Fostering Permanency of Children in Out-of-Home Care: Psycho-Legal Aspects

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Over the past 20 years increasing interest has been given to children's rights that grant special protections to children living apart from their biological parents. The Adoption Assistance and Child Welfare Act of 1980 was promulgated to prevent unnecessary removal of children from their original families and to ensure permanency when return to their families could not be secured. The psychiatrist's role in this process has been to ensure that effective interventions occur prior to the child being removed from home and that every effort is made to return the child to his or her family of origin once placement has been made. In the event that the child cannot return home, the psychiatrist can assist the court by providing grounds for termination of parental rights and by otherwise ensuring that the child's best interests are protected.

In 1980 more than two million children in the United States were under child welfare supervision.[1] Of these, more than one-half million, almost 14 percent of all children under age 18 in out-of-home care under the auspices of the child welfare system, had been placed in state custody by parental request or as the result of a court order.[2] In 1983 a quarter of the 47,783 children receiving services for children and youth in the Commonwealth of Pennsylvania were either in community placement (foster family homes, group homes, emergency placement) or in institutional placement (residential placement, secure detention, secure residential placement, or intensive treatment units).

Although some parents voluntarily place their children in the custody of child welfare, most children in welfare custody have been removed from their homes because of neglect or abuse by their families. Some children have poor relationships with their parents who, in desperation, seek placement; others are out of their homes because alternatives that would keep families together are not available. A surprisingly large number of children are in state care because either they or one or both of their parents suffer from mental illness or emotional problems.[3]

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The Concept of Permanency Planning

Before the early 1800s children were regarded as chattel, the property of their parents, particularly of the father, who was responsible for maintaining, educating, and protecting his offspring. With the increasing industrialization and immigration that occurred at the beginning of the nineteenth century, American society began to concentrate in urban areas. Social reformers, alarmed by children's increasing exposure to poverty and the vices of urban living, instituted rehabilitative measures to reduce the number of destitute, abandoned, wayward, and vagrant youths. To effect these reforms the state often removed children from their parents and placed them in private orphan asylums and public almshouses. Some children were placed in foster care in the country or even sent west to work on farms. In some instances families were provided enough money or goods to enable them to keep their children at home.[4]

During the reform movement public interest in protecting children from abuse and neglect was high; societies for the prevention of cruelty to children sprang up throughout the country, particularly after the case of Mary Ellen Wilson brought the issue to public attention. The first White House Conference on Children in 1909 promoted the idea that a child should not be removed from home due to poverty alone but that, rather than prosecute the parents and remove the child, service and economic programs should be designed to keep the family intact. This concept was gradually enacted through state and federal legislation.

At the turn of the century a new juvenile court system, segregated from the adult court system, was created to assume jurisdiction over cases of abandonment, abuse, and neglect. The juvenile court was intended to humanistically address the child's problems and treat them by directing children's care, custody, and control. Two legal doctrines controlled all judicial proceedings: *parens patriae* (the government's authority as an ultimate parent over children) and the state's responsibility to ensure that its actions were conducive to *the best interest of the child.*[5]

This well-intentioned system continued undisturbed for some 60 years, until the United States Supreme Court, in the *Kent* and *Gault* decisions, rejected the absolute, unchecked (if benevolent) power of the juvenile court. In 1969 Justice Fortas, in a First Amendment case, declared children to be "persons" under the Constitution. Since then major gains have been made in the legal rights of children, most of them attributable to federal action—either by Congress or by the federal courts. The Adoption Assistance and Child Welfare Act of 1980 (PL96-272) encourages better management of children living apart from their biological parents by giving them special protections, such as the right to separate legal representation, protection against foster-care "drift," recognition of the rights of relatives and foster parents, protection from abuse and neglect by foster parents, and the

right to special services for handicapped children. This legislation forestalls unnecessary removal of children from the original family unit. Moreover, children placed in foster care are assured either of being returned to their families of origin within a reasonable time or, if the reasonable time standard cannot be met, of being placed in "permanent" homes.

