

Memorandum

To: Andrew Cohen

From: [Law Student Intern]

Re: Legal Orphans – An Argument *Not* to Terminate Parental Rights for Older Children
Lacking Viable Permanency Plans

Date: [Working Draft 10-1-2015]

I. FACTS

Jennifer Smith (“Child”), d/o/b 3/5/2001, was removed from the custody of her mother, Mary Smith (“Mother”), in January 2014 after Mother was arrested for unlawful possession of a controlled substance. Child was adjudicated in need of care and protection and placed in a group home. The department’s service plan for Mother focused on her substance abuse, and Mother has attended both residential and outpatient treatment programs. Unfortunately, Mother still struggles with her addiction. In March, the department changed its internal goal for Child to adoption. Child, who has serious mental health needs, does not want to be adopted and would like to be returned to Mother. A consolidated permanency hearing and termination trial are scheduled for next month. Mother and Child intend to argue that the permanency goal for the child should be “another permanent planned living arrangement” (instead of adoption), and that termination of Mother’s parental rights is not in Child’s best interest. Mother wants to know the strongest arguments to make to the trial judge.

II. QUESTION PRESENTED

Where a child will be rendered a “legal orphan” by terminating parental rights (because the child does not want to be adopted or is otherwise unadoptable), what are the strongest arguments against terminating the parental rights of an unfit parent?

III. BRIEF ANSWER

Massachusetts courts have upheld termination decrees even when adoption is not viable where the trial judge found that termination would provide stability and permanency. However, the Appeals Court has been cautious about upholding such decrees when the department's permanency plan is insufficient. Courts in other jurisdictions have recognized that termination, when adoption is not viable, is not in the child's best interest.

Additionally, clinical research shows that termination itself does not afford permanency and stability to children in foster care. The research shows that permanency for children requires legal, physical, and relational permanency. Relational permanency (connection to a trustworthy, consistent adult over a long period of time) has a significant impact on the health and long-term well-being of foster children. Relational permanency requires lifelong attachments that, even for children who eventually age out of foster care, often exist with biological parents. Terminating legal rights to unadoptable children may hurt children by prioritizing legal permanency over relational permanency.

IV. DISCUSSION

- A. **Since the passage of the Adoption and Safe Families Act in 1997, the number of “legal orphans” in foster care, as well as the number of youth aging out of foster care, has dramatically increased, putting more former foster care youth at high risk for homelessness, joblessness, and involvement in the criminal justice system.**

The Adoption and Safe Families Act (ASFA) was intended to encourage states to increase the rate of adoptions and decrease the amount of time children spend in foster care.

Stack, *supra*, at 1. It requires child welfare agencies to seek termination if the child has been in

foster care for 15 of the past 22 months.¹ 42 U.S.C. § 675(5)(E). However, ASFA has led to a significant increase in the number of legal orphans. Barbara White Stack, *Federal Adoption Law Spurs Rise in Legal Orphans*, Pittsburgh Post-Gazette, Dec. 26, 2004, at 1. In 1997, only 5,870 children in foster care were legal orphans, *id.*, by 2013 that number had risen to 58,887. Dept. of Health and Human Services, *The AFCARS Report* at 4-5 (2013).

Many children who are freed for adoption are never adopted. See Hon. Sharon McCully & Elizabeth Whitney Barnes, *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NCJFCJ April 2013, at 8. In 2011 data showed that, on average, children freed for adoption were still waiting to be adopted two years later. Meredith L. Shalick, *Bio Family 2.0: Can the American Child Welfare System Finally Find Permanency for “Legal Orphans” with a Statute to Reinstate Parental Rights?*, 47 U. Mich. J.L. Reform 467, 474 (2014). Minority children are less likely to be adopted than white children, *id.* at 475-476, and once a child reaches the age of nine they become more likely to continue waiting than to be adopted. *Id.* at 477 n. 54. The overall adoption rate has also declined in recent years from a high of 57,000 in 2009, *id.* at 475, to a low of 50,608 in 2013. *The AFCARS Report* at 5 (2013).

