

INTRODUCTION

TIES THAT BIND: THE IMPACT OF PSYCHOLOGICAL AND LEGAL DEBATES ON THE CHILD WELFARE SYSTEM

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INTRODUCTION

The harsh dilemmas that arise when the state seeks to separate families, temporarily or permanently, have long confounded all involved in the child welfare system—child welfare workers, lawyers, mental health professionals, judges, birth parents, foster parents, and children. Three fundamental questions involving a mix of psychological and legal issues frame much of the debate. First, what role should a child's attachment to a foster parent play in deciding whether to return the child to her biological parents from foster care or terminate parental rights? Second, is termination of parental rights followed by adoption the best legal outcome for children who cannot be returned to their biological parents? Third, how intensively and for how long must child welfare agencies attempt to preserve families? Profoundly divergent opinions on these questions have resulted in enormous controversy. Each debate has generated polarized views generally pitting the parent against not only the state child welfare agency, but often against the foster parents and even the child as well.

On April 12, 1994, Legal Services of New Jersey, along with the three New Jersey law schools—Rutgers-Newark, Rutgers-Camden, and Seton Hall—sponsored a conference entitled *Helping Families in Crisis: The Intersection of Law and Psychology*. The purpose of the conference was to explore these debates in an effort to move beyond widely held assumptions that children's interests and parents' interests are diametrically opposed. A major focus of the conference was the current viability of Goldstein, Freud,

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and Solnit's psychological parenting theory,¹ a theory which has significantly influenced each of the debates noted above. The conference sought to reexamine views presented by a wide variety of theorists and practitioners who had convened in New Jersey for a similar conference more than a decade ago, in April 1983, to examine the impact of that theory on decisions about terminating parental rights.² Participants also explored alternative legal outcomes that avoid the severance of all ties between the child and her family of origin where reunification is not a viable option. Recognizing that the tragic psychological consequences which often occur when the state seeks to terminate parental rights may be avoided by intensive efforts to assist families long before the point of termination, participants in the 1994 conference also outlined strategies for preserving families when their problems begin.

This Symposium issue includes six articles by conference presenters: *Too Little Too Late: Designing Family Support to Succeed* by Dr. Margaret Beyer; *The Good Mother: A New Look at Psychological Parent Theory* by Peggy C. Davis; *Parents' Rights vs. Children's Interests: The Case of the Foster Child* by Marsha Garrison; *Examining Risks to Children in the Context of Parental Rights Termination Proceedings* by Dr. Matthew B. Johnson; *Keeping Mothers and Their Infants Together: Barriers and Solutions* by Dr. Barry Lester; and *Reinventing Guardianship: Subsidized Guardianship, Co-Guardians, and Child Welfare* by Meryl Schwartz.

These articles describe the plight of the overwhelmingly poor and vulnerable families who compose the child welfare system. The vast majority are families subsisting on welfare grants; many are families of color.³ Together these articles portray a system that, rather than assisting families in

1. In two volumes, Goldstein, Freud, and Solnit proposed guidelines for child welfare decision making premised on psychological theory. JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979) [hereinafter, GOLDSTEIN, FREUD, & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*]; JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). A third volume was later added to the series, JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, *IN THE BEST INTERESTS OF THE CHILD* (1986).

2. Presentations from the 1983 conference were published in a symposium issue of this journal entitled *The Impact of Psychological Parenting on Child Welfare Decision-Making*. 12 N.Y.U. REV. L. & SOC. CHANGE (1983-84). New Jersey courts have often relied on the 1983 Symposium issue to help inform their decisions in cases raising psychological parenting issues. See, e.g., N.J. Div. of Youth and Family Serv. v. A.W., 512 A.2d 438, 443-44 (N.J. 1986); *In re J.C.*, 608 A.2d 1312, 1320-22 (N.J. 1992).

3. See A.W., 512 A.2d at 447 n.8; Michael Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1021-24 (1975) (noting that the overwhelming majority of children in the foster care system come from impoverished families), quoted in *Champagne v. Welfare Div. of Nevada State Dep't of Human Resources*, 691 P.2d 849, 858 n.7 (Nev. 1984). African-American, Latino, and Native American cultures are "heavily represented within the nation's foster care systems." Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Co-Guardians, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 459 (1996) (citing NAT'L. COMM'N ON FAMILY FOSTER CARE, *A BLUEPRINT FOR FOSTERING INFANTS, CHILDREN AND YOUTHS IN THE 1990s* 24 (1991)). In New Jersey, 80% of the 1,280 children in foster care

desperate need of help, deprives them of vital services that might keep them intact. In an endeavor to provide children with permanent homes, this system too often terminates parental rights, separating children from their families of origin forever. The articles are strong testimony to society's refusal to recognize and address the fundamental needs of poor families.

I.