This emphasis on permanency is based on the belief that children need stability, continuity, and commitment from their caregivers if they are to become emotionally stable and competent adults.[6] Children need to know that their parents are committed to caring for them through most kinds of family crises and that they are not likely to abandon their children when distressed or dissatisfied with their behavior. Belonging to a permanent family is believed to provide protection of rights, a feeling of security, respected social status, and a more secure sense of the future than is living with the uncertainty and stigma of foster care.[7] The permanency doctrine also holds that children are better reared by autonomous families than by the state[8] and that duration of placement should reflect the child's, not the adult's, sense of time.[9]

Permanency planning The term "permanency planning" refers to the idea of removing the child from temporary substitute care as soon as possible and, as the preferred alternative, returning him or her to the family or, as the second-best option, to an adoptive home. If feasible, another permanent alternative such as a family with legal guardianship[10] is considered preferable to temporary substitute care. The decision-making process should be conducted in a systematic, goal-directed manner within a brief time period.[11]

The Permanency Planning Process

When possible, child and family problems should be resolved without removing the child from home. Often, however, the decision depends upon what resources are available in the community;[12] thus placement out of the home occurs by default because alternatives such as homemakers, day care, specialized day treatment, alternative housing, and other supportive services are lacking.[13] Sometimes parents of handicapped children are told that out-of-home care is the only way to ensure appropriate educational or social services for their children. In the final analysis, the child should not be removed from home unless there is no alternative available. In an emergency situation this ideal is not always attainable. Nevertheless, the number of temporary placements should be kept to a minimum while a management plan is formulated and reasonably permanent arrangements are sought.[14]

Situations that are likely to deteriorate enough to warrant removal of the child should be identified promptly. Information obtained from a thorough, comprehensive assessment by a psychiatrist, from psychological and developmental testing by a psychologist, and from knowledge of the child's behavior in the school, at home, and in the community can all be used to predict the likelihood

that out-of-home placement will be needed. Regardless of outcome, such an evaluation can provide the caseworker and the court with valuable recommendations for disposition, thereby minimizing the risk of damage that could result from multiple placements.[15]

The Adoption Assistance and Child Welfare Act of 1980 requires that, once children are removed from their own homes, reasonable efforts be made to reunify the family, and that a written case plan be developed to facilitate reunification. This plan must be reviewed by the court or responsible agency every six months to ensure that it is fully implemented. The mental health professional, in conjunction with agency personnel, may be asked to advise the court as to whether the child should be returned to the family or placed outside the home. All that may be required is review of the case plan, a written service agreement denoting the transactions that must occur between clients and caseworkers.[16] Case plans outline specific tasks that the client must complete in order to reach predetermined goals. These tasks are described in observable and measurable terms with a specified timetable for completion. Poorly formulated case plans have in the past proved a major obstacle to permanency planning for children in out-of-home placement.[17] Vaguely stated goals open the door to misunderstandings between client and caseworker, whereas clearly formulated case plans provide a yardstick against which change can be measured.

Termination of parental rights actions are brought in order to secure permanent homes for children who are unable to return home. Termination of parental rights severs the parent's right both to visit or communicate with the child and to receive information about him or her. In most states it also abrogates the parent's duty to support the child. Termination frees the child for adoption by removing the parent's right to consent to adoption.[18] Generally termination proceedings are separate hearings resulting from special petition or motion. When contested, termination actions should be full adversary hearings.[19] The United States Supreme Court recently held in *Santosky v. Kramer*[20] that the burden of proof in a termination of parental rights case is that of "clear and convincing evidence," a higher standard than the "preponderance of evidence" standard used in most dependency or neglect cases. This higher standard of proof is required because of the serious consequences of termination proceedings—the complete legal destruction of the parent-child relationship. (The highest standard of proof required in United States courts is "beyond a reasonable doubt," applied in criminal and delinquency proceedings that could result in incarceration.)[21]

Until recently state statutes for termination proceedings were vague. They tended to rely on individual value judgments as to proper child-rearing practices and frequently left final determination of the child's best interest to the judge's discretion. Various proposed model acts have not led to a clear consensus, either.[5,22] Nevertheless, some

commonalities can be discerned among the nine proposals.[22] First, the court has to determine whether the child can or should be returned to the parent. Common indicators that the child cannot safely return home include extreme parental disinterest, failure of a parent to remedy the conditions that caused the separation, extreme or repeated neglect and abuse, parental incapacity to care for the child, and extreme deterioration of the parent-child relationship. Second, the court has to determine whether termination is in the child's best interest and will indeed lead to a more secure and appropriate home for the child.[17,22]

Extreme parental disinterest toward the child is generally held sufficient to support a finding of abandonment. Primarily the child welfare agency is responsible for demonstrating to the court that all appropriate steps were taken to trace the person who abandoned the child or to show that the parents did not make the necessary adjustments to make the home suitable for the child.

Where parental mental or physical disability is so severe that the parent(s) cannot care for a child, it is essential that this incapacity be confirmed by an expert assessment. The expert is required to demonstrate (i) the existence of the disability, (ii) the parent's inability to provide proper care, and (iii) the likelihood that the condition will persist over time regardless of treatment or services. In addition, the mental health professional may be required to assess parent-child attachment and interactions as well as the child's behavior and development. It may also be necessary to evaluate the nature of the child's relationship with the foster parents and the adequacy of efforts to treat the parent.

