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## Section Five: New York State Adoption Law and the Convention on the Rights of the Child

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tures, makes it difficult to foresee the availability of these services in the near future.

New York State is to be commended for passing the Safe Harbor Act, which definitively recognizes and responds to the sexual exploitation and abuse of children for commercial gain. New York has become a model for national reform by encouraging other states to formally recognize children involved in prostitution as victims, not criminals. Furthermore, New York's leadership in providing children with rehabilitation services is a giant leap towards meeting the international standards of the CRC and Optional Protocol. The New York Legislature must devise a strategy for continuing to fund rehabilitation services for children involved in prostitution, and extend those vital services to children well before they are involved in the criminal justice system.

### **Section Five: New York State Adoption Law and the Convention on the Rights of the Child**

*by Lauren K. DeLuca*<sup>428</sup>

Unfortunately, many children all over the world need the help and protection of their governments. Many of these children in New York State will receive that help through the foster care system. In 2007, there were approximately 27,785 children in foster care in New York State.<sup>429</sup> Approximately 47% of children in foster care were African American, 20% were Latino/Hispanic, and 19% were white.<sup>430</sup> Of these children, 41% were age fourteen or older.<sup>431</sup> Approximately one-third of the children in foster care—31%—were between the ages of six and thirteen.<sup>432</sup> The youngest children, those five years old or younger, comprised the smallest group, constituting 28% of the total foster care population.<sup>433</sup> For many of these children, adoption is the only way out of foster care and into a stable, home-like environment. The goal for just over 7,000 of these children is adoption, and about 1,500 of them have

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<sup>428</sup> J.D. Candidate, Albany Law School, 2010; B.S., Cornell University.

<sup>429</sup> N.Y. STATE OFFICE OF CHILDREN & FAMILY SERV., CHILDREN IN CARE AND CUSTODY OF LDSS—QUARTER ENDING 03/31/07 (2007), <http://www.ocfs.state.ny.us/main/reports/qrcare-2007-03.pdf>.

<sup>430</sup> *Id.* The remaining 14% of these children are classified as "Other/Unknown."

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

been freed for adoption and are awaiting an adoptive family.<sup>434</sup>

With such a large number of children in foster care, and so many hoping to be adopted, it is imperative that state adoption laws provide the help and protection these children need and deserve. Article 21 of the CRC establishes the rights and protections guaranteed to children throughout the adoption process. This paper compares New York State's adoption laws to the requirements in the CRC. Currently, New York State statute does not explicitly incorporate all of the requirements for adoption enumerated in the CRC.

#### I. PRINCIPLES OF THE CONVENTION ON THE RIGHTS OF THE CHILD

There are four overarching principles in the CRC. These principles are enumerated in Articles 1, 2, 3, and 12 of the CRC. Article 1 defines a child as "every human being below the age of eighteen years."<sup>435</sup> This definition provides an end to childhood, at which point the individual is no longer protected by the CRC.

Article 2 protects the child from "discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."<sup>436</sup> The purpose of Article 2 is to ensure that children do not face discrimination in any area of their lives.

Another main principle of the CRC is enumerated in Article 3. According to this article, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>437</sup> Article 3 clearly demonstrates the child-centered approach of the CRC as it instructs state parties to place the best interests of the child before all other considerations. This principle is critical to the evaluation of adoption law.

The final overarching principle of the CRC is the child's right to be heard, which can be found in Article 12. This article "assure[s] to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child."<sup>438</sup> The child's views can be expressed "either directly, or

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<sup>434</sup> *Id.*

<sup>435</sup> CRC, *supra* note 2, art. 1.

<sup>436</sup> *Id.* art. 2, ¶ 1.

<sup>437</sup> *Id.* art. 3, ¶ 1.

<sup>438</sup> *Id.* art. 12, ¶ 1.

through a representative or an appropriate body.”<sup>439</sup> This article is also crucial to the assessment of adoption law.

## II. THE CRC AND NEW YORK ADOPTION LAWS AND PRACTICES

In New York State, the Domestic Relations Law, Social Services Law, and the Family Court Act govern the process of adoption. In the context of adoption, the Social Services Law defines an authorized agency as “[a]ny agency . . . empowered by law to care for, place out or board out children” within the state “which is approved, visited, inspected and supervised by the Office of Children and Family Services.”<sup>440</sup> Agencies not incorporated under the laws of New York State are considered authorized agencies if they are licensed or authorized by another state and approved by the Department of Social Services.<sup>441</sup> Authorized agencies also include courts and social services officials.<sup>442</sup> This requirement of oversight by the Office of Children and Family Services ensures that only competent authorities are authorized to facilitate adoption, as required by Article 21 of the CRC.