¹ The statute also requires the department to seek termination if (1) the child has been abandoned; (2) the parent has committed, aided and abetted, attempted or conspired to commit murder or voluntary manslaughter of another child of the parent; or (3) has committed, aided and abetted, attempted or conspired to commit a felony assault that has result in serious injury to the child or another child of the parent. 42 U.S.C. § 675(5)(E). The statute allows for exceptions when the child is being cared for by a relative, the state has provided a compelling reason why termination would not be in the best interest of the child, or the state has not provided the family with such services as are deemed necessary for the safe return of the child. *Id.*

As a result, ASFA has also led to a rise in the number of youth aging out of foster care, a significant portion of which are legal orphans.² In 1998, 17,310 youth aged out of foster care, compared to 27,854 in 2010, a sixty percent increase. Merci McCoy-Roth, et al., *Number of Youth Aging out of Foster Care Drops Below 28,000 in 2010*, Analysis No. 5, August 10, 2011 Washington D.C., FosteringConnections.org.³

In 2009, over one thousand youth in Massachusetts aged out of foster care, the seventh highest rate in the nation. *Id.* Youth who age out of foster care are significantly more likely to struggle academically, face joblessness, homelessness, early pregnancy, and be involved in the criminal justice system.⁴ See Mark E. Courtney, et al., *Midwest Evaluation of the Adult Function of Former Foster Youth: Outcomes at Ages 23 and 24*, 5 (2010). Research suggests that, for legal orphans who leave foster care without supportive adults in their lives, these challenges are compounded. See Madelyn Freundlich, et al., *The Meaning of Permanency in Child Welfare: Multiple Stakeholder Perspectives*, 28 *Children & Youth Servs. Rev.* 741, 744 (2006). With such high risks, courts should consider whether termination of parental rights when

² Out of the 29,471 youth who were emancipated from foster care in 2009, either by aging out or another means, see *The AFCARS Report* at 4 (2009), 4,848, or sixteen percent, were legal orphans. See McCully & Barnes, *supra*, at 8.

³ Available at: (<http://www.fosteringconnections.org/tools/assets/files/older-youth-brief-2011-final.pdf>).

⁴ Youth who age out of foster care are three times less likely to graduate from high school and seven times less likely to graduate from college than their peers. See Mark E. Courtney, et al., *Midwest Evaluation of the Adult Function of Former Foster Youth: Outcomes at Ages 23 and 24*, 22 (2010). Thirty-six percent experience homelessness or couch surf. *Id.* at 10. Seventy-seven percent of female study participants had experienced a pregnancy, compared to only forty percent of their non-foster care peers. *Id.* at 49. Since age 18, thirty-nine percent of female study participants had been arrested compared to less than one percent of their non-foster peers and sixty-four percent of male study participants had been arrested, compared to only three percent of their non-foster peers. *Id.*

adoption is not viable – which almost guarantees that the child will age out of foster care – is ever in the child’s best interest.

B. Before a parent’s rights can be terminated a court must find by clear and convincing evidence that termination is in the best interest of the child.

Despite ASFA’s requirements, a court may only terminate a parent’s rights if it finds by clear and convincing evidence that the parent is unfit *and* that termination is in the best interest of the child. G. L. c. 119, § 26 (a)(4); *Adoption of Ilona*, 459 Mass. 53, 59 (2011). The best interest analysis must focus not on whether the parent should be deprived of *custody*, but on whether “*all legal relations*” between the parent and child should be ended. *Adoption of Helen*, 429 Mass. 856, 863 (1999) (emphasis in original). While the best interest analysis is intended to be flexible, *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 644 (1975), the court must consider both the fitness of the parents and the department’s permanency plan. G. L. c. 210, § 3(c).

