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RACE MATTERS IN ADOPTION

By

Ruth-Arlene W. Howe*

In any discussion of adoption, . . .we must not lose sight of its primary goal: to provide a permanent, secure, loving home for a child whose birth parents are unable or unwilling to meet the child's needs. Throughout. . . ,we must never cease to ask the basic question: "Is it well with the child?"

Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, at 10 (Summer 1982)

Introduction

In Part I of this Essay, I share some personal concerns that the real needs of African American children and families are not met if race is ignored. The findings and recommendations of the May 2008 Evan B. Donaldson Adoption Institute paper: *Finding Families for African American Children: The Role of Race & Law in Adoption From Foster Care*¹ are reviewed in Part II. Next in Part III., I discuss the current Child Welfare League of America (CWLA) Standards of Excellence for Adoption Services² -- the lens through which the Adoption Institute assessed the efficacy of current federal laws. I conclude this Essay by urging members of the family law bar to endorse the Adoption Institute study recommendations and to work for their expeditious implementations.

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¹ THE EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE (May 2008) (available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf>. [hereinafter Institute Report].

² CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES (2000) (place order at <http://www.cwla.org/programs/standards/cwsstandardsadoption.htm>).

Part I - Personal Perspectives

Because of my perspective, shaped by academic training in social work and law, and professional experiences working in the field, I concur whole-heartedly with Professor Katz's view that the primary focus of adoption should be child-centered. Moreover, I interpret his exhortation never to cease asking the basic question: "Is it well with the child?" as articulating an ethical obligation that all lawyers assume when working in the field of adoption. Hence, whether representing a prospective adoptive parent or relinquishing birth parent, formulating policy, drafting legislation or regulations, I believe that lawyers have an ethical responsibility to make promoting the welfare and "best interests" of a child the priority.

In prior writings³ I have questioned whether the "best interests" of African American foster care youngsters waiting for alternative permanent adoptive homes, are actually promoted and protected by federal and state laws and policies, the practices of public and private agencies, and private adoption attorneys. In 1995 when vested interests were pushing policy makers to attack "same-race" placement preferences as discriminatory to white adults, I viewed this "as a consequence of the general shift in focus from meeting the needs of children for permanent homes to satisfying the desires of adults to become parents."⁴ I argued then that:

The needs and interests of Black children, Black families, and Black communities . . . [would not be met or advanced] if a constitutional "right to adopt" were to be recognized. Nor would these be met if

³ See Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE . GENDER L. & POL'Y (1995) [hereinafter "*Redefining the TRA Controversy*"], available at <http://lrn.nelco.org/bc/bclsfp/papers/82>; *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT.L.J. 409 (1997) [hereinafter "*Old Prejudices and Discrimination*"], available at <http://lrn.nelco.org/bc/bclsfp/papers/119>; and *Adoption Laws and Practices in 2000: In Whose Interests?* 33 FAM. L.Q. 677 (1999), available at <http://www.lrn.nelco.org/bc/bclsfp/papers87>.

⁴ *Redefining the TRA Controversy*, *supra* note 3, at 163.

the House Welfare Reform Bill, passed and forwarded to the Senate in late March 1995, containing a blanket prohibition against all consideration of race in placement were enacted into law and the size and composition of the country's foster care population remained the same.⁵

I am keenly aware that our legal system's emphasis on individual rights and liberties accorded adult citizens makes it very difficult to ensure that the basic needs of children are met in a manner that enables them to grow, to mature, and to become productive contributors to society, ready and able to parent and raise their own children successfully. The basic task of child-rearing and socialization is given to parents and the family unit. According to Margaret F. Brinig:

Usually public policy follows from the wishes of adults. In family law, this occurs although virtually all the legislation dealing with families and children begins with a "best interests of the child" premise. Most, if not all of the litigated outcomes at least seem to maximize the results for adults.⁶

The Supreme Court in *Parham v. J.R.* "noted that in most cases what is good for parents will also be good for children."⁷

Nevertheless, under the doctrine of *parens patriae*,⁸ the State reserves the right to intervene and remove a child from the custody of his birth parents in order to protect the child from abuse, neglect or when abandoned. And, if the parents are deemed "unfit" they may have their parental rights terminated, freeing the child for adoption, by third party strangers or possibly other kin. Unfortunately, our society has been unable or unwilling to develop and financially support programs and other initiatives that might provide parents and families with the requisite skills and tools

⁵ *Id.*

⁶ Margaret F. Brinig, *Promoting Children's Interests Through A Responsible Research Agenda*, 14 U. FLA. J.L. & PUB. POL'Y 137, 139 (2003) (quoting *Parham v. J.R.*, 442 U.S. 584 (1979)).

