



MEMORANDUM OF SUPPORT

S.5790 (Savino)/A.8020 (Joyner)

“The Preserving Family Bonds Act”

November 1, 2017

Brooklyn Defender Services (“BDS”) strongly supports S.5790 (Savino)/A.8020 (Joyner) which would provide New York State Family Courts with the jurisdiction to hear applications for continued visits between children and their parents of origin at the dispositional stage of a termination of parental rights (TPR) case.

BDS is a comprehensive public defense organization that provides multi-disciplinary and client-centered criminal defense, family defense, immigration and civil legal services, social work support and advocacy in nearly 40,000 cases in Brooklyn every year. Over the past ten years, our family defense practice has represented nearly 10,000 parents in cases involving their 22,000 children. We represent the vast majority of parents in child abuse and neglect cases in Kings County Family Court, putting us in a unique position to advocate for improvements to the family court and child welfare systems.

The Preserving Family Bonds Act brings New York’s termination of parental rights (TPR) statutes in line with other states that allow post-TPR contact and is a reform grounded in the growing recognition of empirical research and anecdotal evidence demonstrating the value and importance of openness in adoption.

EXISTING LAW

Under current law, Family Court judges do not have the authority to allow or honor a child’s desire to have contact with her biological parent in cases where the parent’s rights have been terminated by the court, even if contact is deemed to be in the child’s best interest. In contrast, parents who voluntarily surrender their parental rights may negotiate to have ongoing contact with their child as a condition of the surrender.

For many years, New York State judges in the Second and Fourth Appellate Divisions were authorized to order post-TPR contact pursuant to case law.¹ That practice changed after the Court of Appeals held in June 2012 in *Matter of Hailey ZZ* that judges did not have the explicit authority to grant post-TPR contact.²

As a result of the *Hailey ZZ* decision, parents who do not surrender their parental rights risk losing all contact with their children if they choose to defend their rights in a termination of parental rights proceeding and lose. Parents are often coerced into surrendering their rights in order to maintain some level of contact and an open relationship with their children, even if they have a strong case to make that their rights should not be terminated.

This current policy is harmful to children and families and stands in stark contrast to a growing body of research about the importance of openness in adoptions. The Court of Appeals made clear: the legislature must act to right this wrong and ensure the option of post-TPR contact where continued visitation is in the child's best interest.

PROPOSED AMENDMENT

The Preserving Family Bonds Act is narrowly tailored to give Family Court judges the authority to allow continued contact between children and their biological parents, in cases where contact would be in the child's best interest.

- This bill amends the Family Court Act and the Social Services Law to allow Family Court judges to hear applications for post-termination contact during the disposition phase of termination of parental rights proceedings.
- If a biological parent, subject child or other party to the dispositional hearing moves for consideration of post-TPR contact, the court will be required to determine whether or not visitation and/or contact between the and the child should occur, and which level of supervision, if any, is necessary.
- Under this bill, the child's foster parents and siblings must be notified of and will have standing to participate in the dispositional hearing determining any post-TPR contact. All

¹ In December 2006 the Fourth Judicial Department ruled in *Matter of Khalil S.* that judges could order post-termination contact with the biological parent if in the best interests of the child. *Matter of Khalil S.*, 35 AD3d 1164 (4th Dept. 2006). Judges in the Second Department had endorsed post-TPR cases where parental rights were terminated on the ground of intellectual disability or mental illness as far back as 2002. *See, e.g., Matter of Corinthian Marie S.*, 746 N.Y.S.2d 606 (2d Dept. 2002); *Matter of Selena C. [Thelma C.]*, 909 N.Y.S.2d 84 (2d Dept. 2010).