Termination should only occur when the future health and welfare of the child demands it. *Adoption of Carlos*, 413 Mass. 339, 350 (1992). In *Adoption of Ramona*, 61 Mass. App. Ct. 260, 265 (2004), the Appeals Court affirmed the Juvenile Court’s finding that the mother was unfit as to two older boys but nevertheless reversed the termination decree. The Court recognized that because “their mother is the one person with whom [the children] have an enduring parent-child relationship” and neither child would be adopted, entry of the decrees likely “render[ed] them legal orphans.” In those circumstances, the trial judge’s failure to explain “why it is in the best interests of [the children] to terminate their mother’s rights” required vacatur of the decrees. *Id.* at 266.

Massachusetts courts have found that termination is in the child’s best interest even when adoption is not viable if it will provide the child permanency and stability. *See Adoption of*

Nancy, 443 Mass. 512, 517 (2005). The department’s permanency plan must only “provide sufficient information” about the placement to allow the judge to “properly evaluate the suitability of the department’s proposal.” *Adoption of Willow*, 433 Mass. 636, 651 (2001). However, courts are cautious about terminating when the permanency plan is insufficient. *See Adoption of Thea*, 78 Mass. App. Ct. 818, 826 (2011) (reversing a termination decree when at the time child was placed in a locked hospital unit and no information regarding future plans was provided). Courts in other jurisdictions more readily acknowledge that termination when adoption is not a viable option does not provide permanency and therefore is not in the child’s best interest. *See In re M.S.* 2015 WL 2255136, 215-Ohio-1847, ¶ 24 (Ohio Ct. App. May 14, 2015); *New Jersey Div. of Youth and Family Services v. L.M.*, 430 N.J. Super. 428, 422 (App. Div. 2013).

- 1. Massachusetts courts will terminate even when adoption is not viable if the judge finds that termination will afford permanency and stability based on the department’s permanency plan; however, courts are cautious about such terminations, especially when the permanency plan is insufficient.**

To be in the best interest of the child, termination must be necessary for the present or future well-being of the child. *Adoption of Carlos*, 413 Mass. 339, 350 (1992). If adoption is not viable, a judge may still terminate if he or she finds termination will give the child permanency and stability based, in part, on the sufficiency of the permanency plan. In *Adoption of Nancy*, the children were removed due to father’s alcohol abuse. 443 Mass. at 513. For the older daughter the permanency plan was guardianship with her foster parents. *Id.* at 514. For the younger daughter, who suffered from depression and ADHD, the plan included long-term substitute care followed, hopefully, by adoption. *Id.* at 517. The SJC held that termination under G.L. c. 119, § 26(4) does not require a long-term plan of adoption, *id.* at 516-517, and agreed with the trial judge that the children “deserve permanency and stability” which would be “eased

by termination.” *Id.* at 517; *see also Adoption of Jacques*, 82 Mass. App. Ct. 601, 610 (2012) (affirming a termination decree despite the lack of an identified adoptive resource because “the judge’s decision was clearly focused on Jacques’s need for ‘permanency and stability’ that the mother had failed to provide”).

The department’s permanency plan does not need to identify an adoptive placement; it must only show sufficient information for the judge to evaluate the suitability of the proposal. In *Adoption of Willow*, the court upheld a termination decree under G.L. c. 210 § 3 as to Mother, despite the permanency plan’s focus on reunification with Father and adoptive placement as a contingency plan. 433 Mass. at 648. The court held that the plan contained enough information to allow the judge to evaluate its suitability. *Id.*

