

Restoring Parental Rights: Giving Legal Orphans a Chance at a Family

By Cameryn Schmidt and Brenda Dabney

“The only reason a juvenile court terminates parental rights is to free the child for adoption. If the child is not adoptable, termination merely renders the child a legal orphan.”—*In re J.I.*, 134 Cal. Rptr. 2d 342 (App. Ct. 2003).

Creating legal orphans is a decades-old problem. Recently, legal advocates and judges working with abused and neglected children in California’s child welfare system got creative to solve it. The result was groundbreaking legislation that allows California’s juvenile courts to reinstate parental rights when in a child’s best interest. Advocates and policymakers nationwide might consider modeling similar efforts on California’s work so that more children have the option of exiting legal orphanhood.

Legal Orphan Limbo

Legal orphans are dependent children who were freed for adoption but were never actually adopted. Typically, the juvenile court’s finding that the children were adoptable was based on the availability of a specific prospective adoptive parent and after the court terminated parental rights, the adoptive placement failed.¹ Often, these children are older, have special physical or emotional needs, or are part of a designated sibling group—making it difficult to find adoptive homes for them.

According to a 2003 report by the California Department of Social Services, as of July 30, 2002, there were 5,846 legally-freed children in the state who were not yet placed in an adoptive home. For nearly 1,000 of these freed children, their case plan goal was no longer adoption. In addition, in one 12-month period, over 100 children were removed from their adoptive homes.²

Until recently, California law offered no remedy for children left

orphaned by the state. Juvenile courts lacked any authority to set aside an order terminating parental rights, even where circumstances had changed dramatically and it was clear the child would no longer be adopted. The reason was to prevent parents from collaterally attacking the termination order and delaying the child’s right to a permanent home.³ However, for children who were unlikely to ever be adopted, the law merely rendered them permanent orphans.

In 2004, responding to a 14-year-old foster child’s unsuccessful plea to undo the order terminating his parents’ rights after the planned adoption by his stepfather failed to materialize, California’s First District Court of Appeal invited the California legislature to consider allowing juvenile courts to reinstate parental rights where the child would otherwise be left a legal orphan. The court lamented: “To avoid such an unhappy consequence, legislation may be advisable authorizing judicial intervention under very limited circumstances following the termination of parental rights and prior to the completion of adoption.”⁴

California’s Solution

The court’s invitation was accepted by the Children’s Law Center of Los Angeles which, together with the Judicial Council of California, the County Welfare Directors Association of California, and other children’s advocacy organizations, began crafting a legislative solution to the legal orphan problem that impacts as many as 1,000 children each year in California. The result

was passage of Assembly Bill 519, codified in California Welfare & Institutions Code § 366.26(i)(2), which took effect January 1, 2005.⁵

The statute allows a dependent child who has not been adopted within three years of the date parental rights were terminated to petition the juvenile court to reinstate parental rights. The child may file the petition before three years have passed if the state adoption agency stipulates. The court must also have determined that adoption is no longer the child’s permanent plan goal. Assuming the child makes a prima facie showing of changed circumstances, such that it would now be in his or her best interest to reverse the termination order, the court is required to set a hearing and give notice to the former parent(s). Evidence that there is currently no one who is willing or able to adopt the child, that the parent’s circumstances have significantly improved, and/or that the child wishes to return to the parent may be used to support the petition. If the evidence is clear and convincing that the child is no longer likely to be adopted and it is in the child’s best interest to reinstate parental rights, the court must grant the petition.

Some adoption advocates were concerned that parents might purposely try to derail pending adoptions to take advantage of the new law. Therefore, the statute was tailored to allow only the child, not former parents, to bring the petition. Cal. Welf. & Inst. Code § 366.26(i)(2) also contains an express retroactivity clause so that dependent children who were left legal orphans years ago can still benefit.

Once parental rights are reinstated, the judge may order the child returned to the parent’s custody. In

that case, the court will likely order the child welfare agency to provide services to assist the family with the transition and maintain jurisdiction temporarily to monitor the child's progress. Or, the court may grant an additional reunification period for the parent. In some cases, return to a parent may not be an option. An older child may simply want his or her legal relationships with biological relatives (including inheritance rights) restored before aging out of the foster care system.

