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## In the Interests of Children: The Role of the Massachusetts Department of Social Services in Private Custody Proceedings

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# IN THE INTERESTS OF CHILDREN:

## THE ROLE OF THE MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES IN PRIVATE CUSTODY PROCEEDINGS

### A CASE STUDY

CARRIE LEONETTI\*

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## I. INTRODUCTION

Academic research and writing generally focus on the theoretical doctrines of the law and the policy choices that they represent. Law school courses and continuing legal education programs primarily utilize published, appellate court decisions as the source of these doctrines. But what happens if the policy choices reflected in the statutes, administrative regulations, and appellate case law do not reflect the actual practice of trial courts and administrative agencies?

This Article explores that question as it relates to the Massachusetts Department of Social Services ("DSS") and the procedures for substitute care and custody of minor children in the Commonwealth. Part II presents three case studies based upon the author's work as a student attorney at the Harvard Legal Aid Bureau from 1998 to 2000. Efforts were taken to protect the anonymity of the case study participants, including the omission or amendment of certain identifying details; however, the relevant portions of the narratives are true.<sup>1</sup> Part III explores the basic legal doctrines used in proceedings initiated by DSS regarding the care and custody of minor children. Further, Part III analyzes the case study findings in order to compare the reality of experiences of the three clients to the theoretical legal doctrine outlined. Finally, Part III argues that the Massachusetts Department of Social Services has repeatedly circumvented the requirements governing substitute care and custody of minor children whose best interests it is supposed to protect.

According to the statute governing the protection and care of children in Massachusetts, it is the policy of the Commonwealth to strengthen and encourage family life for the protection and care of children; to assist and encourage families to use all available resources to this end; and "to provide substitute care of children only when the family itself . . . [is] unable to provide the necessary care and protection to insure the rights of any child in sound health and normal physical, mental, spiritual and moral development."<sup>2</sup> According to its own Statement of Philosophy, it is the goal of DSS to "make every reasonable effort to encourage and assist families to use

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1. Although identifying characteristics have been omitted or changed, the events and their basic chronology are true and accurate. In an additional effort to protect anonymity, the case studies consist of composites of several clients.

2. MASS. GEN. LAWS ANN. ch. 119, § 1 (West 1993); *see also* MASS. GEN. LAWS ANN. ch. 18B, § 3(A)(1) (West 1994) (requiring DSS to provide service programs to strengthen and encourage family life).

all available resources to maintain the family unit intact.”<sup>3</sup> The Department’s Principles of Service further recognize that, “consistent with the need to ensure the safety of children, the family is the best source of child rearing.”<sup>4</sup> Furthermore “substitute care is a temporary solution” requiring DSS to direct its efforts toward reunification of children and parents.<sup>5</sup>

## II. THE CASES

### A. Case #1: Amy A.’s “Neglect”

Amy A. is a single mother with one daughter, Abigail A. Before DSS became involved in their case, Amy had sole physical custody of Abby since divorcing Abby’s father, Andrew A., when Abby was an infant. During their marriage, Andrew was verbally and physically abusive to Amy. Amy called the police several times during their marriage and she filed several incident reports with the police. After they divorced and prior to DSS’s involvement with the family, Andrew had only sporadic contact with Abby and has paid no child support since the divorce, despite a court order that he do so. In fact, the Massachusetts Department of Revenue attempted to garnish his wages to collect on the substantial child support obligation that he had accumulated. Andrew never showed any serious commitment toward sharing custody or having regular, substantial visitation with his daughter and he began to be verbally and emotionally abusive toward her during the few visits that they had together. Amy, on the other hand, has been a devoted mother to Abby, who is a happy, well-adjusted little girl.

Amy works part-time and is occasionally required to work evenings or nights, although she primarily schedules her shifts so that she is at work during the day while Abby is at school. When she has to work nights, she leaves Abby in the care of her parents, Abby’s grandparents, who live nearby and have had a significant caretaking presence in Abby’s life.

In the fall of 1997, Amy developed a dependency on Percocet, a prescription painkiller and sedative. Eventually, her dependency turned into a more serious heroin addiction. After using heroin for several months, Amy recognized that she had a problem. She called her parents and told them that she wanted to check herself into an

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3. MASS. REGS. CODE tit. 110, § 1.01 (1993).

4. *Id.* § 1.02(2).

5. *Id.* § 1.02(4).

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inpatient drug rehabilitation program. Her father drove her to the hospital, where Amy checked herself in through the emergency room. During this time, Amy's parents took Abby back to their house and cared for her. After two weeks in the hospital Amy was transferred to a daytime treatment facility for substance abuse.

While Amy was undergoing treatment at the hospital, one of the hospital counselors filed a report with DSS pursuant to the Massachusetts mandatory child abuse reporting statute,<sup>6</sup> apparently believing that Amy had neglected or abandoned Abby by leaving her with her grandparents when she checked herself into the hospital. Unbeknownst to Amy, a DSS investigator went to Amy's parents' house and took Abby into protective custody prior to investigating the complaint. Pending the outcome of the Department's investigation, DSS placed Abby in foster care and notified her father. DSS then allowed Andrew to pick up Abby from the foster home for visitation.<sup>7</sup> He never returned her to the foster home. Instead, with encouragement and legal advice from the DSS social worker on the case, Andrew kept Abby in his custody and filed an emergency motion for temporary custody with the probate court, which the court granted.

A few days later, Amy received a form letter from the DSS social worker explaining that her investigation had found reasonable cause to support the allegation that Abby had been "abused and/or neglected" (at least, presumably, as the letter addressed to Amy incorrectly contained a different child's first name). The letter also informed Amy that although the allegation was supported, DSS did not find it necessary to open a file on Abby for an assessment. The letter went on to explain that an assessment is "an opportunity for [DSS] to collect information on [the] need for services and to develop a plan for how services will be delivered to [the] family."<sup>8</sup>

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6. See MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993) (requiring medical, mental health and human services personnel who, in their professional capacity, have reasonable cause to believe that a minor child is "suffering physical or emotional injury resulting from abuse" or neglect to report the child's condition to DSS immediately, legal privileges relating to confidential communications notwithstanding). The phrase "*reasonable cause to believe*" has been construed as being equivalent to the phrase "known or suspected instances of child abuse and neglect" used in the federal regulations, 45 C.F.R. 1340.3-3(d)(2)(i). See 66 Op. Att'y Gen. 157 (1975).

7. Cf. MASS. GEN. LAWS ANN. ch. 119, § 35 (West 1994) (allowing a parent, guardian, or next of kin to visit a child placed in state custody at court ordered times and conditions).

8. See MASS. REGS. CODE tit. 110, § 5.01 (1993) (defining an *assessment* as "the process of gathering and evaluating information regarding a family or individual's situation, in order to determine: (a) whether services are necessary, (b) which services would be appropriate, and (c) who could best provide the needed services

DSS closed the investigation, leaving Abby temporarily in the physical custody of her father and leaving Amy unsure of how to proceed legally to get her daughter back.

Amy successfully completed the five-week daytime treatment program and entered into a heroin recovery counseling program, which included methadone treatment that was gradually reduced each month.<sup>9</sup> Upon her discharge from the treatment program, Amy obtained legal counsel and petitioned the court either to vacate the temporary order of custody and return Abby to her care, or to appoint a guardian ad litem ("GAL") to evaluate the family.<sup>10</sup> The court denied both motions, and a custody battle ensued. Andrew repeatedly discussed the custody battle with Abby, threatening her and telling her that she would have to choose between her parents. During the time that Abby was living with Andrew, Amy arranged for her to meet with a child psychologist to help her deal with the uncertainty of the situation. However, Andrew, as her custodial parent, felt that Abby did not need treatment, and it was ultimately discontinued. After more than a year of protracted custody litigation, Andrew spontaneously agreed to return Abby to Amy's custody. The court issued a new temporary order, although, to this day, Amy still does not have permanent custody of her daughter.

