, *supra* note 165. If ACS withdraws the termination petition, the agency must continue working with the parent.

<sup>217</sup> E-mail from Staff Attorney, *supra* note 165; *see also* N.Y. FAM. CT. ACT § 633 (McKinney 2010) (governing suspended judgments when the grounds for termination are permanent neglect); N.Y. SOC. SERV. LAW §384-b(8)(c) (McKinney 2010) (governing suspended judgments when the grounds for termination are severe and repeated abuse).

<sup>218</sup> FAM. CT. ACT § 633(b). A suspended judgment is for the maximum period of a year, but a parent may receive an extension for up to an additional year for exceptional circumstances. During this period, the court may terminate the parent's rights upon determining that she violated the terms of the suspended judgment. *Id.* § 633(f). However, the court may extend the suspended judgment even after a violation if it determines it would be in the best interest of the child and no prior extension was granted. *Id.* § 633(f).

for continued contact, a court would be able to consider an ongoing arrangement if in the best interest of the child.

Similarly, under the current statutory scheme, when a parent does not wish to surrender and the outcome of the parent's case is less clear, the parent generally winds up surrendering her rights.<sup>219</sup> When presented with the option of arranging for some contact through a conditional surrender, as approved by a judge, versus risking losing all contact, a parent is likely to opt for the less risky choice.<sup>220</sup> For this category of parents, more parents may proceed to having a trial after a change in the statutory scheme. While increasing the number of trials in an already overburdened court system<sup>221</sup> is not ideal, it is of critical importance to ensure proper procedures for terminating parental rights.

Another possible outcome of adopting the amendment is that some pre-adoptive parents may be dissuaded from adopting.<sup>222</sup> They may not be open to facilitating contact or communication between a child and his birth parent.<sup>223</sup> While the amendment allows a court to approve an agreement for contact to which a pre-adoptive parent is a party, it also provides for court-ordered contact when a pre-adoptive parent is not yet identified. As such, the adoptive parent may be held to an order that preceded her involvement in the case. However, this does not pose a legal problem. It is true that once a foster parent adopts, she obtains full legal rights as a parent, and a parent's constitutionally protected rights include limiting which third parties are able to visit and have contact with her child.<sup>224</sup> In the context of adoption from foster care, however, the adoptive parent adopts subject to the court's orders, which may include visitation provisions.<sup>225</sup> Furthermore, courts can be mindful of

---

<sup>219</sup> E-mail from Staff Attorney, *supra* note 165.

<sup>220</sup> *Id.*

<sup>221</sup> *See, e.g.,* ABIGAIL KRAMER, CTR. FOR N.Y.C. AFFAIRS, IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3–4 (2016).

<sup>222</sup> Maldonado, *supra* note 5, at 356. *See also* Mabry, *supra* note 26, at 323 (arguing that if a prospective adoptive family is unwilling to support any contact and the child and the birth relative want contact, then the agency should find another pre-adoptive parent unless it would significantly delay the child getting adopted).

<sup>223</sup> The pre-adoptive parents may view the contact as a “burdensome” task, or they may feel threatened as they seek to establish themselves as the new parents. *See* Cushing & Greenblatt, *supra* note 185, at 695.

<sup>224</sup> *Troxel v. Granville*, 530 U.S. 57 (2000) (finding that a Washington statute allowing for third parties to petition for visitation unconstitutionally infringed on fundamental parental rights by allowing for a judge to make a best interests determination as to visitation instead of the fit custodial parent).