However, courts are cautious about terminating when the permanency plan is insufficient or inadequately considered. In *Adoption of Thea*, a 17 year old girl who suffered from bipolar disorder, ADD, and enuresis was removed from her home. 78 Mass. App. Ct. at 819. The trial court found Mother was unfit and terminated her rights. *Id.* at 821-822. The Appeals Court reversed the decree and remanded for further proceedings emphasizing the trial courts failure to consider the department’s permanency plan. *Id.* at 823-824. At the time of the appeal Thea was housed in an intensive care locked hospital unit and the record showed no examination of the permanency plan, only a finding that the department planned to transfer her to a less secure facility once she could keep herself safe. *Id.* at 824. The Appeals Court distinguished this case from *Nancy*, noting that while stability and permanency are important goals, the departments plan for Thea “appeared to have neither.” *Id.* at 824; *see also Adoption of Carlos*, 413 Mass. at 350-351 (upholding a suspension of a termination decree because the court found Mother had the potential to become fit and the department lacked a “fully developed adoptive plan” for child the

court noted, “[i]n determining whether the extreme step should be taken, consideration of the future is a necessity.”).

2. Other jurisdictions have recognized that termination when adoption is not viable does not afford the child permanency and is not in the child’s best interest.

Other jurisdictions have recognized that termination when adoption is not viable does not provide permanency and is not in the child’s best interest. In *In re M.S.*, Child was removed from the home because of substance abuse, domestic violence, and unstable housing. 2015 WL 2255136, 215-ohio-1847, ¶ 24 (Ohio Ct. App. May 14, 2015). The trial court terminated Father’s rights. *Id.* On appeal, the court noted that while a child’s best interest does require permanency and security, the child had no bond with anyone other than his parents and the department’s adoptive plan consisted only of sending child to “matching” with the hope that he would be adopted. *Id.* at ¶ 55-56. The court stated that “[t]he value of having a biological parent who cares for and loves a child and with whom the child wants to be with cannot be underestimated, particularly when there is no one else in the child’s life who fills the role. Familial bonds are not easily replaced, if ever, and they should not be permanently severed without careful consideration of all the potential costs.” *Id.* at ¶ 54. The Court of Appeals found that judge had abused his discretion and reversed the termination decree. *Id.* at ¶ 61-62.

Similarly, in *New Jersey Div. of Youth & Family Services v. L.M.*, Mother appealed the termination decree as to her three children. 430 N.J. Super. 428, 433 (App. Div. 2013). The court upheld the decree as to two of them, who were placed together in a pre-adoptive home, but reversed as to a third child, Sally. *Id.* at 455. The court emphasized that Sally’s age and behavioral problems posed a significant challenge when it came to adoption. The court noted, “[t]ermination of parental rights does not always result in permanent placement of the child . . .

too many children ‘freed up’ for adoption do not in the end find permanent homes.” *Id.* at 453. The court, citing research showing that children who move around in foster placements have increased behavior problems, also reasoned that “[t]he detriment caused by cycling a child through multiple placements may be greater than keeping the parent-child relationship intact since ‘the child’s psychological and emotional bond to the parent may have been broken with nothing substituted in its place.’” *Id.* at 453 (quoting *N.J. Div. of Youth & family Servs. v. A.W.*, 103 N.J. 591, 611 (1986)). The court held that the department had not shown that termination would do more good than harm for Sally, and reversed the decree. *Id.* at 444- 445.

Finally, in *In re J.M.*, 2015 VT Lexis 75, 127 A.3d 921 (2015), the family court denied the state’s petition to terminate a father’s parental rights to a nine-year-old boy. Although the father could not parent the child within a “reasonable time,” he was a consistent support to the child and the child had no other parental substitutes. According to the trial court, while it was a close call, the child’s best interests was the ultimate inquiry, and preserving the child’s attachment to his father was more important than freeing the child for adoption. *Id.* at P6. The Vermont Supreme Court affirmed. It noted that, while trial courts can consider the child’s favorable relationship with foster parents in the best-interests determination, it can also consider the “absence of such a relationship in its best-interests analysis, especially where — as here — the child's sole emotional connection resides with the parent.” *Id.* at P11. While “permanency is the presumed means of accomplishing [the child’s best interests] . . . it is not the only permitted outcome,” and nothing “precludes a court from concluding — as here — that the balance of factors weighs against a termination of parental rights notwithstanding a parent's inability to resume parental responsibilities within a reasonable time.” *Id.* at P14.