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and (d) the desired outcome(s)/behavioral changes to be achieved." ). According to the DSS regulations, an assessment of a family's or individual's need for services must be completed for each new case. *See id.* § 5.02. However, DSS is not automatically required to open a case file if it finds a report to be supported by reasonable cause, as long as the child is not at an ongoing risk. *See id.* § 9.04(1) (highlighting commentary that illustrates why DSS is not required to open a case if the child is not an ongoing risk). Once the assessment is completed, the supported decision in the case automatically undergoes an administrative review. *See id.* § 5.05(1). The administrative review considers all information gathered during the assessment, as well as the original information that resulted in the supported decision. *See id.* § 5.05(2). This process determines whether the supported decision should be changed to unsupported, either because the supported decision was unreasonable or because of new information uncovered during the assessment. *See id.* If a supported decision is changed to unsupported after the administrative review, DSS expunges the supported decision from its Central Registry and the parents and the reporter are notified of the change. *See id.* § 5.05(3).

9. Amy continues to attend counseling twice a week since completing the daytime treatment program, once per week in a group session and once per week in individual therapy.

10. *See* MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989) (granting Massachusetts probate courts the power to appoint GAL's to investigate the facts in any proceeding involving domestic relations or relating to the care, custody or maintenance of minor children); *see also* MASS. GEN. LAWS ANN. ch. 201, § 34 (West 1994) (authorizing courts to appoint GALs in any other proceeding in which a minor has an interest). After the investigation, the GAL files a written report with the court. *See* MASS. GEN. LAWS ANN. ch. 215, § 56A; MASS. R. PROB. CT., Practice 32; MASS R. PROB. & FAMILY CT. Order 2-98.

*B. Case #2: Bill B.'s "Unfitness"*

Bill B. is an older gentleman with several adult children. In the 1970's, while his older children were growing up, he had a serious problem with alcohol abuse. After extensive involvement with the family, DSS terminated Bill and his first wife's parental rights and placed the children in foster care.<sup>11</sup> Since that time, Bill has undergone alcoholism treatment and has been sober for almost two decades. During his recovery, Bill has worked hard to mend his relationship with his older children.

Bill became a father again when his second wife, Barbara, gave birth to their son, Bobby. Unfortunately, Barbara has a serious drug abuse problem, primarily with crack cocaine. When Bobby was born, Bill separated from Barbara, concerned that her drug use would be detrimental to their son. Bill has had sole physical custody of Bobby since he was an infant, and has been his primary caretaker. Bill has allowed Barbara to have only minimal contact with Bobby because of his concerns with her ongoing addiction.

Because Barbara used drugs while she was pregnant, Bobby has special needs, including learning disabilities and behavioral problems. When Bobby reached school age, Bill enrolled him in special education classes. At first, Bobby struggled with controlling his behavior and completing his schoolwork. Bill retired from his job in order to stay home full time with Bobby, particularly to help Bobby with the extra work that he had to do each day to continue his progress in school. Bill and Bobby worked together each day on tutorial books that helped Bobby improve his reading and learning skills. The extra time paid off, and Bobby began to do very well in school. Bill and Bobby have a very strong bond and spent a lot of time together. Bill has expressed that he has attempted to make up for the problems that he had with his older children by being a devoted father to Bobby.

In 1998, Bill received a notice that the public housing project in which he was living was being renovated and that he would have to vacate his apartment for the duration of the construction. He attempted to locate alternate housing for himself and Bobby after receiving the notice, but was unable to do so. He also could not find a suitable homeless shelter for them, because most shelters serve either women and children or adult men. Bill could not find space for them in any shelters that allowed men and children to be housed

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11. See MASS. GEN. LAWS ANN. ch. 119, § 24 (West 1994) (authorizing DSS to terminate parental rights).

together. Not wanting his son to be homeless, he arranged for Bobby to stay with one of his older daughters, Bobby's half sister, Belulah, and her four children.

The anxiety of moving out of his home into a shelter, and not having Bobby with him, caused Bill to experience a brief relapse in his alcoholism. After Bobby was already living with Belulah and her children, Bill drank beer with a neighbor several times during the two weeks immediately preceding their move-out date. A DSS case worker stopped by his apartment during one of these relapses, claiming that she was conducting a "site visit" even though, to Bill's knowledge, DSS had never been involved with Bobby or opened a file on his family. Bobby was not even staying with him at the time. Bill suspected that Belulah, having residual anger over the tragic events of her childhood, may have called the Department and claimed that he was neglecting Bobby. The DSS caseworker went to Belulah's home and advised her to obtain a temporary guardianship of Bobby.<sup>12</sup> DSS also initiated a service plan for the family.

Shortly after the DSS caseworker visited his home, Bill entered into an inpatient substance abuse treatment program. When Belulah petitioned the court for a ninety day guardianship of Bobby, Bill consented, since he was in the rehabilitation program and still did not have permanent housing for himself and his son. He wanted Belulah to have the legal authority to make important decisions for Bobby, in such areas as his education or medical care, while he was staying with her. Both DSS and Belulah represented to Bill that the guardianship would only last ninety days. Once the guardianship was in place, DSS withdrew its service plan and closed the case. Bill continued with the service plan voluntarily even after the Department's involvement ended.

During the ninety days that Belulah had legal custody of Bobby, Bill completed his treatment program and found a new two-bedroom apartment in a secured complex for himself and Bobby. He attends Alcoholics Anonymous four times a week, therapy twice a week, and he participates in mood management classes twice a week. In addition, he voluntarily contracted with an alcohol screening service to conduct random toxicological screens (blood alcohol tests) and breathalyzers on him in order to ensure his accountability and to document his continuing sobriety. All of the results of those tests

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12. There are two main types of guardianships for minor children in Massachusetts: *temporary* and *permanent guardianships*. See MASS. GEN. LAWS ANN. ch. 201, § 14 (West 1994) (authorizing appointment of temporary guardians); MASS. GEN. LAWS ANN. ch. 201, § 2 (West 1994) (authorizing appointment of permanent guardians).



have been negative and there has been no doubt about his sobriety.

While Bobby was living with Belulah, Bill did everything that he could to have contact with him. They spoke on the phone every day and Bill visited Belulah's house frequently. During the temporary guardianship, Belulah allowed Bobby to spend weekends at his father's apartment. Bill made arrangements with Bobby's school to have special weekend homework packets put together for them, since Bobby's schoolwork had been slipping while living with Belulah. Just before the expiration of the ninety day guardianship, the entire family spent Thanksgiving together. Apparently things did not go well, and Belulah and Bill got into an argument over Belulah's childhood.

Shortly after Thanksgiving, when the temporary guardianship expired, Bill went to get Bobby from Belulah, but she refused to relinquish custody of him. She forbade Bill from communicating or visiting with Bobby, even changing her phone number so that he could not call anymore. She accused her father of being a drunk and filed a petition with the court to extend the guardianship for another ninety days. DSS supported Belulah's attempt to keep custody of Bobby, even though they had no official involvement in the matter since the Department had closed its file on Bobby. While Bill could have simply taken Bobby and left,<sup>13</sup> he chose to wait for the court's ruling in order to spare his son any trauma or instability. While Belulah's petition to extend the temporary guardianship was pending, the holidays came and went. The only contact that she allowed was a phone call from Bobby to Bill telling him that he could drop off Bobby's Christmas presents at Belulah's house. In addition, Belulah also applied for Social Security disability benefits for Bobby without Bill's knowledge or consent. Bill strongly opposed receiving the benefits because he was afraid that the benefits would stigmatize Bobby or condition him not to be self-sufficient. During the limited contact that Belulah allowed between them, Bobby has thrown temper tantrums demanding to return home with his father. Since the weekend visits were discontinued, Bobby's schoolwork deteriorated and his behavioral problems returned. Bill attempted to visit Bobby at school on several occasions, as a classroom volunteer and to have lunch with him, but the visits proved too disruptive because Bobby often threw temper tantrums when Bill left. Bill arranged for Bobby to be treated by a psychiatrist, who determined Bill to be a fit parent and recommended that Bobby be returned to

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13. Because Belulah's temporary guardianship of Bobby had expired, his legal custody had automatically reverted back to his father.

his custody.