In New York State, adoption is a long process that aims to ensure that the best interests of the child are met.<sup>443</sup> First, the prospective adoptive parent-applicants must complete an adoption study process. Among other things, the applicants must submit a “report from a physician about the health of each member of the household,”<sup>444</sup> “references from at least three persons,”<sup>445</sup> “evidence of employment and salary,”<sup>446</sup> and responses to inquiries exploring “each applicant’s ability to be an adoptive parent.”<sup>447</sup> The process also requires the authorized agency to obtain fingerprints of the applicant and “each other person over the age of 18” currently residing in the applicant’s home.<sup>448</sup> Federal and state criminal history record checks must be obtained for each member of the applicant’s household.<sup>449</sup> The agency must also inquire “to the Statewide Central Register of Child Abuse and Maltreatment” whether the applicant, or anyone living with the applicant, has ever

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<sup>439</sup> *Id.* art. 12, ¶ 2.

<sup>440</sup> N.Y. SOC. SERV. LAW § 371(10)(a) (McKinney Supp. 2009).

<sup>441</sup> *Id.* § 371(10)(c).

<sup>442</sup> *Id.* § 371(10)(b).

<sup>443</sup> N.Y. DOM. REL. LAW § 114(1) (McKinney 1999).

<sup>444</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 421.15(c)(1) (2008).

<sup>445</sup> *Id.* § 421.15(c)(2).

<sup>446</sup> *Id.* § 421.15(c)(6).

<sup>447</sup> *Id.* § 421.15(d).

<sup>448</sup> N.Y.C.R.R. tit. 18, § 421.27(c)(1).

<sup>449</sup> *Id.* § 421.27(a).

been “the subject(s) of an indicated child abuse or maltreatment report.”<sup>450</sup> After successfully completing this process, children may be placed with the approved adoptive family. The adoptive child must remain with the adoptive family for a minimum of three months before an order of adoption will be issued.<sup>451</sup> During that time the child must be legally freed for adoption, if that has not already occurred.<sup>452</sup> Thereafter, the adoptive family may petition the court for an order of adoption which, if granted, would legally create a parent-child relationship between the adoptive parent and the child.<sup>453</sup>

These procedures set up by New York State are consistent with the requirements of the CRC. As established by Article 3 of the CRC, “the best interests of the child shall be a primary consideration.”<sup>454</sup> All of the pertinent New York laws articulate the best interests of the child as the appropriate standard to be used. The purpose of the lengthy and detailed pre-placement investigation of the adoptive parents is to ensure that the placement would be in the child’s best interests. This investigation is conducted by a “disinterested person” to ensure that the information provided to the court is reliable, a concern expressed in Article 21 of the CRC.

New York State recognizes that “it is generally desirable for the child to remain with or be returned to the birth parent.”<sup>455</sup> As a result, under New York law a child is not available for adoption until the child’s natural parent’s rights are terminated, legally freeing the child for adoption.<sup>456</sup> Parental rights can be terminated for five different reasons. First, if both of the child’s parents died without appointing the child a guardian, then the child is free for adoption.<sup>457</sup> Another reason for termination of parental rights is abandonment,<sup>458</sup> meaning that the parents fail to visit or communicate with the child for a period of six months although they are able to do so.<sup>459</sup> Third, parental rights can be terminated when as a result “of mental illness or mental retardation” the parents are unable “to provide proper and adequate care for a child.”<sup>460</sup> Child neg-

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<sup>450</sup> *Id.* § 421.15(c)(7).

<sup>451</sup> N.Y. DOM. REL. LAW § 112(6).

<sup>452</sup> N.Y. SOC. SERV. LAW § 384-b(1)(b).

<sup>453</sup> N.Y. DOM. REL. LAW § 117(1)(c).

<sup>454</sup> CRC, *supra* note 2, art. 3, ¶ 1.

<sup>455</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii).

<sup>456</sup> *Id.* § 384-b(1)(b).

<sup>457</sup> *Id.* § 384-b(4)(a).

<sup>458</sup> *Id.* § 384-b(4)(b).

<sup>459</sup> *Id.* § 384-b(5)(a).