² In 2012 the New York Court of Appeals overturned *Khalil S.* in the *Matter of Hailey ZZ* because they felt that the courts did not have the explicit legislative authority to order post-termination contact. The Court of Appeals did not cite massive delays or any demonstrated harm to children and families in the Second and Fourth Department for this change in policy. Instead, the Court declined to opine at all on the potential implications of this policy change, only to say that the legislature is "the entity best suited to balance the critical social policy choices and the delicate issues of family relations involved in such matters." *Matter of Hailey ZZ*, 19 N.Y.3d 422, 438 (2012).

parties to the proceeding have the right to assistance of counsel and to free counsel if they cannot afford a lawyer, as already established in the Family Court Act.³

- The legal standard for determining post-TPR contact will be the best interests of the child.
- Parties to the TPR disposition hearing, as well as any subsequent guardians of the child, may subsequently make a motion to the court to enforce or modify the order based on a showing of good cause and the best interest of the child.
- The bill specifically incorporates language from two sibling contact bills that passed in recent legislative sessions affirming the rights of siblings to have contact.⁴

BACKGROUND

The Preserving Family Bonds Act brings long overdue reform to New York’s Family Court Act and Social Services Law.

Post-TPR Contact Makes Families Stronger

Even when a biological parent is unable to care for their child, post-termination contact allows the child to retain a relationship with his or her parent and/or sibling(s) and may allow that biological parent to play a positive role in the child’s life. Most children placed in the foster care system already have established significant ties to their biological parents and other family members.⁵ Even children who enter foster care at birth and are ultimately adopted will likely have had regular contact and strong bonds with their biological families for a lengthy time period, even years, prior to the time the parent-child relationship is legally severed.⁶

Post-TPR Contact in Other States

Post-termination contact is not a novel concept: judges in other states have been successfully ordering contact for decades. Florida and Louisiana have broad post-termination contact statutes protecting a child’s relationships, pending adoption, with birth parents, siblings,

³ Family Court Act § 262(a)(iv) already provides for the assignment of counsel for indigent persons who are party to family court proceedings. The list of persons who have the right to assistance of counsel includes “the foster parent, or other person having physical or legal custody of the child.” For the complete list of parties and proceedings, see F.C.A. § 262(a)(iv).

⁴ The 2016 & 2017 bills amended Family Court Act §§1081, 1089 & 1095 and Social Services Law §§358-a, 383-c & 384. See S.6859/A.9759 (2016), available at <https://www.nysenate.gov/legislation/bills/2015/s6859>; S.4835/A.7553 (2017), available at <https://www.nysenate.gov/legislation/bills/2017/s4835/amendment/original>.

⁵ See Child Welfare Information Gateway, *Foster Care Statistics 2014* 8 (2016), available at <https://www.childwelfare.gov/pubs/factsheets/foster.pdf> (last visited Dec. 2, 2016) (median age of child entering foster care in fiscal year 2014 was 6.4 years).

⁶ U.S. Dep’t of Health and Human Services, Administration for Children and Families, *The AFCARS Report, Preliminary FY 2014 Estimates as of July 2015*, available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> (showing mean time in care for children waiting to be adopted was 32.3 months, with 85% of those children having spent one year or more in care).

and the birth parents' relatives, when it is in the child's best interests.⁷ In Florida, the order may be reviewed upon the motion of any party or a prospective adoptive parent, and the nature and frequency of the contact must be reviewed by the court upon the child's placement for adoption.⁸ The Preserving Family Bonds Act is based on Florida's law.

Unlike the New York Court of Appeals, high courts in Massachusetts, West Virginia and Nebraska have authorized judges to order post-TPR contact where contact is in the best interest of the child for decades. The Supreme Judicial Court of Massachusetts has interpreted state law to allow for both post-termination and post-adoption contact where contact would be in the child's best interests since the 1980s.⁹ The Supreme Court of West Virginia similarly held that post-termination contact between a child and her birth parent is the right of the child, rather than a right of the birth parent, back in 1995.¹⁰ The West Virginia Supreme Court has repeatedly recognized a child's right to post-termination contact, instructing the trial court to consider the child's wishes when determining whether contact is in the best interests of the child.¹¹ For more than ten years, Nebraska judges have been granting post-termination contact pursuant to a Nebraska Court of Appeals decision, *In re Stacey D.*¹² As noted above, the New York State Court of Appeals has made clear that in New York, the legislature must act to authorize post-TPR contact.