Ultimately, the court denied Belulah's petition,<sup>14</sup> although DSS's recommendation made the process far more difficult and time consuming than necessary. By the time that he returned to his father's custody, Bobby had been living with Belulah for almost a year. While living with Belulah, Bobby lost valuable progress with his behavior and school work. In addition, during that time Bobby and Bill were unable to spend Christmas or Bobby's birthday together.

*C. Case #3: Carla C.'s "Foster Placement"*

Christine C. is the mother of three children, Carl, Carla and Carolyn C., all of whom have different fathers. Carl lives with Christine's ex-husband, Christopher C. Carla lives with her guardians, David and Danielle D., who are Christopher's sister and brother-in-law. Carolyn is an infant and lives with Christine.

Christine suffers from a mental illness that can be fairly severe when untreated. However, her illness is controllable and, when she complies with the treatment recommended by her doctors, Christine is symptom-free and stable. She was diagnosed with her illness shortly after she and Christopher divorced, when Carla was an infant. At that time, DSS became involved with Christine and Carla. The DSS case worker who conducted the assessment found Christine to be psychotic and mentally unstable. DSS sought legal custody of Carla, which the court granted. DSS gave physical custody of Carla to David and Danielle D. The court ordered DSS to establish a service plan with the goal of reuniting Christine and Carla. An initial attempt at reunification failed.

Christine sought treatment for her mental illness, and after approximately two years her psychiatrist pronounced her: stable; compliant with her treatment; no longer showing any symptoms of psychosis or depression; and able to live on her own. At that time, DSS returned Carla to Christine's care, where she remained for several months until Christine suffered a brief relapse in her mental illness. During Christine's hospitalization DSS again briefly placed Carla with David and Danielle. Later that year, after Christine's condition stabilized, DSS again placed Carla with Christine, but the

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14. The legal standard in Massachusetts for extending a temporary guardianship of a minor child without the assent of the child's parent(s) is clear and convincing evidence of current parental unfitness. See *Freeman v. Chaplic*, 446 N.E.2d 1369, 1373 (Mass. 1983); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1211, 1215 (Mass. 1980); *Petition of Kauch*, 264 N.E.2d 371, 373 (Mass. 1970). In the instant case, the Probate Court denied Belulah's petition for a second temporary guardianship of Bobby, finding that she had not proven that Bill was an unfit parent.

Department retained legal custody of Carla in order to monitor the reunification. Christine successfully complied with the DSS service plan for more than six months until she was hospitalized again.

When Christine arrived at the hospital by ambulance, a case manager notified DSS by telephone. DSS contacted David and Danielle D. to ask them if they would be willing to act as foster parents again. At that time, DSS discovered that David had an open Category I criminal charge from several years earlier. However, DSS did not remove Carla from David and Danielle's care, as the regulations require. Instead, the Department closed its case file on Carla and advised David and Danielle to seek guardianship. During the proceeding on David and Danielle's petition for temporary guardianship of Carla, DSS updated the court on Carla's status and recommended that the petition be granted. When Christine was released from the hospital one month later, she sought visitation with Carla, but David and Danielle refused to allow her to have even minimal contact with her daughter. Christine petitioned the court for visitation with Carla, but the court denied her motion.

The court appointed a GAL to conduct a sixty-day evaluation of Carla's custody situation and extended David and Danielle's guardianship of Christine for another ninety days, pending the GAL's report. Despite the court's order that the GAL complete its report within sixty days, a year-and-a-half passed before she submitted the report. During that time, David and Danielle refused to allow Christine any contact with Carla. The courts denied Christine's repeated attempts to seek visitation pending the outcome of the much overdue GAL evaluation. Also during that time, David and Danielle's temporary guardianship of Carla lapsed for more than one year, leaving Carla with no clear legal custodian since DSS had closed her case and Christine had no contact with Carla.<sup>15</sup> By the time the GAL's report was complete, Christine had been stable, compliant and symptom-free for almost two years, and was residing in a structured, residential facility where she underwent extensive therapy and job training. Despite these facts, because Carla had been in David and Danielle's custody for so long, with no contact whatsoever with Christine, a change of custody was no longer feasible.<sup>16</sup> At the

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15. Because David and Danielle's temporary guardianship of Carla had lapsed, legal custody theoretically reverted back to her mother, Christine. During this time period, Christine could have demanded that David and Danielle return Carla to her and their refusal arguably could have constituted kidnapping. However, out of concern for her daughter's well-being and desire to reach a permanent judicial determination, Christine chose to await a court order on the matter.

16. See *Cennami v. Dep't of Pub. Welfare*, 363 N.E.2d 539, 546 (Mass. 1977) (declaring that after a "sufficient duration . . . a substitute parental relationship is

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recommendation of the GAL, Christine ultimately consented to grant David and Danielle a permanent guardianship of Carla in exchange for modest daytime visitation rights. The GAL's appointment was extended for two years to allow her to monitor visitation between Christine and Carla and to ensure that visitation continues in the future.

### III. ANALYSIS

The DSS circumvented at least one major substantive requirement or procedural safeguard in each of the three cases presented in Part II of this Article. That circumvention had tangible impacts, in each case, on the custody of the children involved. Part III compares the practices employed by DSS in these three cases to the procedural system envisioned by the Massachusetts legislature and appellate courts to demonstrate that the envisioned system is not being realized.

#### A. *Removal of a Child from a Parent's Custody*

Massachusetts law provides that "[a]ny child under eighteen years who is left in any place and who is seemingly without a parent or legal guardian available shall be immediately reported to the department [of social services], which shall proceed to arrange care for such child temporarily" and that DSS shall "forthwith cause search to be made for parent or guardian."<sup>17</sup> It further provides that "if [the] parent or guardian cannot be found or is unable or refuses to make suitable provisions for the child, the department [of social services] shall make such lawful provision as seems for the best interest of such child within the provisions of this chapter."<sup>18</sup>

Courts have interpreted the Due Process Clause to require that a parent be afforded a hearing to contest DSS caseworker's decisions that a parent has not made suitable provisions for a child pursuant to this subdivision.<sup>19</sup> The hearing must be provided before a child is removed from the custody of her natural parents. The removal of a

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recognized by our law to be a legally protected right." ).

17. MASS. GEN. LAWS ANN. ch. 119, § 23 (West 1993).

18. *Id.*

19. See *White v. Minter*, 330 F. Supp. 1194, 1197 (D. Mass. 1971) (holding that a mother's constitutional rights under the Due Process Clause of the Fourteenth Amendment were violated because six months elapsed before she was provided "an opportunity to appear before any tribunal, whether administrative or judicial, to contest" a case worker decision that the mother was unfit); see also U.S. CONST. amend. XIV, § 1 ("Nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .").

child from nonconsenting parents must be based upon a judicial determination that the parents are currently unfit to care for the child.<sup>20</sup>

In none of the three cases presented above were these procedures followed. Clearly, both Amy and Bill made "suitable provisions" for their children by leaving them in the care of reasonable substitute caregivers (grandparents in Amy's case and an adult sister in Bill's, both of whom had extensive caregiving experience). In both cases, the caretaking arrangements were temporary and were implemented because the parents were undergoing inpatient treatment programs where their children could not be present. In none of the three cases, prior to the removal of their children from their custody, was a hearing provided for the parents to contest that the provisions made for their children by DSS were unsuitable.