<sup>460</sup> *Id.* § 384-b(4)(c).

lect<sup>461</sup> and child abuse<sup>462</sup> are also grounds for termination of parental rights.<sup>463</sup> Finally, termination can also occur voluntarily, when a child's birth parents commit the child to an authorized agency via a written surrender.<sup>464</sup> After a child is legally freed for adoption, the court inquires if foster parents or relatives are interested in adopting the child.<sup>465</sup> These state law provisions operate to protect against impermissible adoptions as required by Article 21 of the CRC.

A. *The Consent Discrepancy*

The next issue for consideration is consent to adoption, which is governed by section 111 of the New York State Domestic Relations Law. If the child was conceived or born to married parents, the consent of both parents is required.<sup>466</sup> If the child was conceived or born to unmarried parents, the mother's consent is required,<sup>467</sup> and the father's consent is required if the father has acknowledged the child as his own, has made payment "toward the support of the child of a fair and reasonable sum," and regularly visits or communicates with the child.<sup>468</sup> If the child has been surrendered or abandoned by the parents, the consent "[o]f any person or authorized agency having lawful custody of the adoptive child" is required before the child can be adopted.<sup>469</sup> Finally, the consent "[o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent," is also required.<sup>470</sup> With the exception of this last provision on the consent of the child, these laws comply with Article 21 of the CRC, which mandates that "the persons concerned have given their informed consent to the adoption."<sup>471</sup>

The provision limiting the child's consent requirement to those children over the age of fourteen is one of the most glaring conflicts between international adoption law and New York State law. Under New York State law, there are no statutory requirements that children under the age of fourteen be given the opportunity

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<sup>461</sup> Definition of the term "neglected child." N.Y. SOC. SERV. LAW § 371(4-a).

<sup>462</sup> Definition of the term "abused child." *Id.* § 371(4-b).

<sup>463</sup> *Id.* § 384-b(4)(d)-(e).

<sup>464</sup> *Id.* § 383-c(1).

<sup>465</sup> *Id.* § 383-c(10)(a).

<sup>466</sup> N.Y. DOM. REL. LAW § 111(1)(b).

<sup>467</sup> *Id.* § 111(1)(c).

<sup>468</sup> *Id.* § 111(1)(d)-(e).

<sup>469</sup> *Id.* § 111(1)(f).

<sup>470</sup> *Id.* § 111(1)(a).

<sup>471</sup> CRC, *supra* note 2, art. 21(a).

to be heard and to make their views known concerning their future. This is in direct conflict with Article 12 of the CRC, which provides that “the child shall . . . be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.”<sup>472</sup> In New York, the closest fulfillment of this right for the child to be heard is through the child’s appointed law guardian.<sup>473</sup> The Family Court Act “establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court.”<sup>474</sup> However, case law has confused this goal. In *Matter of Amkia P.*, a New York Family Court upheld a law guardian’s decision to advocate for the position that the law guardian believed was in the child’s best interests.<sup>475</sup> This case has lent support to the view that a law guardian is not required to advocate the child’s position, and can therefore advocate the position the law guardian deems to be in the child’s best interests. Under this view, the child is potentially left without a means of expressing his or her views. Absent a clear statutory requirement, a child in adoption proceedings in New York State may not be guaranteed the opportunity to be heard.

Other countries have similar laws limiting the child’s consent requirement to children above a designated age. However, most of these countries set the age for consent much lower than fourteen. For example, under Mongolian law, consent to an adoption is needed from any child ages nine or older.<sup>476</sup> The Philippines<sup>477</sup> and Croatia<sup>478</sup> set this age of consent at ten, while Nova Scotia, a province in Canada, sets the age at twelve.<sup>479</sup>

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<sup>472</sup> *Id.* art. 12, ¶ 2.

<sup>473</sup> N.Y. FAM. CT. ACT § 249(a).

<sup>474</sup> *Id.* § 241.

<sup>475</sup> *In re Amkia P.*, 197 Misc. 2d 387, 390 (N.Y. Fam. Ct. 1999).

<sup>476</sup> Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Mongolia*, ¶ 136, U.N. Doc. CRC/C/3/Add.32 (Feb. 3, 1995), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G95/153/07/pdf/G9515307.pdf?OpenElement>.

<sup>477</sup> Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Philippines*, ¶ 52, U.N. Doc. CRC/C/3/Add.23 (Nov. 3, 1993), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/193/47/img/G9319347.pdf?OpenElement>.