C. Clinical literature suggests that Massachusetts courts are misguided in believing that termination provides stability and permanency for foster youth, for many foster youth termination hinders their sense of permanency by cutting off an important life long relationship.

ASFA's emphasis on adoption is reflective of the needs of infant children; however the needs of older children can be quite different. Katherine 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, 905 (1984). While infants may benefit from promoting future relationships at the expense of past, older children benefit from maintained relationships with past caregivers. *Id.* Massachusetts courts should re-conceptualized permanency to include three elements: legal (termination of rights, adoption, guardianship), physical (family-based setting), and relational (a network of consistent, long-lasting relationships). Madelyn Freundlich, et al., *The Meaning of Permanency in Child Welfare: Multiple Stakeholder Perspectives*, 28 Children & Youth Servs. Rev. 741, 757 (2006).

1. Relational permanency is the most important form of permanency for healthy youth development.

Studies examining foster youth opinions on permanency show that the youth prioritize relational permanency over legal permanency. Reina M. Sanchez, *Youth Perspective on Permanency* 10 (California Permanency for Youth Project ed., 2004). As one youth said, “[e]motional permanence is above all very important because in the foster care system you know someone’s going to provide food and you know that you’re going to be in a home – you just don’t know which one. If you can count on someone to come back to, and you know that and

they know that, you don't need legal permanency because it's distrust right there if you need to make things legal.”⁵ *Id.* at 11.⁶

Clinical research also shows that relational permanency has the greatest impact on positive youth development and long-term outcomes. Without a strong attachment to at least one caring adult, regardless of legal status, foster youth are at risk for lifelong challenges interacting with others, handling emotions and stress, and functioning intellectually. *See* Freundlich, *supra*, at 743. Studies have also shown a connection between strong relationships and resilience, Kristi Charles, et al., *Permanency Planning: Creating Life Long Connections* 14 (Nat'l Resource Ctr. for Youth Dev. 2000), and the development of a positive self-image. Freundlich, *supra*, at 744. Once youth leave foster care these relationships become even more important. Youth aging out of care need life-long relationships to ameliorate the impact of their earlier loss and separation. *Id.* Without these critical relationships, the challenges faced by all youth aging out of foster care are exacerbated. *Id.* at 744.

2. Termination when a child is not going to be adopted is detrimental to the child's wellbeing and impedes the child's ability to develop strong relationships and his or her sense of permanency.

⁵ Other youth commented: “Legal permanence could be taken off the list and I wouldn't miss it. You can have legal permanency – but without relational or physical permanency, what's the point?” Sanchez, *supra*, at 10. “Do not trust what the legal moves mean in terms of relational connection.” *Id.* at 13.

⁶ This sentiment is also reflected in the responses of a focus group of foster youth who were asked to come up with a list of factors that they associated with permanency. Kristi Charles, et al., *Permanency Planning: Creating Life Long Connections* 21 (Nat'l Resource Ctr. For Youth Dev. ed., 2000). The youth generated a list of 12 factors, including “connections to family,” “relationships,” “birth family resolution – making peace with the past,” and “expanded definition of family.” Other factors refer to both physical and relational permanency, such as “continuity” and the “ability to return.” *Id.* The remaining factors were “sibling connections,” “cultural identity,” “youth driven planning,” “traditions around holidays,” “access to skill training,” and “interdependence on community.” *Id.* None of the factors mentioned legal permanency.

Family is in large part characterized by lifelong relationships. While family members' functions can be replaced – such as a parent's role as caregiver – the actual person cannot. Mary E. Collins, et al., *The Permanence of Family Ties: Implications for Youth Transitioning from Foster Care*, 78 Am. J. Orthopsychiatry 54, 56 (2008). Similarly, the child's bond to the family of origin is never replaced. *See id.* Birth-family relationships, even for children who have experienced abuse and neglect, are central to a child's healthy development. LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 Va. J. Soc. Pol'y & L. 318, 320 (2010). Forcing youth to endure traumatic loss by severing the parent-child relationship can be detrimental to the child's social and emotional wellbeing, *id.* at 327, and may impede a child's ability to create connections with other adults. *Id.* at 327 n. 45.