In none of the three cases presented above was there, or has there ever been, a judicial determination of parental unfitness. In Amy's case, the court granted Andrew temporary custody under the divorce statute without ever making a determination of Amy's fitness. In Bill's case, the first temporary guardianship was granted to Belulah with his consent and the second was ultimately denied by the court precisely because there was no evidence that he was an unfit parent. In Christine's case, she was not present when David and Danielle obtained the first temporary guardianship of Carla because she was hospitalized and so, since the petition was without objection, no determination of unfitness was required. When the temporary guardianship was extended, it was without a determination of unfitness pending the outcome of the GAL evaluation.<sup>21</sup> The

20. See *Adoption of a Minor*, 438 N.E.2d 38, 43 (Mass. 1982). Current parental unfitness must be established by clear and convincing evidence, whether determined under the care and custody statute, MASS. GEN. LAWS ANN. ch. 119, §§ 21-39 (West 1993), or under the adoption statute, MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1998). See MASS. GEN. LAWS ANN. ch. 119, § 29B (requiring a determination of the "child's best interests" and that "reasonable efforts to preserve and reunify families" be made when considering the future status of a child that has previously been removed from nonconsenting parents); *In re Care and Protection of Laura*, 610 N.E.2d 934, 938 (Mass. 1993); *In re Adoption of Carlos*, 596 N.E.2d 1383, 1389 (Mass. 1992); *In re Care and Protection of Martha*, 553 N.E.2d 902, 907 (Mass. 1990); *In re Care and Protection of Stephen*, 514 N.E.2d 1087, 1092 (Mass. 1987) *Care and Protection of Three Minors*, 467 N.E.2d 851, 857 (Mass. 1984) (holding that proof of unfitness by clear and convincing evidence is constitutionally required); see generally *Santovsky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that, before a state may remove a child completely from the care and custody of natural parent(s), due process requires that the state support its allegation of unfitness by at least clear and convincing evidence).

21. Christine's attorneys at the time argued that, given the legal presumption against a guardianship over the opposition of the parent, absent clear and convincing evidence of parental unfitness, custody should revert back to Christine pending the GAL's evaluation. Their opposition was dismissed. Christine subsequently filed an interlocutory appeal to a single justice of the Court of Appeals,

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permanent guardianship was granted with Christine's consent, which she gave in exchange for visitation rights with Carla and in recognition of the fact that the passage of so much time had made a finding of unfitness likely.

### 1. *Neglect*

Generally, DSS involvement with a family is initiated when the Department receives a report of suspected child abuse or neglect.<sup>22</sup> DSS regulations define *neglect* as the "failure *by a caretaker* . . . to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care . . . ." <sup>23</sup> The definition of *caretaker* includes a guardian or "any other person entrusted with the responsibility for a child's health or welfare in the child's home, [or] a relative's home . . . ." <sup>24</sup>

It is hard to imagine how the custodial arrangements made by Amy and Bill for their children could constitute neglect under this standard. In fact, the definition of caretaker specifically entails substitute caregiving arrangements. Furthermore, in Bill's case, in order for his actions to constitute neglect, it would have to be because the caregiver with whom he left Bobby was inadequate. This hardly makes sense given that the caregiver was Belulah, the person with whom DSS sided in the guardianship proceedings.

DSS conducts an initial *screening* of all reports of alleged abuse or neglect that it receives.<sup>25</sup> If DSS receives a report of subject matter or events that do not constitute child abuse or neglect, it is "screened out."<sup>26</sup> The reporter is advised that the report is not appropriate and DSS must treat the report as a request for information rather than a report of abuse or neglect.<sup>27</sup> If DSS receives a report of suspected child abuse or neglect that it finds reliable, it is "screened in" and the Department must investigate and evaluate the reported information

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which was denied without hearing.

22. See MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993) (providing for mandatory reporting for certain professionals as well as voluntary reporting by anyone else who has reasonable cause to believe that child abuse or neglect is occurring).

23. MASS. REGS. CODE tit. 110, § 2.00 (1993) (*italics in original*).

24. *Id.*

25. See tit. 110, § 4.21.

26. See *id.*

27. See tit. 110, § 4.20(3); see *generally* tit. 110, § 3.01 (providing information and referral services).

within ten days.<sup>28</sup> After the completion of its investigation, DSS must make a determination of whether the allegations of child abuse or neglect are *supported* or *unsupported*. A finding of *supported* means that DSS “has reasonable cause to believe that an incident . . . of abuse or neglect by a caretaker *did occur*.”<sup>29</sup>

In Amy’s case, it seems that the DSS employee who received the report of neglect that was filed by the hospital counselor could have screened it out because it did not constitute neglect or abuse. At a minimum, the report should have been found to be unsupported once the caseworker visited Abby in the loving home of her grandparents. In both Bill and Christine’s cases, DSS never conducted an investigation of the alleged abuse and neglect. Instead, they closed their files on Bobby and Carla and instructed their caregivers to seek custody through private proceedings. In Amy’s case, once DSS found that the allegations of neglect were supported, it closed the case file without taking any further action in the matter and counseled Andrew on how to obtain custody of Abby through the probate and family court.

Even if one or all of the children involved in these three cases were abused or neglected, it seems illogical at best for DSS to proceed in this manner. In the cases of Amy and Bill, they had both been their child’s primary, if not sole, caretakers for Abby and Bobby’s entire lives. Even if the allegations in these cases were supported, DSS involvement, coupled with a service plan for providing and monitoring services while leaving Abby and Bobby with their primary caretakers, certainly would have been preferable to an unmonitored transfer of custody to a “deadbeat dad” in one case and a nonparent in the other. Furthermore, if DSS had genuine concerns for Abby and Bobby’s safety, it should have retained ongoing supervision of their custody by keeping their cases open, which is, after all, the underlying purpose of the Department and of its care and protection authority.

## 2. Care and Protection Proceedings

The standard procedure for committing a child to the care and protection of DSS is governed by Massachusetts General Laws chapter

28. See MASS. GEN. LAWS ANN. ch. 119, § 51B (West 1993); MASS. REGS. CODE tit. 110, § 4.31 (1993). There is a shorter time frame if the report is designated an *emergency report* by the DSS screener because “the reported condition poses a threat of immediate danger to the life, health or physical safety of the child.” Tit. 110, § 4.25. Emergency reports must be completed within twenty-four hours after receipt of the report of abuse or neglect. See tit. 110, § 4.26, 4.31.

29. Tit. 110, § 4.32 (*italics in original*).

119, section 24. A petition for care and custody must be brought in the juvenile court department and must allege that a minor child is without necessary and proper physical or educational care and discipline; is growing up under conditions damaging to her sound character development; or is lacking proper attention of a parent or guardian; or whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care, discipline or attention.<sup>30</sup> In such a case, the child should be brought before the court, notice should be issued to DSS and summonses should be served upon both parents to show cause why the child should not be committed to DSS custody.<sup>31</sup> Custody of the child is to be transferred to DSS or a foster home only if the juvenile court finds “reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child from serious abuse or neglect,” unless the parents consent to the transfer.<sup>32</sup>

Care and protection proceedings, pursuant to Massachusetts General Laws chapter 119,<sup>33</sup> were not initiated in either Amy or Bill’s cases above. Instead, DSS abdicated its responsibility in all three cases and closed them by ushering the substitute caretakers into private custody proceedings. In the cases of Amy and Bill, it seems unlikely that DSS could have succeeded in obtaining court-ordered custody of Abby or Bobby. By ushering them into a temporary custody arrangement and temporary guardianship, respectively, DSS deprived them of custodial relationships with their primary caretakers, both of whom had strong parental bonds with their children. Furthermore, the legal standard for transferring custody in Amy’s divorce case is far less strict than the standard for terminating parental rights, even temporarily, through a care and protection proceeding.<sup>34</sup> This less stringent standard helps to explain how Abby

30. See MASS. GEN. LAWS ANN. ch. 119, § 24 (West 1994).

31. See *id.*

32. *Id.* As a condition of receiving federal foster care funds, states are required to make reasonable efforts to preserve and reunify families prior to the placement of the child in foster care in order to eliminate the need to remove the child from her home and/or to enable the child to return home safely. This requirement does not apply if the parent has subjected the child to “aggravated circumstances” (e.g. abandonment, torture, chronic abuse or sexual abuse). See Adoption and Safe Families Act (“ASFA”), 42 U.S.C. § 671 (1994), *amended by* 42 U.S.C. § 671(a) (Supp. V 1999). In response to ASFA, Massachusetts now makes the safety of the child the paramount factor in the decision whether or not to remove her from her home. See 1999 Mass. Acts ch. 3.