⁷ *Id.*

⁸ *Parens patriae* is Latin for "father of the people." The doctrine has its roots in English common law. In U.S. law it commonly is used to refer to the State's legal role as the guardian to protect the interests of children and others who cannot take care of themselves.

to rear their children properly. We have failed to develop any consensus about the kinds of social supports that would enable more families to meet and successfully perform the fundamental parenting tasks that society has assigned to them.

I contend that poverty, classism, sexism and racism are the key elements that fuel the continuing large numbers of African American children who are separated from their birth families, enter foster care, some never to be reunited with their birth parents or families and some, after being legally freed to be adopted, instead may “age out” of foster care, never having been adopted.⁹ I concur with Carol C. William’s view that “the disproportionate number of African American children needing adoption is a *symptom of failed policy implementation*: failure to prevent unnecessary placement; failure to reunite families in a timely fashion; and failure to stabilize the lives of children lacking the protection of families.”¹⁰

Without utilizing “macro” social work competencies - of problem definition, program planning and policy development, research and evaluation of outcomes, it was very simplistic and unethical to assume that the best way to meet the physical, social and emotional needs of Black foster care children was by eliminating the practice of “same –race” placements and promoting transracial adoption (TRA).¹¹ It’s like building a hospital at the bottom of a cliff to treat victims of car crashes, instead of posting speed warnings and erecting a fence or other guard rail at the top to prevent

⁹ See e.g., Sandra Patton-Imani, *Redefining The Ethics of Adoption, Race, Gender, And Class*, 36 LAW & SOC’Y REV. 813 (2002) (reviewing HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* (2002) and RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001)) (explaining intersections of gender, race, and poverty shape choices and arguing that public discussion of transracial adoption reflect power relations in the United States that shape the politics of race, gender, and class); see also, SANDRA PATTON, *BIRTH MARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA*, (2000)..

¹⁰ *Old Prejudices and Discrimination*, *supra* note 3 , at 462-463 (citing Carol C. Williams, *Expanding the Options in the Quest for Permanence*, in *CHILD WELFARE: AN AFROCENTRIC PERSPECTIVE* 246 (Joyce E. Everett et al. eds. 1991) (emphasis added).

¹¹ See *id.* 422, n.61 (citing THOMAS M. MEENAGHAN ET AL. *MACRO PRACTICE IN THE HUMAN SERVICES: AN INTRODUCTION IN PLANNING, ADMINISTRATION, EVALUATION AND COMMUNITY ORGANIZING COMPONENTS OF PRACTICE* (1982); *id.* at 456-464 & accompanying notes (explaining and contrasting “macro” system problem solving approaches with the “micro” direct-services of adoption).

cars from plunging down the cliff side. I view TRA as “a classic example of embracing and promoting a solution without accurately defining the problem” that affirms the validity of the maxim: “Once an indivisible problem is divided, nothing effective can be done about it.”¹²

I have always seriously doubted that “same-race” placement preferences were **the** barrier that kept African American youngsters waiting in foster care longer than their white peers.¹³ Instead, I characterized this claim, asserted in class action suits filed by The Institute of Justice¹⁴ on behalf of adult clients, as a “diversionary smoke-screen” strategy that “obfuscate[d] important systemic problems and create[d] additional barriers to meeting the needs of Black children, Black families, and the Black community.”¹⁵ To me, there always seemed to be:

something very disingenuous about the way proponents of transracial adoption constantly refer[red] to the plight of Black children in foster care when, in fact, most whites who seek to adopt look for healthy infants, not older children with a range of “special needs,” and most of the growing

¹² *Redefining the TRA Controversy*, *supra* note 3, at 131 n.160 (citing LUTHER H. GULICK, *THE METROPOLITAN PROBLEM AND AMERICAN IDEAS* 24 (1966) (discussing the importance of accurate and comprehensive problem definition).

¹³ I contend that the biggest barrier was that:

Most agencies did not diversify their staffs to include more African-American workers, nor did they actively consult with, or enlist the help of, the African-American community. Instead, agencies simply used the micro direct-service approach of TRA.

Old Prejudices and Discrimination, *supra* note 3, at 416.