<sup>478</sup> Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Croatia*, ¶ 103, U.N. Doc. CRC/C/8/Add.19 (Dec. 7, 1994), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/703/60/img/G9470360.pdf?OpenElement>.

<sup>479</sup> Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1994: Canada*, ¶ 1129, U.N. Doc. CRC/C/11/Add.3 (July 28, 1994), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/703/60/img/G9470360.pdf?OpenElement>.

The Implementation Handbook for the CRC,<sup>480</sup> which was endorsed by the Committee on the Rights of the Child, proposes giving the child the opportunity to veto her or his adoption rather than requiring the child's consent. Since adoption is irrevocable, the child's consent to such adoption "carries more risk, [and] is a weightier decision, than vetoing it. Passively refraining from exercising a right of veto, rather than actively stating consent, is also less likely to place a burden of guilt on children in relation to their natural parents."<sup>481</sup>

*B. The Discrepancy in Safeguards*

The CRC also suggests that safeguards such as monitoring mechanisms be adopted.<sup>482</sup> New York State law provides for adoption services consisting of "the evaluation of a child's placement needs and pre-placement planning, recruitment of and homestudy for prospective adoptive parents, training of adoptive parents, placement planning, supervision and post adoption services."<sup>483</sup> Despite this provision in the law, post-adoption services such as counseling are seriously lacking.<sup>484</sup> These aftercare services, while available to adoptive families, are not mandatory. This prevents the state from monitoring adoptive placements after the adoption has been finalized. While New York State has attempted to provide safeguards for adoption, its adoption procedures do not meet the safeguard requirements expressed in the CRC absent a mandate that adoptive families utilize the post-adoption services provided by the State.

New York State is improving the safeguards it provides to children in foster care. Pursuant to an amendment to the Family Court Act, a judge must hold permanency hearings for children in foster care every six months.<sup>485</sup> Judge Margaret Walsh, a Family Court judge in New York, spoke about the importance of this amendment, and the need to hear from children involved in foster care during the proceedings.<sup>486</sup> According to Judge Walsh, mechanisms that allow for a child's input in the foster care process provide

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ments-dds-ny.un.org/doc/UNDOC/GEN/G94/180/21/pdf/G9418021.pdf?OpenElement.

<sup>480</sup> See generally UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89.

<sup>481</sup> *Id.* at 274.

<sup>482</sup> CRC, *supra* note 2, art. 21.

<sup>483</sup> N.Y. SOC. SERV. LAW § 372-b(1)(b).

<sup>484</sup> Telephone Interview with Michael J. Donahue, Former Program Director, Foster Care and Adoption Program, Parsons Child and Family Center (Feb. 22, 2009).

<sup>485</sup> N.Y. FAM. CT. ACT § 1089(a).

<sup>486</sup> The Honorable Margaret T. Walsh, N.Y. Family Court, Panel Discussion at the

judges with a more complete picture of the child's situation and the child's needs and desires.<sup>487</sup>

C. *The Discrepancy in Confidentiality*

The next issue to be addressed is the effects of adoption on the rights of the child. The effects of adoption under New York State law are laid out in sections 112-b, 114, and 117 of the Domestic Relations Law. During adoption proceedings, a record is created detailing the child's "full name, date and place of birth," medical history, and heritage.<sup>488</sup> This record also includes a complete description of the child's parents, including "nationality, ethnic background and race; education . . . general physical appearance of the parents at the time of the birth of the adoptive child [and] . . . health and medical history of the parents."<sup>489</sup> Also, if the adoptive parents seek to change the child's name, and the court finds no reasonable objection to the proposed change, the record will include a directive to that effect.<sup>490</sup> After these adoption records are filed, they are sealed and kept confidential.<sup>491</sup> Thereafter, these records cannot be accessed without a court order.<sup>492</sup> Once an adoption is completed in New York, the birth parents are "relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child."<sup>493</sup> Unless an agreement regarding contact or visitation between the adopted child and the biological parents was incorporated into a written court order, the birth parents are no longer entitled to such contact or visitation with the child.<sup>494</sup> Legally, the adopted child is the child of the adoptive parents, and all parental rights and duties are vested in the adoptive parents.<sup>495</sup>

The CRC guarantees to the child "the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents;"<sup>496</sup> the right to "preserve his or her identity,

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Albany Law School Conference: U.N. Convention on the Rights of the Child (Mar. 6, 2009).