33. See MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993).

34. Probate and family courts use the more nebulous “best interests of the child”



could have spent a year in the custody of a person who never even had regular visitation with her, much less contributed to her material needs. Furthermore, in practice, the old adage of “possession is nine-tenths of the law” seems to govern many child custody proceedings between private parties in Massachusetts in a way that it does not in DSS cases.<sup>35</sup> Judges frequently look to the person with whom the child is currently residing for an indication of which parent has the stronger bond and is the child’s primary caregiver.<sup>36</sup> In Carla’s case, it might have been reasonable for DSS to conclude that Christine was not able to provide for her child’s best interests, at least temporarily during her hospitalization. However, there is no way to know that now, given that there was no opportunity for a court to look at evidence of Christine’s alleged unfitness or to examine the appropriateness of David and Danielle’s home.

In addition to the different substantive legal standards used to award custody in care and protection proceedings as opposed to custody proceedings between private parties, there is also a fundamental procedural difference. In Massachusetts, parents have the right to the assistance of counsel at all hearings relating to care and protection proceedings.<sup>37</sup> This entitlement does not extend to private custody proceedings such as Amy and Andrew’s divorce or the guardianship proceedings in Bill and Christine’s cases.<sup>38</sup>

### 3. *Emergency Removal*

Massachusetts law has a provision for the emergency removal of a child that permits a child to be taken into DSS custody without a court proceeding.<sup>39</sup> However, according to DSS regulations, these

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standard, which is measured by a preponderance of the evidence, in apportioning custody among divorced parents, rather than the current parental unfitness by clear and convincing evidence that is required when the state is a party to a custodial proceeding. See *supra* note 20 and accompanying text.

35. See generally *In re Adoption of Carlos*, 596 N.E.2d 1383, 1388 (Mass. 1992) (noting that the passage of time can create a recognized right to custody).

36. See *id.* (noting that the child’s regular visitation with, and attachment to, his mother weighed heavily in the court’s denial of adoption without parental consent).

37. See MASS. GEN. LAWS ch. 119, § 29 (1993); *In re Care and Protection of Stephen*, 514 N.E.2d 1087, 1090 (Mass. 1987).

38. The theory behind providing assistance of counsel in all proceedings relating to the custody of children to which DSS is a party is that these proceedings involve the coercive intervention of the state into the private sphere of family, which is not true in custody disputes between two private parties who, at least theoretically, already have a familial interest in the child whose custody is at stake. See *In re Stephen*, 514 N.E.2d at 1090. However, this distinction seems to break down in cases like the three presented here, where state intervention initiates and supports the private petitions for custody, although DSS is not officially a party to the proceedings.

39. See MASS. GEN. LAWS ANN. ch. 119, § 51B (West 1993) (authorizing emergency

emergency removals are “extreme measure[s] requiring dire circumstances.”<sup>40</sup> A child may be immediately taken into DSS custody if the social worker finds reasonable cause to believe:

- (a) that a condition of serious abuse or neglect (including abandonment) exists, *and*
- (b) that, as a result of that condition, removal of the child is necessary in order to avoid the risk of death or serious physical injury of the child, *and*
- (c) that the nature of the emergency is such that there is inadequate time to seek a court order for removal.<sup>41</sup>

If an emergency removal has occurred, DSS must file a written report stating the reasons for such removal and must file a petition for care and custody of the child, pursuant to Section 24 of Chapter 119.<sup>42</sup>

It appears that this emergency removal procedure is what DSS invoked in Amy’s case, since the DSS case worker appeared at Amy’s parents’ house without warning and immediately took Abby into custody, delivering her to a foster home. However, the Department’s seizure of Abby from her grandparents was inappropriate for at least two reasons, one substantive and one procedural. First, it seems highly unlikely that Abby’s custodial arrangement with her grandparents while Amy was in the hospital meets the three criteria listed above. There is no evidence whatsoever to suggest that Abby’s grandparents were anything other than loving caregivers with a great deal of experience in providing for Abby’s needs. Second, DSS never filed a petition for care and custody of Abby in the court. Instead, the Department simply allowed Andrew to remove Abby from foster care for “visitation” and never return her. It is hard to imagine how that procedure could ever be the best way of promoting a child’s welfare, whether the allegations of abuse or neglect are substantiated or not.

### *B. Ongoing DSS Involvement and Services*

If an abused or neglected child has been committed to the custody of DSS pursuant to Massachusetts General Laws chapter 119, DSS has the responsibility to care for her until her permanent custody is determined.<sup>43</sup> On the other hand, DSS must close a case when the

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removal if there is reasonable cause to believe it is necessary to protect the child from further abuse or neglect).

40. MASS. REGS. CODE tit. 110, § 4.29(1) (1993).

41. *Id.* § 4.29(2) (emphasis in original).

42. See MASS. GEN. LAWS ANN. ch. 119, § 51B; MASS. REGS. CODE tit. 110, § 4.29(3).

43. See MASS. GEN. LAWS ANN. ch. 119, § 51B (West 1993).

child is adopted or placed with a permanent legal guardian.<sup>44</sup> DSS failed to fulfill this responsibility in all three cases presented here.

In Abby's case, DSS closed the file based upon a temporary order of custody to Andrew. In Bobby's case, DSS closed the case after Belulah had obtained a temporary, ninety day guardianship of Bobby. In Carla's case, DSS dropped her off at David and Danielle's home and closed her case without any official determination of her custody, even a temporary one. This created a situation in which Carla was living with David and Danielle per DSS' instructions. However, Carla was still presumed to be in the legal custody of Christine, because no one else had legal custody of her, until David and Danielle obtained a temporary guardianship. This was true again for the more than one year period when that temporary guardianship expired but Carla continued to live with David and Danielle. Moreover, David and Danielle did not even possess the legal authority to make educational decisions or to authorize medical treatment for Carla without a valid guardianship. It is also important to bear in mind the fact that DSS closed Carla's case rather than appointing David and Danielle as foster parents because David was ineligible to be a foster parent because of his record of violent criminal activity.<sup>45</sup>

DSS is required to establish and monitor service plans for children in its custody, which it must evaluate in regard to its effectiveness in protecting the child from further abuse or neglect.<sup>46</sup> This is another disadvantage of DSS dropping children in private custody arrangements and closing their cases. If the suspicions of abuse or neglect in any of these cases were meritorious, then the families, and

44. See MASS. REGS. CODE tit. 110, § 9.02(2) (1993).

45. See MASS. GEN. LAWS ANN. ch. 28A, § 10A (West 1994) (prohibiting the placement of children in foster homes where an occupant of the home has a criminal record involving violence).

46. See MASS. REGS. CODE tit. 110, § 9.02(2); MASS. GEN. LAWS ANN. ch. 119, § 51D (West 1994 & Supp. 2001); MASS. REGS. CODE tit. 110, § 6.02 (1993). A *service plan* is:

a written document which describes in detail the tasks to be undertaken and the services to be provided to either: (1) strengthen a family unit; or (2) provide an alternative permanent home for a child who has been removed from his or her home; or (3) enable a mature minor to live independently.