¹⁴ *See id.* nn.29-34 and accompanying text (discussing The Institute of Justice’s, founding in 1991 by Chip Mellor and Clint Bolick). (“[O]n April 13, 1995, the Institute announced the launching of a nation-wide challenge to race-matching’ by state agencies. To establish a rule of law that racial discrimination in adoption is unconstitutional, the Institute reported the filing of a Texas class action lawsuit, its joining a Tennessee case as co-counsel, and its investigation into the possibility of filing additional lawsuits in other states.”). *See Matthew O & Joseph L. v Texas Dep’t of Protective & Regulatory Services (DPRS)*, No. 9504417 (Tx filed April 13, 1995) (class action seeking enforcement of the Texas Family Code § 162-308(a) which prohibits presumption that a same-race adoptive placement is in the best interests of a child and arguing that race matching violates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the Texas Constitution). *See also Reisman v. Tenn. Dep’t of Human Services*, No. 9303083 (W.D. Tenn. Filed Dec. 17, 1993) (challenging racial classifications in adoptive placement process, under the Fourteenth Amendment of the United States Constitution and the constitutionality of the Multi-Ethnic Placement Act of 1994 under the equal protection guarantee of the Fifth Amendment of the United States Constitution).

¹⁵ *See Redefining the TRA Controversy*, *supra* note 3, at 138 & n.41; *see also Adoption Laws and Practices in 2000*, *supra* note 3, at 685.

number of transracial placements being made involve[d] newborns or babies.¹⁶

Sadly, to this day “[r]ace and color continue to be unresolved issues in our society--inextricably tied and merged with issues of power, status, and inequalities - that mock American claims of being a democratic land of equal opportunity.”¹⁷ The harsh truth is that African American children are not well served when race is off the table and no consideration can be given to whether foster or prospective adopters are “racially and culturally competent to help prepare the child for the challenges that he will encounter because of his appearance.”¹⁸ To deny the reality that continuing racial hostilities and inequalities abound in our society because of a belief that society is “color blind”¹⁹ is irresponsible and unethical.

Thus, I am truly excited about the May 2008 release of the Evan B. Donaldson Adoption Institute report: *Finding Families for African American Children: The Role of Race & Law in Adoption From Foster Care*.²⁰

¹⁶ See *Redefining the TRA Controversy*, *supra* note 3, at 138 (citing Judith K. McKenzie, *Adoption of Children with Special Needs*, THE FUTURE OF CHILDREN, Spring 1993, at 72 (adoption issue) (discussing past history and current placement issues); see also Patton-Imani, *supra* note 9, at 841 (asserting those who claim race and racial matching policies keep children from being adopted, co-op “the language of racial equality and in the process. . . deny the salience of disability, age, and status as a member of a sibling group).

¹⁷ *Redefining the TRA Controversy*, *supra* note 3, at 132.

¹⁸ See *Old Prejudices and Discrimination*, *supra* note 3, at 471. According to Patricia I. Johnston:

Developing cultural competence means being sensitive to the issues surrounding moving an Asian child to a rural American community. It means understanding the problems inherent in sending an African American child to an all white private school. It means developing a willingness—no an excited interest—in living in an integrated community, eating ethnic foods, extending one’s circle of support and friendship to include people of color, and more. For most middle and upper middle class people of European heritage developing cultural competence will not be easy, because the fact is that most of us are much more racist than we care to believe.

Id. at 164n.169 (quoting PATRICIA I. JOHNSON, *ADOPTING AFTER INFERTILITY* 139 (1992)).

¹⁹ It is my belief that:

Indeed, those who consider the United States now to be a “color-blind” society, in fact, take a very “blind-sighted” approach to race and color issues. . . . Most individuals are not “colorblind” and skin color and perceptions of racial difference trigger within the beholder unconscious stereotypical expectations and assumptions that then govern any ensuing social interactions.

Adoption Laws and Practices in 2000, *supra* note 3, at 685.

²⁰ *Institute Report*, *supra* note 1.

Part II - Evan B. Donaldson Adoption Institute Report

Following Professor Katz’s exhortation to ask the basic questions: “Is it well with the child?” this Adoption Institute study concludes: “No, it is not.”²¹ The Adoption Institute May 27, 2008 press release asserts that *Finding Families for African American Children: The Role of Race & Law in Adoption From Foster Care* “is the most thorough examination to date of the often-sensitive, controversial issues relating to transracial adoption..” Executive Director Adam Pertman is quoted as explaining: “We tried to assess what was working and what wasn’t, andhope this knowledge helps to shape more effective policy and practice, so that every child has better prospects of growing up in a family - and of being ready for the world they’ll live in.”²²

It has been more than a decade since passage of the Howard Metzenbaum Multiethnic Placement Act (MEPA)²³ of 1994, later amended to prohibit any consideration of race in placement decisions for foster care or adoption by passage of the Removal of Barriers to Interethnic Adoption Provisions (IEP)²⁴ of 1996.. On September 21, 2007, the U.S. Civil Rights Commission held a hearing entitled “The Multiethnic Placement Act: Minority Children in State Foster Care & Adoption” to commence an assessment of this federal legislation.