Practice Tips

- Consider whether it is in the child's interest to reinstate the rights of just one parent or both parents. Occasionally, one parent may pose such a risk that it would not be in the child's interest to allow that parent any legal rights to the child.
- Determine whether the parents' whereabouts are known for purposes of providing notice; if not, a due diligence search and notice by publication will likely be necessary. Also, determine if the court will require the agency or the child to provide notice.

Stephen's Story

The following story shows how the California legislature helped a youth in foster care. "Stephen" is a composite client drawn from a few clients who filed petitions to restore parental rights.

At age three, Stephen⁶ entered the foster care system when his mother began abusing drugs and alcohol. Recently abandoned by Stephen's father, his mother began a binge that lasted several months before Stephen was removed from her care by social workers. He was initially placed with his grandmother who, though elderly, wanted to help her daughter while she got treatment. However, after a year of failing numerous treatment programs, his mother's parental rights were terminated to free Stephen for adoption.

Due to her ailing health, Stephen's grandmother was not interested in adoption, and he was instead placed with a young couple who were thrilled at the chance to adopt and raise him as their own. However, before the adoption was finalized, the couple had a change of heart when Stephen began to develop some behavioral problems. The adoption never occurred, and Stephen was moved back into his grandmother's home.

Last winter, when 10-year-old Stephen came to the Children's Law Center of Los Angeles, and asked how he could go back to live with his now-sober biological mother. His dependency court lawyer was happy to tell him that under a new law, he could start the process to restore his mother's parental rights.

That afternoon, Stephen and his lawyer sat down and talked for a while about how he felt about losing the chance at having a "real family" when his prospective adoptive parents decided that adopting a growing boy was no longer in their life plans. He said that at each review hearing, his mother had been more clear-headed and excited about visiting him. He described how their visits started out at a local fast-food restaurant with her unsure if he liked ketchup on his fries or not and increased to overnight visits at her newly-furnished apartment in a drug-free neighborhood and a good school district.

He said his mother would show him pictures of his cousins and grandparents, after he had spent years without having any family connections. He said these things and much more, as he described what he saw as hope for a "real family" with his own mother after so many years in foster care.

After listening to Stephen, during what was probably the most important conversation he ever had with an adult, his lawyer told him that based on all he described she thought it would be possible to go

to the judge in his case, ask her to reinstate his mother's rights, and allow him to return to live with her in her new home. Stephen was overjoyed, and his lawyer felt for the first time in many weeks that she was about to play an important role in reunifying a family. Just a year ago, that would not have been possible.

A petition was filed to reverse the termination of parental rights. Given the circumstances of Stephen's legal limbo, the court agreed it was in his best interest to reinstate his mother's parental rights and return Stephen to her care.

Conclusion

The addition of Welf. & Inst. Code § 366.26(i)(2) in California has turned a previously insurmountable legal problem into a new opportunity to provide children the hope of a "real family." At minimum, it allows juvenile courts to correct a mistake that does not benefit a child who is never adopted. As lawyers representing children in the most important cases of their lives, we owe it to them to use all our talents, both legal and legislative, to find creative ways to repair their families when possible and not subject them to the unhappy consequence of life as a permanent legal orphan.

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Endnotes

¹ See *In re Jayson T.*, 97 Cal.App.4th 75 (2002), disapproved on other grounds in *In re Zeth S.*, 31 Cal.4th 396, 413-414 (2003).

² California Department of Social Services. *Adoptions in California: Agency, Independent, and Intercountry Adoption Programs Annual Statistical Report for July 1, 2001–June 30, 2002*, October 2003, 16.

³ See *In re David H.*, 33 Cal.App.4th 368 (1995); *In re Ronald V.*, 13 Cal.App.4th 1803 (1993).

⁴ *In re Jerred H.*, 121 Cal.App.4th 793, 799 (2004).

⁵ 2005 Cal. Stat. 634 (A.B. 519), § 2.

⁶ Names changed for confidentiality.