Research on the Benefits of Open Adoptions

The Preserving Family Bonds Act reflects a growing national consensus that openness in adoption is beneficial for all members of the family of adoption (including adoptive parents, adopted persons, and birth parents).¹³ According to the Donaldson Adoption Institute, a national research-based adoption advocacy organization:

⁷ FLA. STAT. ANN. § 39.811(7)(b) (West 2003); LA. CHILD. CODE ANN. ART. 1037.1(A) (West 2004).

⁸ FLA. STAT. ANN. § 39.811(7)(b).

⁹ See, e.g., MASS. GEN. LAWS ANN. 210 § 3(d); *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption*, 467 N.E.2d 861 (Mass. 1984) (granting judges the authority to consider parental visitation where in the child's best interests); *In re Adoption of Ilona*, 944 N.E.2d 115, 124-125 (Mass. 2011) ("We have repeatedly recognized the equitable authority of a judge to order visitation between a child and a parent whose parental rights have been terminated, where such visitation is in the child's best interest."); see also MASS. DEPT. OF CHILDREN AND FAMILIES REGULATION 110 CMR 7.215 A&B (Providing guidance to department caseworkers on both post-termination and post-adoption contact).

¹⁰ *In re Christina L.*, 460 S.E.2d 692, 701 & n.9 (W. Va. 1995).

¹¹ See, e.g., *In re Alyssa W.*, 619 S.E.2d 220, 223-24 (W. Va. 2005) (recognizing a child's right to post-termination visitation when it is in her best interests, but noting that it is usually granted to older children who have had time to establish emotional bonds); *In re Katie S.*, 479 S.E.2d 589, 601 (W. Va. 1996) ("[P]ost-termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents.").

¹² *In re Stacey D.*, 684 N.W.2d 594 (Neb. 2004) ("We hold that the juvenile court retains continuing jurisdiction to enter orders, following the termination of a parent's parental rights, that are consistent with the best interests of the children, which orders may include providing for continued contact with a natural parent.")

¹³ See, e.g., Minnesota/Texas Adoption Research Project available at <https://www.umass.edu/ruddchair/research/mtarp>; Marianne Berry & Debora J. Cavazos Dylla, *The Role of Open Adoption in the Adjustment of Adopted Children and their Families*, 20 CHILDREN & YOUTH SERVICES REV. 151-171 (1998); Karie M. Frasch, Devon Brooks & Richard P. Barth, *Openness and Contact in Foster Care Adoptions: An Eight Year Follow-Up*, 49 FAMILY RELATIONS 435-446 (2000); Thomas M. Crea & Richard P. Barth, *Patterns and Predictors of Adoption Openness and Contact: 14 Years Postadoption*, 58 FAMILY RELATIONS 607-620 (2009).

Openness in adoption is healthy for all members of the extended family of adoption. It helps facilitate identity development for the child and their family and allows family members to fully embrace the truth. Families need to be encouraged to build authentic relationships in order for their families to be strong.¹⁴

Research on openness in adoption shows that adopted children cite advantages such as having more family, access to useful information, being freed from the frustration of not knowing, being empowered by knowledge, feeling compassionate, fortunate and more secure.¹⁵ Contact can help youth reconcile pieces of their identity and promote the exchange of critical family and medical health information; all of which are vital to developing a young person's sense of self and well-being.¹⁶ When children are able to build positive relationships with their biological families, their adoptive and foster families benefit, too.