MASS. REGS. CODE tit. 110, § 6.01 (1993). The service plan also provides "a basis for assessing the progress of family members in meeting the goal of the service plan." *Id.* The service plan must be completed within ten days after the case assessment is completed, but in no event later than fifty-five working days after the opening of a case. See MASS. REGS. CODE tit. 110, § 5.02; see also MASS. REGS. CODE tit. 110, § 6.06(1). For the purposes of developing a service plan, the opening of a case occurs at the time of the decision that a report of suspected abuse is supported or a court order giving custody to DSS. See MASS. REGS. CODE tit. 110, § 6.06(3). Except in an emergency, every family must have a service plan prior to placing a child in substitute care. *Id.* § 6.06(2). The service plan must, as much as possible, be jointly developed by DSS and the clients receiving the services. *Id.* § 6.07(1).

particularly the best interests of the children, would have been best served by ongoing DSS involvement and support.<sup>47</sup> If the allegations of abuse or neglect were without foundation, then the children would have been better off had they not been removed from their primary caretakers, particularly in Amy and Bill's cases where Abby and Bobby were both returned home eventually. Forcing families to undergo multiple court proceedings relating to the temporary custody of children is far less conducive to the goal of providing children with stable and permanent custodial environments than a commitment to removing children only when that removal is necessary for their welfare and supporting the existing family structures when it is not.

### C. Foster Care

DSS is required to conduct an initial screening process for any prospective foster parent to determine if the individual and all household members meet the Department's initial eligibility criteria.<sup>48</sup> This initial screening includes a criminal offender records information ("CORI") check for all adult household members.<sup>49</sup> Among other things, the eligibility criteria mandate that a prospective foster parent is ineligible if he/she, or a member of her household, has a criminal record that, in the judgment of the Department, bears adversely upon the individual's ability to assume and carry out the responsibilities of being a foster parent.<sup>50</sup> According to the DSS screening policy, an individual will also be ineligible if he/she has been convicted of a Category I criminal charge, or any other violent crime, whether or not that charge remains open.<sup>51</sup> In order to be licensed as a foster parent, an individual "must be willing to accept and support the child's relationship with his/her parents and siblings."<sup>52</sup> Foster placements are supposed to be made in the best interests of the child and in a manner conducive to the safe and timely return of the child to her

47. See MASS. REGS. CODE tit. 110, § 7.128 (1993).

48. See MASS. REGS. CODE tit. 110, § 7.100(2) (1993).

49. See MASS. GEN. LAWS ANN. ch. 28A, § 10A (West 1994).

50. See MASS. REGS. CODE tit. 110, § 7.100(3)(a). Pursuant to the Social Security Act, as amended by ASFA, federal law also requires states to perform criminal record checks on all prospective foster parents before the child's foster placement is approved and forbids placement with a foster parent who was convicted of a felony involving violence. See 42 U.S.C. § 471(a) (1994), amended by 42 U.S.C. § 671 (Supp. V 1999).

51. See MASS. GEN. LAWS ANN. ch. 28A, § 10A (West 1994); DSS Policy #86-014 (stating that if the result of the screening process indicates any Category I criminal charge, the result will be that "no child shall be placed in said home").

52. See MASS. REGS CODE tit. 110, § 7.104(1)(h) (1993).

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original home.<sup>53</sup> In assessing what is in a child's best interest, DSS is required to consider, among other things, the close proximity to the child's parent(s) and the ability for frequent visits between the child and her parent(s).<sup>54</sup> If DSS obtains information after the time of the initial foster care eligibility screening process that would have excluded the individual from being a foster parent, DSS must discontinue the foster care assessment and notify the individual that she is ineligible.<sup>55</sup> If the child was already placed with the ineligible foster parent, she must be removed from the home immediately.<sup>56</sup>

DSS is also required to conduct foster care reviews ("FCRs") within six months after a case is opened and every six months thereafter.<sup>57</sup> This is the phase in Carla's case where DSS most flagrantly violated its own regulations. David and Danielle were clearly not eligible to be Carla's foster parents. Not only did David's criminal record make the family ineligible,<sup>58</sup> but their repeated expressed desire for Carla to terminate all contact with Christine independently prevented their eligibility.<sup>59</sup> In addition, they were not "willing to accept and support" Carla's relationship with Christine, and David and Danielle repeatedly badmouthed Christine to Carla and insisted that Carla refer to them as "mommy" and "daddy." They also repeatedly told Carla that they wished to adopt her permanently. Furthermore, David's criminal conviction was more than ten years old, resulting in David and Danielle being ineligible to be foster parents for Carla the first two times that she was placed with them.<sup>60</sup> Presumably, DSS must not have conducted the required CORI search of the household residents at all during the first two placements.

Once the caseworker assigned to Carla's case discovered that David and Danielle were ineligible to be foster parents, she should have

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53. See *id.* § 7.101.

54. See *id.* § 7.101(1).

55. See *id.* § 7.106(4).

56. See *id.* § 7.108. While DSS is generally forbidden from placing a child in any foster home prior to the placement being approved, there is an exception for the emergency placement of children with relatives or close family friends. See MASS. GEN. LAWS ANN. ch. 28A, § 10A (West 1994); MASS. REGS. CODE tit. 1.10, § 7.108 (1993). However, because DSS is prohibited by law from placing children in unapproved settings, if the Department later discovers that the foster home is ineligible, the child must be removed immediately. See MASS. GEN. LAWS ANN. ch. 28A, § 10A; MASS. REGS. CODE tit. 1.10, § 7.108 (comment).

57. See MASS. REGS. CODE tit. 1.10, §§ 6.10, 6.12 (1993).

58. See *supra* notes 56-57 and accompanying text.

59. See MASS. REGS. CODE tit. 1.10, § 7.104(1)(h) (1993) (requiring that foster parents support a child's relationship with the child's natural parents).

60. See *supra* notes 52-53 and accompanying text (detailing criminal background check requirements).

placed Carla in an eligible foster home. Simply closing the case while leaving Carla in the physical care of David and Danielle and encouraging them to seek guardianship on their own was entirely inappropriate, and in direct violation of the Massachusetts Code of Regulations.<sup>61</sup> If DSS thinks that its regulations for foster home eligibility are too strict or rigid or otherwise not in the best interests of the children it is seeking to place, DSS should change the regulations, not circumvent them in the case of individual placements like Carla's.

#### *D. Final Disposition*

Absent written findings of extraordinary circumstances requiring continued judicial intervention, the court must enter a final order of adjudication and permanent disposition no later than fifteen months after the date that the case was first filed.<sup>62</sup> That deadline may be extended once for a period of not more than three months if the court makes a written finding that the parent has made consistent and goal-oriented progress likely to lead to the child's return to the parent's care and custody.<sup>63</sup> The court must make written findings in support of its final order of adjudication and permanent disposition within a reasonable time of the order, including written findings of fact and conclusions of law.<sup>64</sup> The committing court must reconvene within twelve months of its original grant of custody, commitment, or transfer of responsibility of a child to DSS, as well as periodically thereafter, while the child remains in the care of the DSS, to determine the future status of the child.<sup>65</sup> This determination includes whether or not it is in the child's best interests to be returned to the parents; to be placed in another substitute placement; to be placed for adoption; to have a guardian other than DSS appointed; or to continue in substitute care on a permanent or

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61. See MASS. REGS. CODE tit. 110, § 1.02 (1993) (stating that "[a]s soon as it is determined that reunification is not feasible, the Department shall take swift action to implement another permanent plan, such as adoption or guardianship.").