Principal causes of parental disability include mental illness in general, specific conditions such as schizophrenia, affective disorder, and personality disorder, mental retardation, drug and alcohol abuse, and extreme physical disability.

Mental Illness Parents who are mentally ill constitute a significant proportion of those individuals likely to have parental rights terminated.[23,24] The children of mentally ill parents are at greater risk of developing psychopathology in either childhood or adulthood than are the children of well parents.[25,26]

The offspring are more likely to suffer from mental retardation, learning problems, emotional and psychophysiological disorders, hyperactivity and conduct disorders, physical growth problems (obesity, failure to thrive), abuse and neglect, and psychosis.[27] Aspects of development that may be negatively affected include affect, cognition, attention, feelings of competence and mastery, peer relationships, and adaptability to new developmental tasks. Although these consequences are relatively nonspecific, risk for the child seems to be greatest when the parents have a personality disorder, a chronic or recurrent depression, or an emotional (neurotic) disorder. Genetic factors are known to play a determining role in schizophrenia, major affective disorders, and antisocial personality disorder. However, children may be affected less by heritability of parents' mental illness than by their caretaker's level of functioning and

affective responsivity. Deficiency in either of these aspects of parenting can cause marital discord, conflict over child-rearing practices, and disruption within the family.[28]

Although the parent's diagnosis is relevant and has some predictive value, the parent's level of functioning has a greater effect on the child. In general, children of depressed parents are most adversely affected, with the children of schizophrenic or manic-depressive parents affected to a lesser degree.[29–31] Chronic parental impairment has been found to consist of more pathogenic than acute episodes.[32] Children seem to be most vulnerable when the ill parent is the mother, when the illness is of moderate severity (diagnosed schizoid or borderline rather than hebephrenic or catatonic), and when the child is symbiotically overinvolved with the ill parent.[33,34] Children under two years of age, still in the phase of separation-individuation, are keenly sensitive to the disturbing influence of the chronically ill mother, particularly when her illness causes a narrow range of affective responsivity. Growing up in the care of a psychotic mother is especially likely to affect the child's development if the mother lacks social supports and is unable to fulfill parental roles.[35]

As with schizophrenia, the overarching vulnerability factor in affective disorders seems to be genetic, particularly in bipolar and, to a lesser extent, in unipolar affective disorders.[36] Although parental affective disorder and child psychiatric disorder seem to be genetically linked, part of the risk for children is increased by psychosocial stressors. Determinants of future problems for the child include his or her age and developmental stage when the parental affective disorder occurred, the type of affective disorder, severity and duration of the condition, and availability of some other source of consistent parenting.[37,38]

Mental Retardation Severity of retardation is usually confirmed by standardized, individually administered intelligence tests. When their intelligence quotient is found to be below fifty, parents are generally unable to care adequately for their children. Although these parents are often able to contribute to their own support by performing unskilled or semiskilled work under close supervision in sheltered workshops, they are unlikely to function at more than a second grade level. In most cases these parents either lack the capacity to understand the need for early infant stimulation or go to the opposite extreme by overstimulating their babies in inappropriate ways.

However, most mentally retarded parents are mildly retarded (IQ of 50–70) and fit roughly into the "educable" category (functioning at about a sixth grade level), which is heavily related to social class. Parents of this intellectual capacity are usually able to acquire social and vocational skills adequate for self-support, though they may need guidance and assistance to handle unusual social and economic stresses. Their ability to function effectively as parents may largely depend upon the presence of such resources as extended family or community support. Marginally re-

tarded parents (those in the mild (IQ of 50–70) or borderline (IQ of 70–85) range) are more often neglectful than abusive. They are able to care for their young children but have trouble with child rearing as the children grow older. In their early years children of retarded parents may appear to be considerably less intelligent than they really are because of understimulation in a relatively impoverished environment. The adolescent may require more sophisticated parenting skills than the intellectually limited parent is capable of providing.

Intelligence tests should not be used in isolation to assess functional ability; rather, adaptive behavior (effectiveness with which a person meets the standards of personal independence and social responsibility for his or her age and cultural group) is an equally important element in the functional capacity determination. Many people who fall in the "retarded" range on psychometric tests function quite adequately in society, are self-supporting and live independently. Indeed, a diagnosis of mental retardation is not given when persons adequately meet the demands of their environment.[39]

Some children of intellectually limited parents can return home if an adequately functioning spouse, an extended family, or community resources exist to help out in time of need. In doubtful cases the parents' ability to cope must be demonstrated and a case plan developed to provide the necessary services to fill the gaps. Marginal cases may need to be monitored until the child is either eighteen years of age or emancipated to ensure that no abuse or neglect occurs. Limited compliance with a case plan may be the evidence needed to confirm retarded parents' incapacity to parent effectively even with community support.