Severing ties between a child and parents may impede a child's ability to process the loss resulting from removal, and to develop healthy relationships with foster parents and other adults. Rather than allowing the child to grieve and move on, termination gives the parent an ambiguous status: alive but unseen. Bartlett, *supra*, at 907. This ambiguity may lead to fantasies of reunification and inflate the importance of the parent in the child's mind. *Id.* at 907-908. Children may also develop unrealistic visions of their parents by either idealizing them or exaggerating their faults. *Id.* at 906-907. These unrealistic conceptions of the child's parents and past may hinder his or her ability to develop a sense of identity. *Id.* Additionally, maintaining contact with the past, even an unstable past, can provide the child with a sense of security and continuity. *Id.* at 910. Rather than creating confusion about the child's relationship with his or her foster parents, this continuity may allow the child to resolve any confusion or conflicting loyalties, and draw strength from multiple relationships. *Id.* at 910-911.

The experience of being freed for adoption but not “chosen” can have a detrimental effect and impede a child’s sense of security and permanency. See Meredith L. Shalick, *Bio Family 2.0: Can the American Child Welfare System Finally Find Permanency for “Legal Orphans” with a Statute to Reinstate Parental Rights?*, 47 U. Mich. J.L. Reform 467, 475 (2014). As one researcher commented, “[b]eing ‘freed’ for adoption but ‘not chosen’ is perhaps one of the worst possible outcomes for children; it leaves them in limbo without a legal parent and is more likely to undermine rather than increase any sense of permanence or security for these children.” Patrick Parkinson, *Child Protection, Permanency Planning and Children’s Right to Family Life*, 17 Int’l J. L. Policy & Fam., 147-172, at 159 (2003) (quoting J. Cashmore, *What can we Learn from the US Experience on Permanency Planning?*, 15 Australia J. of Fam. Law, 215-229, at 219-220 (2001)).

By terminating a parent’s rights, the court may also have unintentionally created a barrier to providing a safe and stable home environment for the child. A child who is unlikely to be adopted may spend many years in foster care. During this time, some parents will address the issues that led to the original termination. See Susan Getman & Steve Christian, *Reinstating Parental Rights: Another Path to Permanency?* 26 Protecting Children, 58, 58-59 (2011); Susan C. Mapp & Cache Steinberg, *Birthfamilies as Permanency Resources for Children in Long-Term Foster Care*, 86 Child Welfare 29, 31-32 (2007). Additionally, even if the parents have not addressed their issues, older children may not be at the same risk as when they were younger. *Id.*; Collins, et al., *supra*, at 59. In those cases, the termination may serve to prevent the child from returning to what has become a safe and stable home. See Getman & Christian, *supra*, at 58-59. Instead of terminating, the child’s interests might be better served by emphasizing the

maintenance of relationships with important adults already in the child's life, including biological parents.

D. Because many foster youth who age out of care seek out relationships with their biological families despite termination decrees, courts should support these important relationships even when a parent cannot provide physical care for his or her child.

A court decree cannot sever the emotional parent-child relationship, and foster youth seek out relationships with their biological families irrespective of legal decisions. *See* Miriam J. Landsman, et al., *Achieving Permanency for Teens: Lessons Learned from a Demonstration Project*, 2 National Resource Center for Family Centered Practice, Prevention Report 14, 19 (1999); Margaret Beyer, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 Fam. L.Q. 233, 238 (1986) (searching for their identity, adolescents often seek out biological parents); Taylor, *supra*, at 320.