<sup>225</sup> *See, e.g.,* Ronald D. v. Doe, 176 Misc.2d 567 (N.Y. Fam. Ct. 1998). The foster care agency failed to tell the pre-adoptive parent that there were surrender conditions providing for contact between the child and the biological parent. *Id.* at 568–69. Following the adoption, the adoptive parent refused to meet the conditions, and the birth father brought a petition to enforce them. *Id.* In upholding the birth father's petition, the Court held that the Department of Social

this and order the minimum contact or communication that would support the child's best interests, and then it would be up to the adoptive parent to increase the communication if she felt comfortable doing so.<sup>226</sup>

Lastly, in providing that a judge assess cases individually according to a best interests of the child standard, the proposed amendment recognizes that in some cases, open adoption will not be appropriate.<sup>227</sup> However, there are risks to open adoption even in scenarios where all parties are open to the continued contact.<sup>228</sup> For example, a child may have trouble connecting to a new parent if he is still involved with his birth parent, or a child may experience confusion in trying to fit in with both families.<sup>229</sup> Ultimately, the benefits of open adoption, especially for an older child in foster care, outweigh the risks.<sup>230</sup>

#### CONCLUSION

In *Hailey ZZ.*, Hailey's father argued that the statutory scheme governing terminations was procedurally unfair because a parent who exercises his due process right to a hearing is punished by being precluded from receiving visitation.<sup>231</sup> In response, the majority maintained that the Legislature was not increasing punishment and was simply making a policy choice that the conditional relief of post-termination visitation would benefit children after a surrender of rights but not after an adversarial process.<sup>232</sup> Contrary to the majority's view, the fundamental right of a parent to the custody of her child demands a change to the statutory scheme. Under a *Mathews v. Eldridge* analysis, allowing for post-termination contact would preserve the due process

---

Services couldn't "grant out any greater rights [to the adoptive parents] than it received from the parent." *Id.* at 571-72; *see also* Adoption of Lars, 702 N.E.2d 1187, 1191 (Mass. App. Ct. 1998); *In re* Adoption of Vito, 728 N.E.2d 292, 296 (Mass. 2000). Additionally, under the New York statute governing surrenders of parental rights, an agreement for communication and contact may be approved by the court even if a pre-adoptive parent has not yet been identified. N.Y. SOC. SERV. LAW § 383-c (2)(b) (McKinney 2010).

<sup>226</sup> Appell, *supra* note 140, at 22 (citing studies from England in which adoptive parents who adopted with court ordered contact between the biological parent and child had a negative view of such contact initially because it detracted from their sense of control as a parent, but that view weakened over time). Appell noted that there were no social science studies from the United States of families who participated in open adoptions, either through court approved visitation agreements or court ordered visitation. *Id.* at 18.

<sup>227</sup> *See supra* note 167 and accompanying text.

<sup>228</sup> *See* Gaddie, *supra* note 16, at 511.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 510-11; *supra* note 29.

<sup>231</sup> *In re* Hailey ZZ., 972 N.E.2d 87, 94 n.8 (N.Y. 2012).

<sup>232</sup> *Id.*

rights of parents, and would actually further the state's interests in ensuring the well-being of children.<sup>233</sup> Furthermore, permitting judges to exercise discretion following a trial on parental rights would not impose any fiscal or logistical problems for the state.<sup>234</sup>

Additionally, the statute is based on misguided policy.<sup>235</sup> The Legislature took the narrow view that contact with a parent who surrenders her rights may be in a child's best interest, but contact with a parent who has her rights terminated would never be. In doing so, the Legislature failed to consider how ongoing contact between a child and parent after termination by trial could similarly support the psychological and emotional well-being of the child.<sup>236</sup>

The proposed statutory amendments to the Social Services Law and Family Court Act to allow for post-termination communication or contact after parental rights are terminated by trial would remedy the current constitutional and policy deficiencies and further the interests of all parties involved.

---

<sup>233</sup> See *supra* Section III.B.

<sup>234</sup> See *supra* Section III.B.

<sup>235</sup> See *supra* Part IV.

<sup>236</sup> See Appell, *supra* note 140, at 9–10 (explaining that the method of termination is not indicative of the child's level of attachment to his parent). Regarding the benefits of contact for children, see Gaddie, *supra* note 16, at 510–11 (benefits of contact for children), and see also Mabry, *supra* note 26; Foehrkolb, *supra* note 29; Williams, *supra* note 29.