Drug and Alcohol Addiction

Chronic alcoholism or drug dependence may also be a basis for termination of parental rights. Children of addicted parents have a much greater probability of being neglected or abused than do children of nonaddicted parents.[40–42] Addicted parents may not only be unavailable during the day while at work but may also be involved in time-consuming efforts to obtain drugs or alcohol. They are also unavailable while intoxicated or "high" and when sober are frequently irritable or withdrawn. Once the effect of the drug has worn off, they tend to be overindulgent to assuage their guilt for neglecting or abusing the child. This inconsistency and unpredictability can play havoc with a child's development.

A psychological test battery to assess parental intellectual and neuropsychological functioning is essential. Although chronic alcoholics and drug users often have intellectual abilities in the normal range, they are likely to exhibit motor and visual-spatial difficulties, deficits in abstracting and nonverbal problem solving, and transient memory losses.[43] However, evidence of a substance abuse problem is insufficient to terminate parental rights. Rather, the parent must be shown to have abused alcohol or other drugs to the detriment of the child, either by mistreatment or by failure to provide the ordinary care that all children re-

quire. It will be necessary for an expert to indicate that the dependence is likely to continue, that assistance was offered to the parent, and that the help either failed or was rejected. In the case of a non-substance-abusing spouse who acquiesces to child abuse by the substance-abusing parent, the expert may conclude that the child's problems were caused by the first parent's act of omission, i.e., his or her neglect in protecting the child.

Children who have been removed from parental care may be able to return home if the parent is willing to participate in drug or alcohol abuse treatment. Presence in the home of another adequately functioning adult who can intervene constructively when the ill parent is intoxicated may also be a mitigating factor in the placement decision.

Personality Disorders Personality disorders in parents have been linked to conduct disturbance in sons,[44] particularly in cases where the parents showed marked irritability, aggression, and hostility. Although no single personality type has been identified as being unsuitable to parent a child, the child whose parent is impulsive and has difficulty controlling aggression is highly at risk for abuse or neglect.[45,46] Many of these parents were themselves brought up in seriously unhappy or disrupted homes that may have been associated with some form of institutional care, markedly poor parent-child relationships, violence, or abuse. Parents who once suffered from such childhood adversity tend to lack planning or coping skills, to have diminished sensitivity to their children's cues and needs, and to show increased irritability.[47] Many parents with personality disorder engage in criminal activities; a number have police records or have spent time incarcerated.[48] Parental criminality has been shown to be associated with delinquency in children.[47] This association is strongest when both parents are criminal and recidivistic, and when the criminal behavior overlaps with the period of child rearing.[48] If the parent's pattern of antisocial behavior can be shown to have extended from adolescence into adulthood and to be recidivistic, one can reasonably predict that this pattern will continue, with adverse effects on the parent-child relationship.

The Abusive or Neglectful Parent Serious, irreversible injuries from isolated incidents of physical assault can cause permanent physical and emotional damage or even death. However, the most common sequelae of abuse are the pervasive, chronic developmental deviations associated with emotional abuse and general physical neglect. Neglectful or abusive parents are likely to have no overt psychiatric disorder.[45,46] However, their behavior may be a manifestation of an underlying personality disorder; or they may simply lack the knowledge, judgment, or motivation to provide a minimally sufficient level of parental care. These parents may also suffer from intellectual inadequacies, physical problems, illness, and alcohol or drug addiction.[49,50] Acts of abusive or neglectful conduct, taken alone, are generally not used to justify termination. Parental history of abuse or neglect and the success of services to rectify the fam-

ily also need to be taken into account in termination proceedings.

A psychiatrist may become involved in equivocal cases in which the weight of expert testimony may tip the balance in favor either of returning the child to his or her natural parents or of terminating parental rights. In this context, a particularly thorny issue is assessment of parenting capacity. With the dramatic changes in the composition and structure of the American family over the past decade, the expert may be seriously challenged in deciding which standards to use. Certain qualities are considered essential for adequate parenting;[6,51] these include a loving, empathic relationship that leads to attachment, is unbroken, provides adequate stimulation, and offers parenting by at least one person within the child's own family.