PSYCHOLOGICAL PARENTING THEORY

For more than two decades, theories and related guidelines proposed by Goldstein, Freud, and Solnit have formed the centerpiece of the debate about the needs of children in foster care. Simply summarized, Goldstein, Freud, and Solnit postulated that children form their primary attachment with a "psychological parent"—the person that provides day-to-day care for the child, whether or not that person is the biological parent—and their psychological well-being requires a continuous relationship with that person. Based on this thesis, Goldstein, Freud, and Solnit advocated that the state should only remove children from their families in extreme situations. However, once the state removes a child from his or her family and the child becomes attached to another caretaker, continuing the new relationship becomes their overriding concern.⁴ In their view, that paramount relationship must be an exclusive one. Thus, complete termination of all parental rights and adoption of the child by the new caretaker is essential.⁵ Although intended to provide guideposts for all child custody cases—divorce and foster care situations alike—psychological parenting theory has never taken root as a viable framework in divorce cases, despite its enthusiastic endorsement in the foster care arena.⁶

From the outset, Goldstein, Freud, and Solnit's psychological parenting theory was controversial in the legal and mental health communities. Although some reviews of their initial proposal touted its "child-centered" approach, others claimed it went too far in attempting to override the rights of biological parents.⁷ Participants in the 1983 conference demonstrated convincingly that the theory had failed to address the complex needs of children, despite its supposed child-based orientation.⁸ Of major concern to conference participants in 1983 were both the lack of conclusive

for four or more years at the close of court year 1992-93 were children of color; 72% were African-American. N.J. CHILD PLACEMENT ADVISORY COUNCIL, A REPORT ON NEW JERSEY'S CHILD PLACEMENT REVIEW SYSTEM DURING COURT YEAR 1992-93 at Appendix B.

4. GOLDSTEIN, FREUD, & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, *supra* note 1, at 31-34, 99-100.

5. *Id.* at 35, 101.

6. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 453 (1983).

7. See, e.g., Richard Edelin Crouch, *An Essay on the Critical And Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L. Q. 49 (1979).

8. See *supra* note 2 and accompanying text. See also Garrison, *supra* note 6, at 459 (summarizing critics' views that emphasis on continuity of care was too inflexible, excluding

research to support the theory and, even more importantly, its misuse in practice. Although critical of the underlying assumptions informing the theory, several conference participants suggested that the greater problem lay with its use as a weapon against vulnerable low-income families, particularly families of color.⁹ They noted its failure to address culturally diverse caretaking patterns.¹⁰ They also criticized its single-minded fixation on the need for one exclusive, continuous attachment to a psychological parent to the exclusion of many other factors essential to the calculation of what is best for children,¹¹ including the potentially devastating consequences to children of losing their families of origin¹² and the recognition that children often have more than one attachment. There was clear agreement that firm reliance on this theory ultimately ignores the full complexity of a particular child's family situation.

In the intervening decade between the 1983 conference and the 1994 conference, scholarly articles continued to explore different views of parent-child relationships,¹³ as courts around the nation continued to grapple with the application of psychological parenting principles to real lives.¹⁴

other important concerns to the detriment of both parents and children); Crouch, *supra* note 7, at 59, 61.

9. David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 N.Y.U. REV. L. & SOC. CHANGE 501, 502 (1983-84); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 540-41 (1983-84); Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 549, 551-53 (1983-84); Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. REV. L. & SOC. CHANGE 485, 493 (1983-84).

10. Stack, *supra* note 9, at 542-45.

11. Everett Waters and Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 505-06 (1983-84); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1983-84); see also Garrison, *supra* note 6, at 459.

12. Fanshel, *supra* note 9, at 502; Davis, *supra* note 11, at 567-71; see also Garrison, *supra* note 6, at 460-72; Margaret Beyer and Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L. Q. 233, 237 (1986).

13. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (arguing for recognition of nurturing parental child relationships in judicial custody and visitation determinations); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (arguing for greater judicial recognition of child/adult relationships outside the nuclear family).

14. For courts refusing to rely on the psychological parenting theory, see, e.g., *In re Jessica M.* 586 A.2d 597 (Conn. 1991); *In re Lisa H.*, 589 A.2d 1004 (N.H. 1991); *In re J.*, 582 So.2d 269 (La. Ct. App. 1988), writ denied, 583 So.2d 1145 (La. 1991); *In re Kristina L.*, 520 A.2d 574 (R.I. 1987). For courts permitting psychological parenting to play an important role, see, e.g., *In re Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988); *In re K.A.*, 484 A.2d 992 (D.C. 1984). See also, Peggy C. Davis, 'There is a Book Out . . .,' *An Analysis of Judicial Absorption of Legislative Fact*, 100 HARV. L. REV. 1539 (1987) (reviewing judicial decisions utilizing psychological parenting theory).

The New Jersey Supreme Court attempted to strike a balance between opposing expert views in two companion cases in which the state sought to terminate the rights of fit parents based on their children's attachment to foster parents.¹⁵ The New Jersey Supreme Court crafted limits on the role of psychological parenting theory in New Jersey jurisprudence by heightening the level of proof necessary to justify termination. The Court required a finding that separation from a foster parent would cause "serious and enduring emotional or psychological harm."¹⁶ The Court also addressed the right of all parties to have psychological experts to ensure a balanced presentation of "competing psychological theories of the effects of parental bonding."¹⁷ Implicitly recognizing that the application of psychological parenting theory in termination of parental rights proceedings had shifted the focus from the biological parent's ability to care for the child to the child's need for an exclusive, continuing relationship with someone other than the biological parent,¹⁸ the Court required a full evaluation of the child's relationship with the family of origin as well as that with the foster family.¹⁹ The Court did not, however, prohibit the use of the theory and cases continue to proceed under it. Unfortunately, while parents' advocates viewed the decisions as a necessary step to recognizing that children's needs must be analyzed in the context of their families of origin rather than in isolation, children's advocates saw them as an erosion of children's rights.²⁰

More than ten years after the 1983 conference discussions, despite a growing body of research, literature, and judicial decisions criticizing psychological parenting theory, much of the substance of the theoretical debate about psychological parenting remains virtually unchanged, fueled as much by philosophical and emotional positions as by theoretical ones. At the 1994 conference, the legal and psychological issues revolving around psychological parenting theory and its legal outcomes were addressed by

15. *In re J.C.*, 608 A.2d 1312 (N.J. 1992); *In re K.L.F.*, 608 A.2d 1327 (N.J. 1992).