²¹ The Report Executive Summary states:

The interpretations of MEPA-IEP that have served as the basis for its enforcement run counter to widely accepted best practices in adoption. The manner in which MEPA-IEP is enforced mandates an unyielding color-blindness that is counter to the best interest of children and sound adoption practice. It prohibits agencies from employing such practices as assessing families’ readiness to adopt a child of another racial/ethnicity, preparing families for transracial adoption in any way that is not provided to those who adopt within race, and considering families’ existing or planned connections with the child’s racial/ethnic group – practices that are considered to be sound are standard in international adoptions.

Id. at 7-8.

²² INSTITUTE REPORT, BACKED BY KEY CHILD WELFARE GROUPS, RECOMMENDS MAJOR CHANGES IN U.S. LAWS ON ADOPTION OF BLACK CHILDREN FROM FOSTER CARE, http://www.adoptioninstitute.org/media/20080527_press_mepa.php, [hereinafter *Press Release*].

²³ Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-67 (1994) (codified at 42 U.S.C. § 5115(a)).

²⁴ Pub. L. No. 104-188, § 1808. 110 Stat. 1755, 1903, amending §§ 471(a) and 474 of the Social Security Act (42 U.S.C. §§ 671(a) and 647), and repealing § 553 of The Howard Metzenbaum MultiEthnic Placement Act of 1994.

I commend the Adoption Institute for undertaking this long over-due study which “focuses on domestic transracial adoption and assesses its use as a policy and practice approach to meeting the needs of African American children in foster care who cannot be safely reunited with their parents or placed with kin.”²⁵ This type of disciplined, scientific assessment of policy and practice by trained social work professionals deserves close attention. It provides the kind of information that can overcome Professor Brinig’s concern about “a disconnect between what legislators and courts do and what the outcomes of the policies or decisions are for children. . . [since] the system does very little follow-up of its policies, even though these rules or structures may make tremendous differences to the children involved.”²⁶

This report was researched and written by Susan Livingston Smith, Program and Project Director of the Adoption Institute, with assistance from co-authors Dr. Ruth McRoy, Senior Fellow of the Adoption Institute; Madelyn Freundlich, Legislation and Policy Director of the Institute; and Joe Kroll, Executive Director of the North American Council on Adoptable Children. It was edited by Adam Pertman, Executive Director of the Institute. A broad range of national child welfare organizations endorse the content of the report, its findings and recommendations.²⁷

²⁵ *Institute Report*, *supra* note 1, at 4 (Executive Summary).

²⁶ Brinig, *supra* note 6, at 141.& n.17 (noting how mandatory reporting by physicians caring for substance-abusing pregnant women fearing arrest contributes to their not getting pre-natal care and trying to deliver their at-risk babies outside a medical setting)..

²⁷ The Report states:

The North American Council on Adoptable Children, the Child Welfare League of America, the Dave Thomas Foundation for Adoption, the Adoption Exchange Association, the National Association of Black Social Workers, Voice of Adoption, and the Foster Care Alumni of America. In addition, the National Association of Social Workers, which has no policy for supporting research papers per se, endorses its recommendations.

And in a footnote, the Report further explains that:

The Voice for Adoption is a coalition whose Board is composed of Adoption Advocacy, Adopt America Network, Adoption Exchange Association, the Adoption Exchange Inn., Casey Family Services, Child Welfare League of America, Children Awaiting Parents, family Builders Network, Kinship Center, Lilliput Children’s Services, National Adoption Center, New York Council on Adoptable Children, North American Council on Adoptable Children, Spaulding for Children, and Michigan Three Rivers Adoption Council.

The report starts with an Executive Summary of major findings and recommendations, followed by an Introduction that describes the major sections thus:

Section I provides data on the disproportionate representation of Black children in foster care and the disparate adoption outcomes for this group.

Section II describes the historical context of race and adoption in the U.S., with an emphasis on African American children, current law on the adoption of Black children in foster care, children adopted internationally, and American Indian/Alaskan Native children; and the social constructs related to color blindness and color consciousness on transracial adoption policy.