62. See MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1994). In response to ASFA, Massachusetts recently enacted a new requirement that a permanency hearing be conducted within twelve months of a child's commitment to the state's custody. See 1999 MASS. ACTS ch. 3. At the hearing, the child either must be returned to the custody of her parents or placed in an adoption, guardianship or another permanent custodial arrangement. See *id.*

63. See MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1994).

64. See *id.* § 27.

65. See *id.* § 29B; 1999 MASS. ACTS ch. 3, § 12 (amending ch. 119, § 29B to its present form).

long term basis in a specific placement.<sup>66</sup>

Because DSS evaded the ordinary care and protection process and closed its case files on these three children, the timetable requirements for a final disposition of child custody matters was circumvented. The time requirements of Chapter 119 exist to promote stability in children's custodial arrangements. They also exist because dragging families into multiple court proceedings is time consuming, expensive and emotionally disruptive (i.e., not in the best interests of families and children, which DSS is supposed to ensure). In Abby's case, it took approximately one year for her physical custody to transfer back to Amy and, to this day, that custody remains temporary. Although Amy has appeared before several different judges, the court still has not entered a final order returning Abby's permanent custody to her. In Carla's case, the parties spent years waiting for an overdue GAL evaluation, during which time Christine had no contact with Carla, even after the birth of Carla's sister, Carolyn. Carla met her baby sister for the first time when she was six months old. The only reason that visitation began at all was because the case was transferred to a new judge, who expressed disbelief that such a long series of temporary guardianships had been extended without a final resolution, due to a scheduling anomaly. The lost years of contact between Christine and Carla have devastated their relationship. Carla now calls Danielle her mother and is afraid to spend time with Christine. The best that either Christine or Carla can hope for at this point is that they can visit one another regularly. Even if it is appropriate that Carla reside with David and Danielle, the GAL made clear in her final report that the lack of visitation with Christine in the intervening years has been traumatic for Carla. If Christine were to experience a relapse of her mental illness, visitation should only be suspended as long as it is required for her to regain stability. Unfortunately, the GAL's report will probably not even be given to DSS and her suggestions certainly are not binding on the Department with respect to its future behavior. In fact, the GAL report is impounded with the probate court and can only be accessed by court order.

The court may make any appropriate order to further the child's best interests, provided that the court has determined that, as appropriate, DSS has made reasonable efforts prior to the placement of the child in foster care to prevent or eliminate the removal of the

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66. See MASS. GEN. LAWS ANN. ch. 119, § 29B (West 1994); *see also* 1999 MASS. ACTS ch. 3 (noting that effective March 31, 1999, a written determination is required if DSS decides not to attempt reunification).

child from her home.<sup>67</sup> DSS must also have made, as appropriate, reasonable efforts after the placement of the child in foster care to make it possible for the child to return to her home.<sup>68</sup> Whenever a court grants custody of a child to DSS, it must certify that the continuation of the child in her home is contrary to her best interests and must determine whether DSS, as appropriate, has made reasonable efforts “to prevent or eliminate the need for removal from the home” before the child is placed with DSS.<sup>69</sup>

In none of these three cases was there any demonstration that foster care was necessary, much less was there any effort on the part of DSS prior to placement to keep these children in their homes. By closing the case files as soon as temporary custody had transferred to substitute custodians, DSS relinquished any obligation to attempt to reunify these three families that it had split apart.

### 1. *Guardianships*

The Department’s policy with respect to sponsoring guardianships for children in their custody is that they will sponsor them only for children who are not likely to return to their parents and who, for whatever reason, are not candidates for adoption.<sup>70</sup> Clearly, DSS failed to consider, much less establish, the presence of its criteria for sponsoring a private guardianship in the cases of Bobby and Carla. First, Bobby quite clearly was able to return to Bill’s custody and Carla might have been able to be reunited with Christine if DSS had not

67. See MASS. GEN. LAWS ANN. ch. 119, § 29C (West 1994).

68. See *id.*

69. *Id.* § 29C.

70. See MASS. REGS. CODE tit. 110, § 7.300 (1993); see also *id.* § 7.301 (stating that the specific criteria for DSS sponsorship of a guardianship are that: (1) the child is unable to return to her biological parents; (2) there is no reasonable likelihood that the child will be adopted; (3) the child has resided with the potential guardians for at least one year; and (4) the child is at least twelve years old). However, the third and fourth criteria are waivable if DSS determines that it is in the child’s best interest to do so. See *id.* § 7.302. Once DSS has determined that a child meets the criteria for sponsorship, several additional implementation steps must be completed. First, the DSS social worker must meet with the child and the potential guardian to present the guardianship plan for their consideration and approval. See *id.* § 7.302(2). Second, the social worker must make reasonable and diligent efforts to contact the child’s parents and inform them of the proposed guardianship proceeding, their right to contest the proceeding and their right, if indigent, of court-appointed counsel. See *id.* § 7.302(3). Third, a member of the DSS legal staff must prepare the appropriate court papers. If the parents of the child have not consented to the guardianship in writing, they will be given notice as required by law. See *id.* § 7.302(4). Fourth, a member of the DSS legal staff must initiate and prosecute all court proceedings necessary to finalize the guardianship. The guardianship plan must be presented to the court for review as part of the proceeding, and the plan must address the appropriateness of the proposed placement and suitability of the proposed guardians. See *id.* § 7.302(5).



closed her case at the very beginning. In the several years since David and Danielle were awarded the first temporary guardianship, Christine had been compliant with her treatment program, stable and living on her own. Second, there is no evidence that DSS conducted any assessment of whether it was likely that Bobby or Carla would be adopted, or whether that would even be desirable. Third, neither Bobby nor Carla had resided with Belulah or David and Danielle, respectively, at the time they sought and DSS supported their guardianships. Fourth, both Bobby and Carla were substantially younger than twelve years old at the time that DSS supported the petition for their guardianships. Fifth, none of the procedural requirements of the DSS regulations regarding DSS participation in the planning and filing of guardianship paperwork was met.

## 2. Visitation

A parent whose child has been placed in foster care by DSS has the right to petition the probate court for information regarding the child's placement and for the right to visitation with the child if it is consistent with the welfare of the child.<sup>71</sup> DSS is required to plan and to promote regular and frequent visitation between children in foster care and their parents and/or siblings to the extent that such visitation is consistent with the family's service plan.<sup>72</sup> In order to terminate or deny visitation rights to a parent whose child is in the court-ordered custody of DSS, a court must make specific findings that such visits would harm the child or the public welfare.<sup>73</sup>

Because DSS closed the case files on Abby, Bobby and Carla, their parents had none of the procedural safeguards to ensure the continued contact that would have benefited for the well-being of these children. Andrew refused to allow Amy anything but minimal visitation for the year that Abby lived with him. Amy's initial attempts to seek court-ordered visitation were denied. After the expiration of her initial ninety day guardianship of Bobby, until the court finally denied her petition to extend guardianship, Belulah allowed Bill no contact with Bobby, even during the Christmas holiday. David and

71. See MASS. GEN. LAWS ANN. ch. 119, § 35 (West 1994).

72. See MASS. REGS. CODE tit. 110, § 7.128 (1993).

73. See *In re Custody of a Minor* (No. 2), 491 N.E.2d 283, 285 (Mass. 1986); *In re Custody of a Minor* (No. 2), 467 N.E.2d 1286, 1290 (Mass. 1984) (finding that the mother's visitation rights were wrongfully terminated because "[t]he judge failed, however, to make specific and detailed findings regarding the psychological effect of returning the child to the custody of her parents."); see also MASS. REGS. CODE tit. 110, § 7.128 (1993) (explaining that DSS will not terminate visitation unless the matter is brought before a judge or unless a parent's right to notice and consent of adoption has been dispensed).

Danielle prevented Christine from having any contact with Carla for several years while she was in their physical custody, even though they did not even have legal custody of her at that time. The lack of contact between Christine and Carla during that time period was a primary factor in Christine's inability to regain custody of Carla once her mental illness had stabilized. The burden of seeking visitation with a child who is in the custody of a private party is on the movant, rather than on the state as it is when DSS seeks to deny visitation to a parent whose child is in the Department's custody.<sup>74</sup> Consequently, the fact that DSS never formally sought court-ordered custody of Abby, Bobby or Carla was a crucial factor in their lack of contact while not in their custody.