16. *J.C.*, 608 A.2d at 1320.

17. *Id.* at 1321-22.

18. Although termination standards have always required a finding of unfitness or abandonment, *In re Baby M.*, 537 A.2d 1227 (N.J. 1988), the introduction of psychological parenting theory suddenly permitted parents who had pulled their lives together and were perfectly fit parents to nevertheless lose their children. See, e.g., *In re J.C.*, 608 A.2d 1312 (N.J. 1992).

19. Interestingly, in *In re J.C.*, once the focus shifted to a fuller view of all the relationships involved, the children were returned to their biological mother. See Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 416-20 (1996) (describing the *J.C.* case).

20. Kathleen E. Kitson, *Protecting Children While Protecting Parents: In the Matters of J.C. and K.L.F.*, N.J. FAM. LAWYER, June 1994, at 149, 151; Toby Solomon and James B. Boskey, *In Whose Best Interests: Child v. Parents*, N.J. LAWYER, Nov.-Dec. 1993, at 36, 39. Commonly in these court cases, particularly those involving younger children who do not know their biological parents or cannot express their opinion, children's advocates urge termination while the biological family resists it. See, e.g., *In re J.C.*, 608 A.2d 1312 (N.J. 1992); *In re K.L.F.*, 608 A.2d 1327 (N.J. 1992).

Peggy C. Davis, a lawyer, law professor, and speaker at the 1983 conference; Dr. Matthew B. Johnson, a clinical psychologist; Marsha Garrison, a lawyer and law professor; and Meryl Schwartz, a lawyer and policy analyst. Building on some of the themes discussed in 1983, the 1994 presenters explored some new areas of study, and suggested some concrete steps and alternatives.

Perhaps even more forcefully than in the past, speakers condemned psychological parenting theory's narrow focus on continuity and exclusivity, characterizing it as an overly simplistic, black and white view of complex family dynamics. The theory's goal of providing foster children with a continuous and exclusive family relationship simply by replacing the child's family of origin with a new family—as if the child's origins could be magically erased—was criticized as unrealistic. Indeed, Dr. Johnson suggested that the term “psychological parent” itself juxtaposes two notions of parenthood in a false dichotomy by obscuring the fact that biological parents are psychologically important to children whether or not the parent and child have an ongoing relationship.²¹ According to Professor Davis and Dr. Johnson, a child's family of origin is never “out of sight, out of mind.” In fact, Professor Garrison pointed to research demonstrating that children are attached “to parents who by all ordinary standards are very bad parents.”²² She maintains that, not only does family separation fail to extinguish the importance of birth parents to their children, but permanent separation can have devastating consequences, by depriving children of their main source of “identity and self-esteem” and ultimately impeding their ability to “mourn [their losses] and move forward.”²³

Professor Davis devoted substantial attention to an emerging consensus that children derive security from a “network of caring adults,” rather than one exclusive caretaker.²⁴ As Professor Garrison pointed out, there has been little dispute that children of divorced parents can and should maintain bonds with both parents.²⁵ Most speakers stressed that children typically have a number of important attachments and that multiple caretakers are the child-rearing norm in a variety of different cultural settings.

21. Johnson, *supra* note 19, at 405.

22. Marsha Garrison, *Parents Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 379 (1996) (quoting JOHN BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 69, 113 (1952)). See also Johnson, *supra* note 19, at 409; Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 318-19 (1996).

23. Garrison, *supra* note 22, at 382.

24. Peggy C. Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996) (citing Jessica Benjamin's and James Bray's strong conclusions that psychological parenting theory has “very little empirical support” and has been “disconfirmed”). Professor Davis also explores a second development in recent literature questioning the idealized version of the “good mother” underlying attachment theory.

25. See Garrison, *supra* note 22, at 395 (“Divorce law today potentially affects all children; child welfare law is generally reserved for those who are poor.”)