Section III provides an overview of the research on the outcomes for children transracially and within race, the experiences of transracial adoptive families, and the outcomes for children adopted transracially from foster care. This research is synthesized to provide a basis for assessing current policy and needed directions.

Section IV assesses the impact of MEPA and IEP on the adoption of Black children in foster care. It examines whether the law's intent - to expedite permanency through adoption for these children of color - has been realized.

Section V offer conclusions and recommendations for policies and practices that will support timely adoptions for African American children waiting in foster care, consistent with their best interests.²⁸

The report ends with a most comprehensive list of References and an Appendix: "Research Findings Related to Transracial Adoption Identity Issues & Outcomes (1995-2007)," summarizing relevant findings from twenty-one studies.²⁹

Section IV of the Report presents thoughtful, well documented responses to the five questions posed by the U.S. Civil Rights Commission at its September 2007

Institute Report, supra note 1, at 5.

²⁸ *Id.* at 11..

²⁹ *Id.* at 47-68.

hearing at which two of the report authors, Dr. Ruth Roy and Joe Kroll, provided testimony.

1. Has the enactment of MEPA removed barriers to permanency facing children involved in the child welfare system ?
2. Has the enactment of MEPA reduced the amount of time minority children spend in foster care or wait to be adopted?
3. How effectively is the U.S. Department of Health and Human Services enforcing MEPA/IEPA? What impact has enforcement had on best practices in adoption?
4. What is the impact of DHHS' enforcement of MEPA/IEP on the efforts of prospective parents to adopt or provide foster care for minority children?
5. Does transracial adoption serve children's best interest or does it have negative consequences for minority children, families and communities?³⁰

Major study findings.

- * The Multiethnic Placement Act (MEPA) of 1994 and the Removal of Barriers to Interethnic Adoption Provisions (IEP) of 1996 have not resulted in equity in adoption for African American children.
- * The “color blind” interpretations of MEPA-EP that have served as the basis for its enforcement run counter to widely accepted best practices in adoption.
- * MEPA's call for “diligent recruitment” of prospective parents who represent the racial and ethnic backgrounds of children in foster care have not been well implemented or enforced.³¹

These findings, more fully discussed in the body of the Report, clearly reveal that the primary assumptions underlying the passage of MEPA-IEP were inaccurate.

³⁰ *Id.* at 30-41.

³¹ *Press Release, supra* note 21. For full exposition of findings, see, *id.* at 20-28.

Proponents asserted that: (1) a substantial number of White families would adopt minority children from foster care; (2) an insufficient number of African American families were able or interested in adopting these children; and (3) children of color would achieve permanency in major numbers by prohibiting race-matching policies and by broadly facilitating transracial adoption.³² The Adoption Institute study establishes that the major anticipated outcome – expediting the adoption of children of color from foster care by promoting transracial adoption – has not been realized. The Report forthrightly declares:

MEPA/IEP has created a different status for African American children adopted from foster care with regard to racial/ethnic/cultural identity – a status that diverges significantly from that recognized in law for American Indian/Alaskan Native children, children adopted internationally, and children who are adopted through private adoption agencies that do not receive federal funds.

. . . For some children (internationally adopted and Native American), the law holds that race and culture matter, and it protects their racial and cultural interests; for African American children in foster care, however, the law minimizes the importance of race and culture, even to the point of punishing those who work to respect and protect racial and cultural interests consistent with best practice in adoption.³³

Study recommendations.

The Report's two major recommendations are to:

³² *Institute Report, supra* note 1, at 30 (stating assumptions advanced by prominent MEPA proponents such as Rita J. Simon, Howard Altstein and Elizabeth Bartholet “were not based on evidence that showed minority children’s longer stays in foster care were caused by policies that promoted same-race adoptive placements, or on evidence that showed transracial adoption would shorten their stays in care.”). *Id.*; see also Patton-Imani, *supra* note 8, at 840 stating:

[V]ocal proponents of “colorblind” adoptions, such as Bartholet and Kennedy, argued that racial matching policies held children of color in “foster limbo” rather than placing them in white adoptive homes. They argued that the increasing demand among whites for children to adopt made transracial adoption the solution to this “crisis.” This was one aspect of the dominant narrative used to justify the passage of the 1996 federal adoption legislation. This public narrative was constructed and fostered through the writings of a small handful of social scientists and lawyers, particularly Simon and Altstein, and Bartholet, whose voices have been very influential in public policy discussions of transracial adoption.

This narrative depends on a faulty set of assumptions about foster care, adoption, and the demand for “adoptable” children (citations omitted).

³³ *Institute Report, supra* note 1, at 39.