<sup>487</sup> *Id.*

<sup>488</sup> N.Y. DOM. REL. LAW § 114(1).

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* § 114(2).

<sup>493</sup> *Id.* § 117(1)(a).

<sup>494</sup> N.Y. DOM. REL. LAW § 112-b(2).

<sup>495</sup> *Id.* § 117(1)(c).

<sup>496</sup> CRC, *supra* note 2, art. 7, ¶ 1.

including nationality, name and family relations;<sup>497</sup> and the right “to enjoy his or her own culture, to profess and practi[c]e his or her own religion . . . [and] to use his or her own language.”<sup>498</sup> Here, New York State law is in conflict with international law. Instead of focusing on the child, as the CRC does, New York law focuses on the biological and adoptive parents. New York State law outlines the severance and transfer of parental rights, but seldom mentions the rights of the child to the extent mandated by the CRC. This leaves most adopted children without any means of establishing a relationship with their biological parents. Also, New York regards confidentiality of adoption records as the primary concern. Without access to these records, adopted children are deprived of information about their birth, which is an essential part of their identity. Again, this is inconsistent with the purpose of Articles 7, 8, and 30 of the CRC.

### III. RECOMMENDATIONS

There are three major discrepancies between current New York State adoption laws and the CRC. The first main conflict lies in the exclusion of children under the age of fourteen from the statutory requirement that the child’s consent be obtained in an adoption proceeding. Second, adequate mechanisms to safeguard adopted children have not been incorporated into New York law. The third discrepancy is the lack of a mechanism to facilitate a relationship between adopted children and their biological parents, thus depriving adopted children of an important sense of identity.

The first conflict of law can easily be resolved by amending section 111 of the Domestic Relations Law to require, in an adoption proceeding, the consent of all children with the ability to speak and assert their views, whether directly or through a representative. This would bring New York State law closer to compliance with Article 12 the CRC, and it would not force procedural alterations since law guardians are already purported to serve this function. Alternatively, the consent requirement could be replaced with a procedure affording the child the opportunity to affirm or veto the adoption.

The second concern is the lack of a mechanism in New York State to monitor the adoption placement once the adoption is finalized. Despite the safeguards in place to ensure that the adop-

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<sup>497</sup> *Id.* art. 8, ¶ 1.

<sup>498</sup> *Id.* art. 30.

tion is furthering the child's best interests, bad placements do occur. By not requiring post-adoption services there is no method to verify that the adoption has been successful. One method of monitoring adoptive placements after the adoption has been finalized would be to condition receipt of the subsidy on participation in post-adoption services.

The third conflict will be considerably more challenging to remedy. In the context of access to information, the New York legislature has placed the confidentiality of the natural parents above the best interests of the child. This directly contradicts the transparency goals of the CRC, found in Articles 7, 8, and 30. Remediating this conflict would require restructuring New York's law to focus more on the child. However, through amendment, New York State law could become compliant with the standards set forth in the CRC.

### **Section Six: The Integration of Children with Disabilities into Mainstream Society: Convention on the Rights of the Child and New York State Law**

*by Francis K. Liu*<sup>499</sup>

Children with disabilities face significant social and economical obstacles because they are not treated equally. This Section compares the U.N. Convention on the Rights of the Child ("CRC")<sup>500</sup> and New York State law on protections for children with disabilities.<sup>501</sup> Specifically, this Section will examine how Article 23 of the CRC interacts with New York's Education and Public Health Laws, and the State's mental hygiene regulations in the administrative code.<sup>502</sup>

Although the United States has not ratified the CRC, children with disabilities are not without protections under U.S. law.<sup>503</sup> Arti-

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<sup>499</sup> J.D., Albany Law School, 2009; B.A., University of Rochester, 2005.

<sup>500</sup> CRC, *supra* note 2.

<sup>501</sup> *Id.* art. 23 (obligating state parties to recognize the rights and needs of children with disabilities).

<sup>502</sup> Many relevant statutes and regulations pertaining to children with disabilities in New York are located in the State's Education and Public Health Laws. *See* N.Y. EDUC. LAW art. 89 (McKinney 2006) ("Children with Handicapping Conditions"); N.Y. PUB. HEALTH LAW, § 2580 *et seq.* (McKinney 2006).

<sup>503</sup> At the federal level, Congress has passed the Americans with Disabilities Act, 42 U.S.C.A. § 12101 *et seq.* (West 2005 & Supp. 2009); as well as the Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794 (West 2008); and the Individuals with