Professor Davis noted that experts have even begun to celebrate the benefits of multiple bonds.²⁶

Yet, the substantial research evidence contradicting a central premise of psychological parenting theory has not diminished the theory's potency in child welfare debates. The continuing debate over the abstract principles that polarize the system and splinter family interests has neither served the needs of foster children nor led to a resolution of opposing viewpoints. Thus, conference speakers emphasized that the needs of children and the complexity of different family situations require individual solutions. Dr. Johnson discussed the particular need for psychological experts, who play a crucial role in guiding the judge's analysis of the child's interests, to probe fully the specifics of each individual situation.²⁷ He cautioned that doctrinaire adherence to a particular theory will cause experts to miss many factors crucial to fair and correct decision making in a case.²⁸ Most child welfare cases do not fall into simple categories of good or bad, black or white. When they do, experts usually agree about what to do.²⁹ The vast majority of cases fall into a more difficult, gray area, often involving "a beleaguered parent with an uneven track record."³⁰ Contrary to the dictates of psychological parenting theory, the task for psychological experts is to analyze the circumstances of each case, each family, each child individually, in light of the full panoply of factors that researchers and clinicians believe influence children's lives.³¹

Unfortunately, however, psychological parenting theory, used exclusively in foster care cases, continues to pose a particular threat to poor and vulnerable families. Ironically, while theorists have debated the fine points of Goldstein, Freud, and Solnit's views in the context of terminating parental rights, their fundamental premise that families should be separated only in the rarest of circumstances has never held sway. Although their formulation about initial intervention was plainly too extreme, the current approach of many child welfare systems leads, on the other extreme, to

26. Davis, *supra* note 24, at 360-62.

27. See generally Johnson, *supra* note 19.

28. *Id.* at 404. Courts have also noted that strict adherence to psychological parenting theory may lead to absurd results. One New Jersey court exclaimed over the conclusions of the state's psychological expert in one termination case whose view "[w]as so inalterable that he expressed the conviction, on cross-examination, that a child bound to her kidnapper might well be better off remaining with him than being returned to her parents." N.J. Div. of Youth and Family Serv. v. T.C., 598 A.2d 899 (N.J. Super Ct. App. Div. 1992), *cert. denied*, No. 34,448 (N.J. June 30, 1992). See also, John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621 (1992). On the other hand, even a "paragon of motherhood" could lose her child based on the mere passage of time. Montgomery County Dept. of Social Serv. v. Sanders 381 A.2d 1154, 1159 (Md. Ct. Spec. App. 1977).

29. Fanshel, *supra* note 9, at 502; Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745 (1987).

30. Fanshel, *supra* note 9, at 502.

31. Johnson, *supra* note 19, at 403.

unnecessary placements.³² Once children are in foster care, psychological parenting theory is used to justify keeping them there, and, in some instances, to separate families permanently.³³ As recognized by the New Jersey Supreme Court, the doctrine may also discourage parents with meager resources from turning to the foster care system for help during periods of crisis for fear that they will never regain custody of their children.³⁴

Psychological parenting theory has clearly failed to resolve the major dilemmas of the child welfare system. In fact, emotional debates over children's psychological attachments to foster parents simply fail to address the needs of troubled families. More critical and concrete change lies with expanding services to preserve families before they reach the point of needing foster care placement as well as developing alternatives to termination of parental rights and adoption in the event that children cannot return home. These issues point to some of the real failures of the child welfare system. These failures have much less to do with psychological theory than with governmental failure, bureaucratic malfeasance, and a society that has turned its back on poor children and families.

II.

ALTERNATIVES TO TERMINATION OF PARENTAL RIGHTS AND ADOPTION

Virtually every participant in the 1994 conference addressed the vital importance of translating the growing consensus about children's needs into more flexible alternatives to accommodate the complex relationships involved in each individual case. Unfortunately, alternatives to termination of parental rights and adoption have gained only limited acceptance. As explained by both Professor Garrison and Meryl Schwartz, adoption has become the favored result for children who cannot be reunited with their families for a number of reasons, including its relatively low cost, the availability of federal subsidies, and the implicit impact of psychological parenting theory on the child welfare system.³⁵ But adoption, with its attendant severance of the child's legal relationship with his or her family of origin, does not always serve children. Although the goal of adoption is to provide permanence to children, Professor Garrison notes that children do

32. Marsha Garrison, *supra* note 29, at 1757-58; Mark Hardin, *Setting Limits on Voluntary Foster Care*, in *FOSTER CHILDREN IN THE COURTS* 70, 70 (Mark Hardin ed., 1983) (noting that, particularly where placement is made without a court order, "[u]nnecessary foster placements sometimes occur because alternatives less drastic than placing the child away from home are not first fully explored and made available"). See also Nancy Goldhill, *Families at Risk: The Need for Foster Care Reform* (1994) (unpublished manuscript, on file with *New York University Review of Law and Social Change*).

33. See *In re J.C.*, 608 A.2d 1312, 1321 (N.J. 1992); Davis, *supra* note 14 (reviewing termination decisions based on psychological parenting theory).

34. *J.C.*, 608 A.2d at 1321.

35. See Garrison, *supra* note 22, at 386-89; Schwartz, *supra* note 3, at 349-50.

not measure permanency by the legal label attached to their situation.³⁶ However, the permanent loss of ties to their family of origin may be far more significant than anything a legal label can offer. There is a critical need, then, to provide options that allow children who cannot return home to retain some type of legal relationship with their families of origin.

Open adoption, subsidized guardianship and, in some cases, long-term foster care provide alternatives to the traditional child welfare policy of severing all ties to the biological family to pave the way for adoption. Open adoption, which permits a child to be adopted without losing all contact with his or her biological family, offers a promising solution to this difficult dilemma. It offers something to everyone. Adoptive parents may adopt without a contentious legal battle. Meryl Schwartz suggested that open adoption may also make adoption acceptable to families who might resist complete severance of their relationships, particularly families whose cultural traditions condemn severing family ties.³⁷ Children are provided the measure of permanence adoption confers without suffering the permanent loss of their families of origin.³⁸ Birth parents obviously benefit as well.