(1) amend the Removal of Barriers to Interethnic Adoption Provisions (IEP) of 1996 to again permit consideration of race/ethnicity in permanency planning and in the preparation of families adopting transracially; and

(2) enforce the Multiethnic Placement Act (MEPA) of 1994 requirement to recruit families who represent the racial and ethnic backgrounds of children in foster care and provide sufficient resources, including funding, to support such recruitment.³⁴

Additionally, the Report includes recommendations to:

- * Reinforce in all adoption-related laws, policies and practices that a child's best interests must be paramount in placement decisions.
- * Address existing barriers to fully engaging minority families in fostering and adopting by developing alliances with faith communities, minority placement agencies, and other minority recruitment programs.
- * Provide support for adoption by relatives and, when that is not the best option for a particular child, provide federal funding for subsidized guardianship.³⁵

As someone who firmly believes that framing discussions of TRA as a pro and con debate, is counterproductive, I hope that close attention will be given to the following paragraph in the Report's Executive Summary

Issues of race and adoption are highly sensitive, and statements relating to them are often subject to misinterpretation. The Adoption Institute wants to be clear about its underlying philosophy and purpose in writing this paper: to bring law and policy in line with sound adoption practice that addresses the relevant issues in selecting families for children and in preparing parents to successfully care for them. The purpose of this paper is *not* to: impede or prevent transracial adoptions or to promote racial matching; rather, it seeks to apply relevant knowledge to the practice of child welfare

³⁴ *Press Release*, *supra* note 21.

³⁵ *Institute Report*, *supra* note 1, at 8-9 (Executive Summary).

adoptions in order to best serve children and families.³⁶

Part III – CWLA Standards of Excellence in Adoption Practice

Admittedly, many chaffed for years at the manner in which child welfare adoption workers and agencies exercised the power to select or reject prospective adoptive parents. After completing a thorough home study, if a child were placed in a home, the agency might monitor the placement for six or more months before actually submitting a petition for final court approval. These practices at the time were justified as necessary to ensure that an adoptive placement would be appropriate, provide a permanent loving family, and be in a child’s “best interests.”³⁷

Over time, however, child welfare “best practices” as articulated by the Child Welfare League of America (CWLA) have changed to reflect new understandings about the developmental needs of the increasing numbers of children in the out-of-home care of public and private agencies. Older African American children today entering foster care are youngsters who “typically have a range of challenging needs, including prenatal exposure to alcohol and other drugs, medical fragility, a history of physical or sexual abuse, or membership in a sibling group.”³⁸

Whenever the State terminates a parent-child relationship, I think an obligation arises to help the child heal from the trauma of abuse and neglect they have experienced. Finding a “loving” family is just a beginning of what it will take to help the child grow and mature into a healthy, productive contributing adult and not become trapped in either our criminal or mental health systems.

³⁶ *Id.* at 5.

³⁷ The practices of both public and voluntary private agencies were grounded in a conviction that adoption should mirror biology. “Matching” adoptive parents and children with respect to religion, as well as physical, intellectual, social and other characteristics was standard practice. See Howe, *supra* note 1, at 177-178; *Redefining the TRA Controversy*, *supra* note 3, at 150 (describing prior child welfare practices).

³⁸ CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES 2 (2000) [hereinafter “CWLA Standards”], <http://www.cwla.org/programs/standards/cwsstandardsadoption.htm>.

The Child Welfare League very clearly reaffirmed adoption as a child welfare service when amending its 1988 Standards in 2000, by proclaiming that:

In adoption practice, the child is the primary client, and the best interests of the child is paramount in decisions concerning his or her adoption. Families are viewed as potential resources for children needing adoption, rather than as an agency's primary clients. The agency's responsibility has also shifted from investigating families to educating and preparing families to meet the needs of children placed with them.³⁹

This means that adopters and the placing agency need to develop a treatment regime directed toward eliminating the toxic effects of a child's prior life experiences, both cultural and relationships. In many instances, it will be necessary to assemble a team of professionals, who interface with the child and adoptive family in various settings - schools, community social and behavior programs, mental or medical health clinics, or churches. "Building a family by adoption is now understood to be fundamentally different from building a family biologically, with life-long implications for the adopted individual, the adoptive parents, and the birth parents."⁴⁰

The core values and assumptions that CWLA consider essential for the ethical development and delivery of adoption services are listed below. I have italicized several to emphasize the ongoing need of adoptive families to have professional help and support in order to ensure the best possible outcomes for older African American youngsters adopted from foster care. Not only must adoptive parents be open and willing to learn how to meet the individual needs of their children by working and collaborating with others, but professionals who work in adoption need to have empathy for and be able to love and respect the children and families they serve. Professionals should also be able to put the needs of the child and family ahead of their own emotional needs to make money or garner prestige and status among their professional peers.