The court may expect a prediction from the expert on the likelihood of recurrence of abuse. Such predictions are impossible to establish with certainty. To deal with the challenge of prediction, the psychiatrist should collect and consider as much information as possible, spanning as long a time period as possible. Items for consideration should include enduring patterns of parental and child behavior, the parents' coping ability in stressful circumstances, and the forces in the parents' enduring environment that reinforce and sustain both the patterns of behavior and the parents' adaptive abilities in key parenting situations. The surest indicator that abuse or neglect is likely to recur, however, is continued presence of the parental condition associated with the original maltreatment. A history of prior abuse or neglect is a further predictor of future abuse. Several parental factors related to maltreatment are exposure to violence or deprivation in the parent's family of origin[45,46] and low frustration tolerance, including inappropriate expressions of anger;[52] social isolation from important sources of support;[53] impaired parenting skills and unrealistic expectations of children;[52,54] and stressful life events, including poverty, low socioeconomic status, unemployment, mobility, and changes in the household.[55] However, information about these factors only allows the expert to make statements "with reasonable medical certainty or probability," not definite predictions.

Extreme Deterioration of the Parent-Child Relationship Another ground for termination is the serious erosion of or nonexistence of an emotional bond between parent and child. Breakdown of the parent-child relationship is generally not sufficient on its own to support termination of parental rights and is generally considered in conjunction with other grounds. The child may have developed a relationship or emotional attachment to the caregiver, i.e., foster parent or preadoptive parent. Interruption of this relationship by removal from an important caregiver with whom the child has resided for a significant part of his or her life usually results in, at least, acute distress and, indirectly, long-term sequelae.[6] The negative effect of separation on attachment is not confined solely to loss of a familiar parenting figure but is compounded by major changes in the quality of personalized care and the

stress associated with unfamiliar surroundings or caretakers. The child is more likely to experience distress and behavioral problems if family discord and disruption preceded separation.[56] Children's responses to separation also show marked individual differences, probably reflecting both the child's temperament and the quality of the parent-child relationship before separation. Thus, to sustain fragile emotional bonds, great care must be taken to ensure adequate contact between parent and child during the period of separation. In general, the younger the child, the more vulnerable he or she is, and the more necessary are frequent visits to maintain attachment and decrease the stress of separation.

In those instances in which the child is unable to preserve emotional ties with his or her primary caregiver because of prolonged absence, chances are greater that a relationship will develop with a new caretaker, who will become the new "psychological parent."[8] Determination of who a child's psychological parents are and how strongly the child is linked to them emotionally is crucial if the child is to be placed in the appropriate caregiving environment. Although we have no litmus test, observations of the child's responses to attempted reunions often become the best data available. The child caught up in this stressful process may experience nightmares and other sleep disturbances, a tendency to cling to significant adults, loss of recently acquired developmental milestones such as bowel or bladder control, increased aggression, shortened attention span, and deterioration in academic performance and classroom behavior.

If reunification proves too disturbing for the child or little likelihood exists of returning the child home, then it may well be better for the child to remain with the psychological parent with whom an emotional tie does exist. However, adoption by this more closely bonded caretaker is no guarantee that the placement will succeed.[57] Failure of the placement and disruption of the parent-child relationship can result in multiple placements and psychiatric disturbance.

When evidence is established to make it clear that the child cannot return home, it must then be shown that termination is in the best interest of the child. The court must determine whether termination of parental rights would result in a better, more stable placement for the child. Ordinarily, parental rights are terminated to free the child for adoption. If adoption is not contemplated, termination is appropriate only if a need exists to decisively and permanently end all parent-child contacts. The child may be better off remaining with his or her present caretaker, even if the caretaker is unwilling or unable to adopt the child, because the risk of substantial emotional harm may be greater if the child is moved to yet another nonpermanent placement. Older children or adolescents may retain ties to their biological parents, with understandable reluctance, because of residual affection or affiliation, to inter-

child interaction, and the child's relationship to foster parents, particularly potential adoptive parents. Where possible, either a formal or an informal diagnosis should be assigned to the parent and child, inasmuch as a diagnostic label has certain prognostic implications and can be applied to statistical or actuarial data on the subject. The expert should voice an opinion on the competence of the parent and on his or her mental capacity; however, it is the responsibility of the judge to make the ultimate judgment as to whether criteria for termination of parental rights have been met.[65]

Although child psychiatry is an inexact science and is limited by insufficient knowledge about many aspects of child rearing and parenting, enough factual information exists on diagnosis and treatment to make fairly accurate predictions about parents' capacity to care for their children. Additional study is required to delineate the psychiatrist's role in the process of termination of parental rights and to communicate the limitation of psychiatry to the courts.

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