Unfortunately, legislators have been hesitant to amend adoption laws to permit open adoptions.³⁹ Professor Garrison argued that acceptance of open adoption and other alternatives to complete termination of parental rights has been thwarted by the state's financial interests and the commanding interests of adoptive parents.⁴⁰ Adoption's appeal also lies in its symbolic replacement of a failed low-income family with a more successful middle-class family.⁴¹ Alternatives such as open adoption were relatively new in 1983, when one conference participant suggested that their future acceptance as viable alternatives would be one measure of the validity of

36. Garrison, *supra* note 29, at 1780 (summarizing research evidence that impermanent nature of foster care does not inherently affect child's sense of well-being); *see also* Garrison, *supra* note 22, at 378.

37. Schwartz, *supra* note 3, at 454-56.

38. Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, 3 THE FUTURE OF CHILDREN 119 (1993).

39. As noted by Meryl Schwartz, Indiana, Maryland, New Mexico, and Wisconsin provide authority for open adoption. Schwartz, *supra* note 3, at 454 n.73. *See* IND. CODE ANN. § 31-3-1-13 (Burns 1995); MD. CODE ANN., FAM. LAW § 5-312(e) (Michie 1995); N.M. STAT. ANN. § 32A-5-35 (Michie 1996); WIS. STAT. ANN. § 48.925 (West 1996). New York law permits courts to approve post-adoption visitation agreements between adoptive and birth parents. N.Y. SOC. SERV. LAW § 383-c (McKinney 1996); *In re Gerald T.*, 211 A.2d 17 (N.Y. App. Div. 1995). When New Jersey amended its adoption law in 1993, however, a provision permitting post-adoption "visitation or other type of communication" between the child and her biological family was stricken. The legislature reported: "While it is not the intent of the committee in deleting this language to discourage open adoptions, it was felt that the issue of open adoption represents a significant policy issue which should be addressed in separate legislation." Senate Judiciary Comm., Statement to Senate, No. 685 (1993), *quoted in In re D.M.H.*, 641 A.2d 235 (N.J.), *cert. denied sub nom.*, *Hollingshead v. Hoxworth*, 115 S.Ct. 433 (1994).

40. Garrison, *supra* note 22, at 386-87.

41. *Id.* at 387.

Goldstein, Freud, and Solnit's view about exclusivity.⁴² Yet, significant challenges to psychological parenting theory's requirement of exclusivity have not led to any wholesale acceptance of open adoption. Although a good deal of literature has emerged discussing its viability and benefits⁴³ and some courts have sanctioned it even absent explicit statutory authority,⁴⁴ open adoption has not flourished.⁴⁵

In New Jersey, as in most jurisdictions, an order of adoption terminates all relationships and attendant rights of children and their birth parents.⁴⁶ Although no published decisions grant open adoption in foster care cases, several New Jersey courts have permitted post-adoption visitation in other contexts where the child's best interests required a continuing relationship.⁴⁷ Similarly, the New Jersey Supreme Court has suggested that, in certain foster care situations, children's interests may require courts to permit ongoing contact.⁴⁸ Of course, where adoptive and biological parents agree, visitation may proceed voluntarily.⁴⁹ Given the limits of adoption and the unavailability of open adoption in most states, alternatives to termination of parental rights and adoption are essential. As explored by Meryl Schwartz, guardianship arrangements offer another compromise solution for the many children for whom termination of parental rights and adoption—even open adoption—are not viable.⁵⁰ A guardian, appointed by the court to care for a former foster child, can exercise authority over most major decisions for the child and eliminate oversight by the child welfare agency and the courts.⁵¹ Appointment of a guardian does not require termination of parental rights and parents retain the rights to visit and consent to adoption as well as financial responsibility for the child.⁵² Although

42. Taub, *supra* note 9, at 491-92.

43. Baran & Pannor, *supra* note 38; Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 LAW AND PSYCHOLOGY REVIEW 137 (1992); Carol Amadio and Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives*, 22 J. FAM. LAW 59 (1983-84); Judy E. Nathan, *Visitation after Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984); Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN (1993).

44. *In re Anthony*, 448 N.Y.S. 2d 377 (Fam. Ct. 1982); *Michaud v. Wawruck*, 551 A.2d 738 (Conn. 1989); *Morse v. Daly* 704 P.2d 1087 (Nev. 1985). The children's best interests are the decisive factor in these decisions.

45. For a discussion of some of the reasons for open adoption's failure to gain widespread acceptance, see Garrison, *supra* note 22, at 386-89; Schwartz, *supra* note 3, at [115].

46. N.J. STAT. ANN. § 9:3-50 (West 1996); see also *In re D.M.H.*, 641 A.2d 235 (N.J.), *cert. denied sub nom.*, *Hollingshead v. Hoxworth*, 115 S.Ct. 433 (1994).

47. *Katterman v. DiPiazza*, 376 A.2d 955 (N.J. Super. Ct. App. Div. 1977) (parent who consented to adoption by grandparents granted visits to promote child's best interests); *In re F.*, 406 A.2d 986 (N.J. Super. Ct. Ch. Div. 1979) (father granted visits after stepfather adopted to promote children's best interests).