Many teenage foster youth express a desire to reunite with family members and return home when they turn 18. Landsman, *supra*, at 19. Seven percent of youth who age out of foster care return home to live with their biological parents. *See* Mark E. Courtney, et al., *Midwest Evaluation of Adult Function of Former Foster Youth: Outcomes at Ages 23 and 24* 9 (2010). Many more youth who age out of care maintain close relationships with their biological parents and other relatives. *See* Collins, *supra*, at 58 (citing statistics showing that, after aging out of care, 50% of children see a relative up to three times a week, 74% have contact with siblings, 45% have contact with grandparents, 37% have contact with birth mothers, and 30% have contact with birth fathers). Fifty-three percent of former foster youth felt very close or somewhat close to their birth mothers. *See* Mark E. Courtney, et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 Child Welfare 685 (2001). Twenty-

four percent reported seeing their birth mother every day; twenty percent reported seeing their birth mother at least once a week. *See* Courtney, *Midwest Evaluation, supra*, at 13.

Young adults often seek out relationships with their biological parent's even when there was minimal contact while the youth was in foster care. *See* Mark E. Courtney, et al, *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, Child Welfare League of Am., 685-717, at 714 (2001). In these situations, families are asked to be support system for young adults whom they may not have seen in years. *Id.* Because the state is not required to provide services to terminated parents in order to ensure that their issues can be addressed, continuing parental dysfunction and inconsistent relationships sometimes makes reunification challenging. For some youth who have tried to return home, this dysfunction has contributed to homelessness. *See* Collins, et al., *supra*, at 58.

Recognizing the extent of post-care reunification and the need to ensure that children and parents are prepared for the young adult to age out of care, researchers recommend that child welfare systems provide families with services to facilitate the reestablishment of ties. *See* Courtney, et al., *supra* (2001), at 714; Collins, et al., *supra*, at 59-60; M. Freundlich & R. Avery, *Planning for Permanency for Youth in Congregate Care*, 27 Children & Youth Servs. Rev., 115 (2004). In a program designed to facilitate the return home of children who had been in foster care for many years, many of the children did well. *See* Mapp & Steinberg, *supra*, at 45. Intensive social work services were provided. *See id.* at 45, 48.

V. APPLICATION TO SMITH CASE

In the case of Mary and Jennifer Smith, Mother and Child should argue that termination is not in Child's best interest. Child is 14 years old and does not want to be adopted.

Termination would do Child more harm than good by cutting her off from an important

relationship while putting nothing in its place. *Cf. New Jersey Div. of Youth & Family Servs v. L.M.*, 430 N.J. Super. 428, 422 (App. Div. 2013). Instead of focusing solely on legal permanency, the court should also look at relational permanency, that is, whether Child will have meaningful connections a family – including her family of origin – and other important adults already in Child’s life. *See Madelyn Freundlich, et al., The Meaning of Permanency in Child Welfare: Multiple Stakeholder Perspectives*, 28 *Children & Youth Servs. Rev.*, 741, 757 (2006). Maintaining a relationship with Mother could provide Child with relational permanency and a sense of continuity; it could also support her healthy development and help smooth her transition out of foster care. *See Freundlich, supra*, at 743-44; Katherine 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, 906 (1984). Additionally, maintaining a relationship with her biological family could help Child develop positive relationships with foster parents or other adults. *Id.*

Child is also likely to return to Mother after leaving foster care. If Mother’s rights are terminated, any reunification will be informal and occur after years in which Mother has been cut off from services. Informal reunification may be challenging, and support for the department would help ensure a smooth transition out of care. Mark E. Courtney, et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 *Child Welfare* 685, 714 (2001).

Familial ties are not made or broken by court decrees, and the significant psychological and developmental impact of cutting Child off from her biological family should not be taken lightly. Such an extreme step should only be taken if the benefits outweigh the harms. *Cf. L.M.*, 430 N.J. Super. at 444. In the case of Child, the harm greatly outweighs the good, and therefore

termination is not in her best interest. *See* Landsman, *supra*, at 19 (“Terminating parental rights in the absence of an alternative plan for permanency does a tremendous disservice to children.”).