³⁹ *Id.* at 5.

⁴⁰ *Id.*

CWLA Core Values and Assumptions Underlying Adoption Services

- * All children have a right to receive care, protection, and love.
- * The family is the primary means by which children are provided with the essentials for their well-being.
- * The birth family constitutes the preferred means of providing family life for children.
- * When adoption is the plan for a child, the extended family should be supported as the first option for adoption placement, if appropriate.
- * Adoption as a child welfare service should be focused on meeting the needs of the children to become full and permanent members of families.
- * All children are adoptable.
- * Siblings should be placed together in adoption unless serious reasons necessitate their separation.
- * Adoption is a life long experience that has a unique impact on all the persons involved.
- * *Adoption should validate and assist children in developing their individual, cultural, ethnic, and racial identity, and should enhance their self-esteem.*
- * All adoption services should be based on principles of respect, honesty, self-determination, informed decision-making, and open communication.
- * All applicants for service should be treated in a fair and nondiscriminatory manner.
- * *Changes in adoption practice, policy, and law demand professional expertise to assist birth families, adoptive families, and adopted individuals.*
- * *The knowledge, skill, and experience of professional social workers should be used in developing and providing all aspects of adoption services.*
- * *The practice of adoption, currently and in the future will require collaboration if all parties in an adoption are to be served effectively.*⁴¹

The above CWLA standards and assumptions provided the lens through which the Adoption Institute study assessed the impact of MEPA-IEP on outcomes for African American youngsters adopted from foster care. From review of recent research on parents' approaches to cultural and racial socialization and differing understandings of and comfortability with his/her ethnicity, the Adoption Institute paper notes the following:

- * Transracially adopted children face challenges in coping with being "different."

⁴¹ *Id.* at 6.

* Transracially adopted children may struggle to develop a positive racial/ethnic identity.

* A key life skill for transracially adopted children is the ability to cope with discrimination.⁴²

If adoptive parents ignore color or believe that our society is “color blind,” and deny that “[v]irulent hatred toward African Americans and other minorities continues to permeate our society,” according to Adam Pertman, they are not adequately preparing their children “for the world they’ll live in.”⁴³ Much more than loving care within the confines of an adoptive home is required for the following reasons.

The messages that a child, if adopted transracially or internationally, receives from the extended familial group of which the family is a part, from the community in which the family resides, and from the larger society are critically important. If these messages convey positive acceptance, the child’s self-esteem will grow and flourish. If the messages are negative, the child will feel devalued, rejected and/or ostracized, and the life-long emotional impact can be devastatingly crippling”⁴⁴

Conclusion

Will those, like The Institute for Justice,⁴⁵ who lobbied successfully in the 1990s for enactment of federal legislation to eliminate all consideration of race from both foster care and adoption placement decision-making now support these recommendations? Will legal scholars⁴⁶ who argued that same-race placement preferences discriminated against white prospective adopters and denied African American children in foster care an opportunity to

⁴² *Institute Report, supra* note 1, at 6-7 (Executive Summary) & 20-28 (discussing findings from research studies and reports from TRA adult adoptees).

⁴³ *Press Release, supra* note 21.

⁴⁴ *Adoption Laws and Practices in 2000, supra* note 3, at 679.

⁴⁵ *See infra*, note 14 and accompanying text (regarding activities of The Institute for Justice).

⁴⁶ *See infra* note 32 (regarding Elizabeth Bartholet and Randall Kennedy).

be adopted, now acknowledge that this was a strategy to abolish the “one-drop” rule,⁴⁷ in order to make the only expanding “crop” of healthy biracial and mixed-blood babies⁴⁸ being relinquished by white birth mothers, available for adoption by waiting white applicants?

But more importantly, in order to truly serve these older African American foster care children waiting to be adopted, will there be a keen understanding that they are indeed “special need” youngsters? Being permanently separated from their birth families can be as traumatic as the original deprivations experienced prior to removal from the custody and care of their parents. These are children whose mental health has been compromised. They can be expected to have behavioral issues that create obstacles both to being able to successfully learn in school or to easily and consistently conform to the societal and cultural norms and expectations of an adoptive family residing in a community very different from the one in which they had been raised.