48. *D.M.H.*, 641 A.2d at 245; *In re J.C.*, 608 A.2d 1312, 1324 (N.J. 1992). See also *In re R.O.M.C.*, 581 A.2d 113, 114 n.1 (N.J. Super. Ct. App. Div. 1990); *In re S.C.*, 587 A.2d 1299, 1307-08 (N.J. Super. Ct. App. Div.), *cert. denied*, 598 A.2d 2 (N.J. 1991).

49. *R.O.M.C.*, 581 A.2d at 114.

50. Schwartz, *supra* note 3, at 456.

51. *Id.* at 458.

52. *Id.*

guardianship, like open adoption, provides an alternative that meets the needs of many children, parents, and caregivers, it is too seldom used, primarily because it lacks financial support.⁵³

Nonetheless, as Schwartz explains, subsidized guardianship is a practical alternative in cases where children, particularly older children, and parents desire ongoing contact despite the parents' inability to care for their children.⁵⁴ Subsidized guardianship also holds promise in states with a high kinship foster care case load, as it avoids the dilemmas created when, for example, a grandmother is asked to adopt her grandchildren.⁵⁵ It also supports cultural patterns, relying on extended family caretaking networks.⁵⁶ As Schwartz concludes, the benefits of subsidized guardianship suggest that it is time to reexamine barriers to its acceptance.⁵⁷

A final, and again underutilized, option for families is long-term foster care. As Schwartz points out, many states provide long-term foster care by default, a result endorsed by no one. True long-term foster care, however, created by statute or regulation, may provide a viable option for children who can neither return home nor be adopted. In New Jersey, for example, the long-term foster care statute creates a status for older children similar to subsidized guardianship.⁵⁸ It reduces the role of the child welfare agency while expanding the authority of the foster parent.⁵⁹ Unfortunately, however, true long-term foster care is costly and available in relatively few states.

The vital need to expand the use of all possible options is clear. These alternatives will give courts the flexibility to accommodate the needs of individual children. Although the trend toward accepting flexible alternatives is creeping ahead instead of leaping as many expected, continued pressure for such options is critical to serving families that cannot ultimately live together.

III.

SERVICES TO PRESERVE FAMILIES

Recognizing not only that Goldstein, Freud, and Solnit provide no sweeping solutions to the ongoing psychological debate, but also that families are best served by early state intervention, conference participants also

53. *Id.* at 457.

54. *Id.* at 460.

55. *Id.* at 461.

56. *Id.* at 459-60.

57. *Id.* at 462.

58. N.J. STAT. ANN. § 30:4C-26.11 to 26.18 (West 1996).

59. *Id.*; 2D N.J. DEP'T OF HUMAN SERVS., DIV. OF YOUTH & FAMILY SERVS., FOSTER CARE SERVICES: FIELD OPERATIONS CASEWORK POLICY & PROCEDURES §§ 606-07 (Supp. 1993) [hereinafter N.J. DIV. OF YOUTH & FAMILY SERVS., POLICY & PROCEDURES MANUAL].

focused on how services can help families.⁶⁰ Federal law requires state child welfare agencies to make “reasonable efforts” to provide services to preserve families as a condition for foster care funding.⁶¹ Reasonable efforts requirements are also embodied in most state termination of parental rights statutes as prerequisites to termination.⁶² Attempts to implement the reasonable efforts standard give rise to the question of what services the state has to provide from the outset as well as how long the state must continue such services. As with the debate about psychological parenting theory, here, too, a polarizing debate pits extreme views against each other. On one extreme is a narrow view of child protection favoring removal of children whenever a family problem appears⁶³ and strict time limits on services to help parents pull their lives together. On the other side, family preservation extremists argue that all families are salvageable.

In reality, most people recognize both that keeping families together when possible is a laudable goal and that some families simply cannot be preserved. They disagree over the many difficult middle-of-the-road cases. In such cases, solutions do not lie with either extreme, but rather require sorting through individual situations that defy ready characterization in an effort to fashion the best plan for each family. Sadly, however, meaningful debate about providing such customized services has been undermined by the prevailing trend of scaling back government services at all levels and the particular lack of resources for high quality child welfare services.

Margaret Beyer, a clinical and community psychologist, and Barry Lester, a physician and professor of pediatrics, outlined the limited impact of the reasonable efforts language and proposed reform to help families get

60. An ongoing debate about the efficacy of services is beyond the parameters of this article. Briefly stated, most research in this area has examined a particular model of “family preservation services” characterized by short-term (typically 4-6 weeks, sometimes up to 12 weeks), intensive services. Results have been mixed and questions have been raised about an agency’s ability to predict accurately which children are likely to go into foster care, thus raising doubts about conclusions that a family has been saved. There are indications that long-term preservation efforts are more likely to succeed. A small study in the early 1970s found that 34% of New York families receiving long-term assistance had children placed in foster care compared with 46% of families not receiving this extended assistance. Celia W. Dugger, *Budget Cuts Threaten Effort to Preserve Families at Risk*, N.Y. TIMES, May 12, 1995, at A1, B5. The researcher for this study, Mary Ann Jones, revisited the original families years later and found that the group that received special services remained less likely to have children in foster care. As Jones concluded “It was not the intensity of the service, but its duration that counted.” *Id.* at B5.