### *E. Children's Privacy*

All care and custody proceedings instituted by DSS pursuant to Chapter 119 of the Massachusetts General Laws are conducted in designated juvenile sessions of the court, which are closed to the general public, and the names of the persons before the court in any such hearing are impounded.<sup>75</sup> This is not true of custody proceedings between private parties, such as guardianships and custody hearings incident to a divorce, which are conducted in the regular session of the probate court and are open to the public.<sup>76</sup> The parties' names are used on the docket, the files are a matter of public record and anyone with a driver's license can access all of the filings and obtain a tape recording of any hearing.<sup>77</sup> This is true even though the subject matter of a child custody proceeding is likely to be the same whether DSS is a party or not.<sup>78</sup> Even GAL evaluations, which are supposed to be available only to the parties and their attorneys, are frequently misfiled in the public portions of the record.<sup>79</sup> By ushering Abby, Bobby and Carla into private custody proceedings with public records, DSS completely abrogated its responsibility to protect the privacy of these children in sensitive family law proceedings.

74. See MASS. GEN. LAWS ANN. ch. 119, § 35 (West 1994).

75. See MASS. GEN. LAWS ANN. ch. 119, §§ 38, 65 (West 1994).

76. See MASS. GEN. LAWS ANN. ch. 209B, § 13 (West 1994) (stating that the court shall preserve pleadings, orders, and judgments, and all pertinent documents until the child reaches age 18); see also MASS. GEN. LAWS ANN. ch. 215, § 3 (West 1994) (noting that probate courts have jurisdiction in divorce actions and petitions for adoption of children).

77. See MASS GEN. LAWS ANN. ch. 209B, § 13 (West 1994).

78. See *id.*

79. See discussion, *supra* note 10 (outlining the role of GALs).

## IV. CONCLUSION

The purpose of this Article is not to suggest that the legal standards for the removal and substitute care of children who have suffered from alleged abuse or neglect should be lessened, nor is it to suggest that the “rights” of parents are more important than the best interests of children. Rather, the purpose of this Article is to suggest that there is a wide gap in Massachusetts between the legal standards for the care and protection of children and the actual practices of the Department of Social Services. These standards exist because they reflect the judgment of the Massachusetts legislature regarding the best way to protect the welfare of minor children in the Commonwealth. If that policy judgment is incorrect, the appropriate forum for reform is political. However, circumvention and subversion of those standards, and their accompanying procedural protections, is not an appropriate way to safeguard children. There is no meaningful opportunity for reform or judicial oversight if DSS caseworkers continue to act outside the scope of their legal authority, particularly given the extensive impounding of juvenile records in the Department to protect the privacy of minor children in its care and custody. Instituting formal procedures for the care and protection of children, whether they result in family reunification or termination of the biological parents’ rights, is the best way to further DSS’s dual goal of protecting children and respecting families’ rights to “be free from unwarranted state intervention.”<sup>80</sup> It is also the best way to ensure that children who have been neglected or abused obtain access to the resources that DSS can provide and achieve the custodial stability necessary for their mental and physical development.

This Article is not an exhaustive study of the practices of the Massachusetts Department of Social Services. It arose out of the author’s experience in working with a few individual legal services clients in Suffolk and Middlesex Counties. It does, however, suggest avenues for further inquiry. First, how widespread are the DSS practices documented here?

Second, what can explain the occurrence of those practices? It is possible that the gap between law and practice is simply the result of DSS incompetence, perhaps because of scarce departmental resources.<sup>81</sup> It is also possible that these practices represent a

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80. MASS. REGS. CODE tit. 110, § 1.01 (1993).

81. In a 1982 opinion granting a preliminary injunction to a class of plaintiffs seeking to bring DSS into compliance with federal law, including the Social Security Act, 42 U.S.C. § 671 (1994), *amended by* 42 U.S.C. § 671(a) (Supp. V 1999), by

deliberate strategy on the part of DSS, or its caseworkers, to facilitate a particular custodial outcome by closing cases and urging private action in situations where the Department has identified a substitute caretaker for the child that it deems fit. This strategy could be employed by a savvy caseworker in order to take advantage of the less stringent standards employed in private custody proceedings (i.e., proving in a probate court hearing that a transfer is in the best interests of the child by a mere preponderance of the evidence) rather than meeting the stricter requirement for DSS termination of parental rights (i.e., proving, in a forum where parents are entitled to the assistance of counsel, that removal of the child is necessary to protect her from serious abuse or neglect, and that the parents are currently unfit by clear and convincing evidence).<sup>82</sup> This explanation seems particularly plausible in light of Carla's case, in which the probate court repeatedly granted temporary guardianships to David and Danielle without any meaningful hearing or findings relating to Christine's parental fitness, a practice that was upheld on appeal.<sup>83</sup> This, in turn, begs an additional question: was the court's extension of Carla's guardianships without applying the appropriate legal standard, the result of sloppy jurisprudence or is it possible that probate court judges are actively participating with DSS in transferring the custody of minor children without findings of unfitness? Or is there a third possibility—namely, that probate courts have begun to utilize the question of who has current physical custody of a child as a *de facto* test of fitness based upon the conventional psychological wisdom regarding the importance of continuity of care for children?

Third, whether the practices documented in this case study are the result of incompetence or deliberate circumvention? What do these practices reveal about the institutional biases of the Department? Is it significant that the three parents presented in this case study were

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requiring the agency to provide each foster child in its custody with a case plan and a periodic case review, Judge Keeton lamented that DSS's limited resources were undoubtedly "a primary factor in the failure of protection of victimized children." *Lynch v. King*, 550 F. Supp. 325, 327 (D. Mass. 1982).

82. See *Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption*, 444 N.E.2d 399, 400-01 (Mass. App. Ct. 1983) (noting that after the Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), Massachusetts state courts changed the burden of proof in cases determining parental unfitness in DSS proceedings); *In re Care and Protection of Stephen*, 514 N.E.2d 1087, 1091 (Mass. 1987) ("In determining whether custody may be removed from a biological parent and awarded to the department the judge must find, by clear and convincing evidence, that the natural parent currently is unfit to further the welfare and the best interests of the child.").

83. See *supra* Part II.B, Case #2: Bill B.'s "Unfitness."

poor, mentally ill, or recovering from alcohol or drug dependency?

Fourth, what role does the passage of time play in these cases? Are the lengthy delays in these three cases, particularly in Carla's case where the sixty-day GAL report took more than a year to complete, the result of bureaucratic overload or is this also a feature of a system that is being manipulated by savvy caseworkers and psychologists to stack the decks in favor of certain custodial resolutions?

Fifth, if Massachusetts DSS caseworkers are manipulating different aspects of the custody system to achieve certain results that they feel could not be achieved by strictly adhering to their regulations, where does the Commonwealth go from here? It seems that there are two possibilities. First, the existing legal standards governing substitute care for minor children must reflect the reasoned and rational judgment of the legislative, executive and judicial branches of the Commonwealth of Massachusetts and that those standards should be enforced strictly. Alternatively, it is possible that these standards are too strict and prevent DSS from adequately protecting children in Commonwealth, forcing caseworkers to employ creative means of working the system in order to rescue children from abusive environments. If this is the case, perhaps the laws and regulations need to change in order to enable transparency in the removal of these children and their placement in suitable substitute care environments.<sup>84</sup>

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84. The desire to expedite the termination of parental rights was one of the motivating factors behind the amendments to the Social Security Act enacted by ASFA. See Pub. L. No. 108-59, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). According to Madelyn Freundlich, ASFA "brought termination of parental rights to the forefront as a core strategy in permanency planning for children in care." Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving the Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 99 (1999). Proponents of expediting the process have argued that the system focuses too much on the rights of parents and the preservation of biological families at the expense of the safety and welfare of children. See, e.g., Richard J. Gelles, *Family Preservation and Child Maltreatment*, in *RETHINKING ORPHANAGES FOR THE 21ST CENTURY* 47 (Richard B. McKenzie ed., 1999). Opponents have pointed out that, given the current overload of foster care and adoption services, using increased resources to remove children from their homes rather than helping them to thrive in their families is not the best way to promote the welfare of the children whose interests are being protected. See *id.*