Since I have no crystal ball, I cannot answer these questions with any certainty. However, I do hope that my reflections spur readers to question the efficacy of the current prohibition against any consideration of race in making domestic placement decisions for African American and other minority children of color in foster care waiting for permanent homes.

⁴⁷ In the mid-1990s, the U.S. Census Bureau had not yet amended its rules to add new racial categories. Hence the increasing number of biracial and mixed race babies being born and voluntarily relinquished by white unborn mothers were still, under the customary “one-drop” rule, considered to be Black. Newspaper columnist Carl Rowan, in a column discussing RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1999), noted in part:

My home state, Tennessee, had a constitution forbidding “the intermarriage of white persons with Negroes, mulattos, or persons of mixed blood, descended from a Negro to the third generation.” The penalty for each miscegenation was up to five years in prison.

The wording of this old Tennessee law reminds us that in most of America a person can have 87.5 percent “white blood” but society still; considers and treats them as “blacks,” and even as pariahs.

Carl T. Rowans, *That Powerful ‘Black Blood,’* BALTIMORE SUN, Sun, Oct. 28, 1994m at 19A, as quoted in *Redefining the (TRA) Controversy*, *supra* note 3, at 145 n.101.

⁴⁸ *Id.*

I also hope that close attention will be given to the Adoption Institute’s finding that the threat of enforcement sanctions for violation of MEPA-IEP’s mandate has had the chilling effect of preventing the use of widely accepted best practices in adoption.⁴⁹ When race and racial issues are “off the table” the standard practices required for international adoption⁵⁰ in order to assess a family’s readiness to adopt a child of another racial/ethnic group, consider a family’s existing or planned connection with the child’s racial/ethnic group does not occur. MEPA-IEP’s separate mandate for domestic adoption of African American children handled by agencies receiving federal funds should be challenged and repealed as unconstitutional. Not only has it created a special status for African American children whereby they do not receive equal treatment and services because agency workers are not able to utilize their skills appropriately; but it also operates like a “gag order” on adoption workers and other child advocates – infringing upon their First Amendment Rights of free speech and to use their full knowledge and training, consistent with the approved standards of the profession..

While I applaud the work of the Adoption Institute for issuing this report calling for restoration of MEPA’s original latitude to consider race, so long as it was not the **sole** factor, I worry, however, that there is still no strong societal momentum to acknowledge the roles that poverty and the long history of discrimination against African Americans play in the large numbers of black kids in foster care. To break the cycle of poverty and

⁴⁹ See *Institute Report, supra* note 1, at 36-37 (describing the fines levied in 2003 against Hamilton County, Ohio (\$1.8 million) and in 2005 (\$107,000)against the South Carolina Department of Social Services). The Report states about these that:

DHHS’ findings . . . rely heavily not only on MEPA/IEP, but also on the broader prohibition against discriminatory conduct found in Title VI of the Civil Rights Act which is referenced in MEPA/IEP. In its interpretation of these statutes, OCR has provided families seeking to adopt transracially with rights that previously were considered secondary to the “best interests of the child.” The manner in which MEPA-IEP is enforced mandates an unyielding color-blindness that is counter to the best interest of children and sound adoption practice.

Id.

⁵⁰ “**International adoptions** into the U.S. are governed by an international treaty, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, and the U.S. legislation to implement the Hague Convention, the Intercountry Adoption Act of 2000. The State Department issued implementing regulations that address children’s racial and ethnic needs, requiring that prospective parents receive training related to transracial adoption, as well as counseling related to the child’s cultural, racial, religious, ethnic, and linguistic background. The Convention took effect in the U.S. in April 2008.”

dysfunction that is passed from generation to generation, we need to find more meaningful solutions than just foster care and adoption which seem to be metaphorically like building a hospital at the bottom of the cliff, instead of precautions at the top of the cliff. What's needed? Simply, (1)**employment** opportunities that pay enough to meet a family's basic needs (food, clothing and shelter; (2)**housing** that is affordable and in neighborhoods with a range of basic social programs to support parents and families in rearing their children; (3)**educational systems** that connect with youngster through love and respect and motivate them to develop a sustained love of learning, with equal emphasis on the arts, humanities, and sciences, so once grown they can be contributors to society.

But, alas, none of this will come to pass so long as unconscious racist presumptions and expectations embedded in the U.S. Supreme Court 1856 Dred Scott v. Sanford⁵¹ decision persist among many Americans— namely, that a Negro has no needs, rights nor privilege that whites are required to respect.

⁵¹ Dred Scott V. Sanford, 60 U.S. 393, 1856 WL 8721 (1856).