61. 42 U.S.C. 671(a)(15) (codifying relevant provisions of the Adoption Assistance and Child Welfare Act of 1980). See also Beyer, *supra* note 22, at 312-14.

62. David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 170-75 (1992).

63. This part of the debate does not flow from Goldstein, Freud, and Solnit, who advocated that initial intervention into family life take place only in extreme situations. GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, *supra* note 1, at 7-8.

the help they need before it is too late.⁶⁴ Reasonable efforts are required to prevent foster care placement where possible, as well as to reunify families after placement has occurred. But, as Dr. Beyer points out, child welfare agencies often "define reasonable efforts in terms of those services already available, however inadequate."⁶⁵ Driven by a combination of philosophical belief, inadequate funding, and inflexible agency policies, this well-intentioned legal standard rarely results in services sufficient to address individual families' needs.⁶⁶

Dr. Beyer's proposal to make "reasonable efforts" more effective is premised on the assumption that most children are better off remaining with their families, assuming their safety can be assured, and that most families want to meet their children's needs.⁶⁷ Her formula for successful family preservation requires engaging parents in decisions about services and tailoring services to the "culture and character of each child and family."⁶⁸ Currently, child welfare workers too often mete out a blanket prescription of parenting classes and counseling instead of developing a customized service plan based on a comprehensive assessment of the family's strengths and needs.⁶⁹ Dr. Beyer's model involves a partnership between child welfare agencies and families to address each family's identified needs, instead of merely placing families into available service slots.⁷⁰

The high percentage of substance-abusing parents with children in or at risk of foster care⁷¹ face even greater barriers to obtaining the help they require. Dr. Lester points first and foremost to the paucity of treatment programs to accommodate pregnant women and mothers,⁷² as well as the inapplicability of available treatment models.⁷³ The lack of appropriate treatment programs is compounded by a variety of practical barriers such as a lack of child care. More generally, Dr. Beyer cautions that substance-abusing parents often require particularly intensive intervention as well as

64. See generally Beyer, *supra* note 22; Barry Lester, *Keeping Mothers and Their Infants Together: Barriers and Solutions*, 22 N.Y.U. REV. L. & SOC. CHANGE 425 (1996).

65. Beyer, *supra* note 22, at 314. See also Malcolm Bush & Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 AMER. J. ORTHOPSYCHIATRY 223, 226 (1982) (arguing that psychological parenting theory "has the effect of excusing and sanctioning a family service department's failure to maintain natural families if the children removed from these homes finally end up with another set of psychological parents").

66. Beyer, *supra* note 22, at 314. See also Schwartz, *supra* note 3, at 452 (citing U.S. Dept. of Health and Human Services report finding that "child welfare agencies repeatedly failed to provide sufficient services and supports to permit state courts to conclude that reunification was impossible and termination therefore appropriate").

67. Beyer, *supra* note 22, at 318.

68. *Id.* at 324.

69. *Id.*

70. *Id.*

71. *Id.* at 328-29; Leslie Brody, *DYFS Gets Tough with Drug-Using Parents*, THE RECORD (Northern New Jersey), Aug. 4, 1995, at A1 ("Drug and alcohol abuse now swamp the vast majority of DYFS clients.")

72. Lester, *supra* note 64, at 426-27.

73. *Id.* at 436-37.

recognition that conquering substance abuse takes time and may entail relapses.⁷⁴ However, the child welfare system has not responded to these deficiencies by enhancing treatment options for pregnant women or parents. As Dr. Lester notes, more money is invested "in criminalizing, rather than treating, the drug user."⁷⁵ Dr. Lester's recommendations for reform include recognizing that drug abuse does not automatically equate with child abuse and, consequently, does not necessarily require the removal of a child.⁷⁶ Not only must services be expanded and enhanced, but also agencies must be more willing to provide the array of in-home services that will support families attempting to overcome substance abuse problems.⁷⁷

Once children are removed from their families, time operates to their detriment. Several studies have suggested that the longer a child remains in foster care, the less chance he or she has of reuniting with his or her family.⁷⁸ Indeed, a significant trend towards strict time limits governing termination of parental rights "bolstered by psychological attachment, or bonding, theory"⁷⁹ threatens to sever parental rights when parents cannot reunite rapidly with their children. Thus, immediate services after removal are imperative.⁸⁰ Immediate services can also help avoid the conundrum created once a child becomes attached to foster parents.⁸¹ Visitation ensuring that a child can maintain ties to his or her family is a critical component of reunification services and ultimately a major predictor of reunification.⁸² Making immediate, intensive, and appropriate services a reality for troubled families requires continued vigilance and pressure from advocates.

Few families can be saved through remedial services, however, if the government fails to provide adequate resources to fund the services troubled families need. The consistent lack of resources devoted to child welfare translates into high caseloads, low salaries, inadequate training, and a system that is utterly incapable of meeting the challenges it faces.⁸³ Greater resources have always been directed to foster care than to preventive or family preservation-oriented services.⁸⁴ Although the child welfare

74. Beyer, *supra* note 22, at 328-30.

75. Lester, *supra* note 64, at 435.

76. *Id.* at 437-38.

77. See Beyer, *supra* note 22, at 329-30.

78. Mary I. Benedict & Roger B. White, *Factors Associated with Foster Care Length of Stay*, 70 CHILD WELFARE 45, 46 (1991).