Broken Adoptions and Kids Who Age Out of Foster Care

This bill is particularly critical to preserve family bonds between youth who are likely to age out of foster care and their biological families. The reality is that many children who are brought into the child welfare system will never find a permanent foster or adoptive family. According to the U.S. Children's Bureau, 62,378 children nationwide were waiting to be adopted in 2015 after their parents' rights were terminated.¹⁷ In the same year, more than 20,000 young people nationwide aged out of foster care.¹⁸ For those children, maintaining ongoing visitation with their birth families throughout their time in foster care can be instrumental in helping them to succeed once they age out, as they may then have some family ties that they can fall back on for support. Under current law, judges do not have the power to order visitation between children and their parents upon termination of the parents' rights, even if contact would be in the child's best interests and the judge suspects that the child or children may never be adopted and that preserving family bonds could be critical to the child's future successful transition out of foster care.

Also troubling is the high number of broken adoptions, or adoptions that dissolve and result in the child being returned to foster care, or all too often in New York City, to the streets and the city's Runaway and Homeless Youth shelter system. The Children's Bureau estimates that as many as 10 percent of adoptions end in dissolution.¹⁹ Openness in adoptions, where appropriate, can be particularly key to fostering successful older child placements. Openness in older child placements can help some youth commit to adoption. For example, it can be difficult for children to move on to life with a new family if they are still worrying about whether their birth family is okay or not. If they can be reassured that their birth families are okay and that they can maintain some level of contact with that family of origin, they may be more willing to agree to adoption.²⁰

¹⁴ The Donaldson Adoption Institute, www.letsadoptreform.org/research.

¹⁵ Susan Ayers-Lopez et al, *Presentation: Openness in Adoptions from Foster Care: Implications for Children and Families*, Rudd Annual Adoption Conference, April 2013.

¹⁶ Ayers-Lopez, id.

¹⁷ Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2015 data, available at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf>

¹⁸ Id. at p. 3.

¹⁹ Child Welfare Information Gateway, *Adoption Disruption and Dissolution* (June 2012), available at https://www.childwelfare.gov/pubPDFs/s_disrup.pdf.

²⁰ Ayers-Lopez, id.

It is no surprise that older age of the child, strong attachment to the birth mother, childhood sexual abuse and emotional and behavioral issues are well-documented factors contributing to broken adoptions.²¹ By passing the Preserving Family Bonds Act, the legislature can foster healthier adoptions and stronger bonds between children, their biological families, their foster parents and future adoptive families.

INEQUALITY IN THE CHILD WELFARE SYSTEM – THE NEW “JANE CROW”

The vast majority of BDS’s clients face child welfare involvement, up to and including termination of their parental rights, because they are poor women of color. Earlier this year the New York Times chronicled the stories of two of our clients – one whose child walked out of bed while the mother was in the bathtub and another who was arrested while in labor for leaving her child in the home while she went to tell her partner at his worksite around the corner that her labor had started and she needed to go to the hospital.²² Both of these women had their children removed from their care, put into the foster care system, and were forced to fight their cases for months to reunite their families. Make no mistake – children are not removed from the home when affluent parents act in exactly the same way. Those who are targeted for child welfare enforcement in Brooklyn are almost exclusively very poor parents of color. Most of them are charged with neglect, not abuse. Most of them are women who live in only five zip codes.

People who have their parental rights terminated all too often have cases that began like these, with actions that would never have resulted in removal in other neighborhoods. When parents are unable to complete required programming because they are unable to find transportation, housing or employment; suffer from mental health issues, addiction or intellectual disability where there is limited help available; or simply are unable to navigate the complex web of services and programming required by agencies or the courts the state begins the process of terminating their rights. If they do not surrender their parental rights and their rights are terminated, they will have no right to visitation with their children.

CONCLUSION

This law ensures that children who would benefit from contact or visitation with their birth families after a parent’s rights have been terminated are able to do so, to the benefit of the children, their birth families, their foster and adoptive families.

If you have any questions, please feel free to contact Andrea Nieves, Senior Policy Attorney, Brooklyn Defender Services, at 718-254-0700 ext. 387 or anieves@bds.org.

²¹ Id.

²² Stephanie Clifford & Jessica Solver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES, July 21, 2017.