79. Garrison, *supra* note 22, at 376.

80. See Beyer, *supra* note 22, at 334-35.

81. *Id.* at 335.

82. Benedict & White, *supra* note 78, at 47-48; David Fanshel, *Parental Visiting of Children in Foster Care: Keys to Discharge?*, 49 SOC. SERV. REV. 493, 502 (1975).

83. Garrison, *supra* note 29, at 1767 (reviewing the evidence of underfunding and its consequences and noting that "child welfare administration has been consistently characterized by its noncompliance with legal standards"); see also Robert Pear, *Many States Fail to Fulfill Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at A1 (describing twenty-one state child welfare agencies under court supervision, of which many still flout their legal obligation after settlement of cases).

84. Garrison, *supra* note 29, at 1757.

system has responded over the last two decades to a call for intensified family preservation efforts by introducing new, experimental approaches, there has not been a commensurate shift in resources to support these new programs.⁸⁵ Indeed, the pendulum may now be shifting decisively away from family preservation efforts. Child welfare officials and workers in several states, motivated by fear of the tragic cases that make headlines, are removing children from their families with growing frequency and greater alacrity, concerned not just with child protection, but with self protection as well.⁸⁶ Budget cuts at the federal, state, and local level only exacerbate the narrowing opportunities for supportive services⁸⁷ in a society in which child welfare is not a priority.

The *de facto* decision not to invest more in supporting poor families simply ignores the tragic consequences of this decision for innocent children. The short-sightedness of this approach is clear. Although the service approaches proposed by Beyer and Lester seem time-consuming and costly, Beyer convincingly argues that, in the long run, customized family support will prove less time-consuming—and less costly—than business as usual.⁸⁸ She describes creative ways of enlisting every available support network to assist families.⁸⁹ Moreover, the high cost of foster care,⁹⁰ as well as the enormous human toll resulting from the splintering of families must be factored in when calculating the cost-effectiveness of investing in family services.

CONCLUSION

Despite ample evidence, supported by solid research, disputing psychological parenting theory, the emotional debate it engendered over two decades ago continues. But, as the articles in this symposium issue make clear, the current terms of that theoretical debate are largely irrelevant to the well-being of millions of overwhelmingly poor families caught up in our nation's deteriorating child welfare system. Participants in the symposium

85. To the extent that more intensive family preservation services have been provided, they have typically been only very short term, four to twelve weeks in duration. This may head off an immediate crisis but is unlikely to address chronic problems, including poverty and substance abuse. See also Garrison, *supra* note 22, at 390-91 ("the multiple, long-standing difficulties of families at risk of foster care placement typically cannot be ameliorated without services that are intensive, long-term, and expensive. But the preventive and reunification services available are generally meager, brief, and cheap.")

86. Joe Sexton, *More Families Are Separated As Child Abuse Reports Rise*, N.Y. TIMES, May 12, 1996, at A1. See also Kimberly McLarin, *Slaying of Connecticut Infant Shifts Policy on Child Abuse*, N.Y. TIMES July 30, 1995, at A1.

87. Celia W. Dugger, *Budget Cuts Threaten Effort to Preserve Families at Risk*, N.Y. TIMES, May 12, 1995, at A1.

88. Beyer, *supra* note 22, at 312.

89. *Id.* at 318.

90. In New Jersey, the foster care board rate ranges from \$288 to \$476 per month per child, depending upon the age and needs of the child. In addition, each child receives a clothing allowance. N.J. DIV. OF YOUTH & FAMILY SERVS., POLICY AND PROCEDURES MANUAL, *supra* note 59, at § 2507 (Supp. 1996).

drew three basic conclusions which point to new directions for debate over improving the child welfare system:

- (1) Foster children, like all other children, need to retain ties to their families of origin. Psychological parenting theory, which has led to the permanent severance of many such families, fails to address the needs of children in the child welfare system and has been discredited.
- (2) A greater array of options, such as open adoption and subsidized guardianship, must be available for children who cannot return home after placement in foster care.
- (3) Child welfare reform requires better services—more comprehensive, more long-term, and more individualized—in order to prevent many of the most tragic problems which the child welfare system is forced to address.

The third point is perhaps the most critical. Once a child has spent extended periods of time in foster care, the opportunity to achieve ideal outcomes has passed. Providing families with the maximum possible help when their problems arise offers the best hope for children to remain with, or be reunited with, their families of origin.

Finally, one cannot escape the conclusion, implicit in these articles, that the crisis of the child welfare system is at root a crisis of resources and priorities. At a time when the very idea of government itself is under attack and when services for low-income people are a first target of budget cutbacks, significant improvements in the child welfare system are unlikely to occur. Today, child welfare agencies generally lack the resources necessary to assess whether a family might be kept intact if provided with supportive services, let alone to provide those services. Government policy supports the removal of children, termination of parental rights, and adoption because they are politically expedient and less costly in the short run. In short, government has turned its back on poor families and children.

Arguments among legal, governmental, and mental health advocates within the child welfare system will continue to have a significant impact on child welfare policy within the framework of the existing system, and the articles contained in this Symposium issue represent a major contribution to that debate. However, unless and until the fundamental terms of the child welfare debate is shifted—until our society makes the welfare of poor children and the preservation of their families a genuine priority—debates such as these will leave a dysfunctional system largely intact.