# Legal Approaches to Foster Care

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## I. INTRODUCTION

This paper will evaluate present legal approaches to foster care in the light of the realities of the foster care experience. Since recent studies have called into question some of our traditional assumptions about foster care, these findings will be a helpful starting point in evaluating the relevance of present law. Decisional law and statutes will be examined in an effort to assess their appropriateness in dealing with placement problems. Finally, where the law fails to reflect the practical realities of the foster care process, alternative approaches will be suggested.

The legal and administrative problems of foster care arise throughout the country. Thus the various state legislatures and courts have been compelled to grapple with the difficult issues raised by child placement cases. This paper will focus upon judicial and legislative responses to foster care questions in the state of New York, as illustrative of the development of law in this area.

## II. FOSTER CARE: MYTH AND REALITY

### A. How Temporary is "Temporary"?

Throughout history there have always been families unable or unwilling, for a variety of reasons, to care adequately for their children. One response to this problem has been the "placing out" of children in institutions and foster families, where they will presumably receive the care unavailable in their homes. From the horrendous conditions of the early workhouses, where children were often little more than slaves,[1] we have progressed to professionally staffed facilities focussed on the welfare of children and often providing at least good physical care. After lengthy debate, however, most professionals agree that foster family care is a preferable alternative to institutional care for most children, approximating, as it presumably does, normal family relationships.[2]

Traditionally, foster family care has been seen as a short-term solution pending return of the child to his family, while institutions have been regarded as more appropriate for long-term care. Generally, temporary care remains the professed goal in foster placements. Agencies are geared to that idea, at least in theory, and all parties to the placement process are influenced, for better or worse, by this assumption of temporariness. The

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New York Legislature has recently recognized the importance of prompt return of the child to his natural family, emphasizing that "it is generally desirable for the child to remain with or be returned to the natural parent"[3] and deploring "unnecessarily protracted stays" in care without development of a permanent plan for the child.[4]

The Legislature's concern was undoubtedly prompted by recent findings that foster family placement is often temporary in name only and that unplanned or "default" long-term placement has become the fate of very large numbers of children. A realistic appraisal of our legal approaches thus requires a closer look at results of this recent research.

In 1959, Henry S. Maas and Richard E. Engler published results of an important study of child-caring systems in nine American communities, ranging from rural to large urban areas. The study focussed upon the "ethnic, physical, psychological and legal statuses"[5] of children in care and considered the interaction of the children, their families, the agencies and the legal system in each community studied. On the basis of their findings, Maas and Engler projected that over half of the children then in care "gave promise of living a major part of their childhood years in foster families and institutions."[6] They also found that with the passage of time, the likelihood of eventual return of the child to the natural family diminished steadily.[7] These researchers noted in addition a higher rate of return when children were placed within their own communities,[8] a result which suggests that reunion of families is facilitated where continued contact between parent and child is readily available.

A 1961 study by the Children's Bureau in collaboration with the Child Welfare League of America reported even more startling results. In 71 per cent of cases of children in care with public agencies, the plan was continued foster care in the same or another placement.[9] It is of course possible that the plan would be modified in some cases to allow return of children to their families, but a percentage of this magnitude even as a prediction indicates the likelihood of very sizeable numbers remaining in care.

Most recently, an important longitudinal study of five years' duration has been completed by David Fanshel of Columbia University School of Social Work.[10] Dr. Fanshel studied 624 children who entered foster care for the first time in New York City in 1966, to remain for a minimum of 90 days. At the conclusion of the study, 36 per cent of the children remained in care; 56.1 per cent had been discharged; 4.6 per cent had been placed for adoption; and the remainder had been transferred to institutional placement.[11] Dr. Fanshel examined the correlation between rate of discharge and several factors, concluding that return home was most likely when entry into care was due to physical illness of a parent[12] (a less intractable problem, perhaps, than the chronic difficulties of many multi-problem families). Of great interest also is the high correlation found between parental visiting and eventual return of the child.[13] The precise significance of this finding is unclear: does it reflect the beneficial effects of continued contact alone, or does it also relate to the greater initial stability and maturity of parents able to accept this responsibility? This result is of interest in either case and may perhaps be related to Maas and Engler's finding of high rates of return for in-community placement. Fanshel's study

also confirms the earlier finding concerning decreasing likelihood of discharge as the placement continues. During the first year, there was a 25 per cent rate of discharge; during the second, 13 per cent; and for the third, fourth and fifth, rates of 8, 9 and 7 per cent were found.[14]

Thus recent research has consistently shown that whatever the original intent, foster care has become anything but temporary for large numbers of children. The reasons for this outcome are doubtless complex and of great interest from the standpoint of possible reform. Whatever the explanation, it is important to bear in mind that foster care is often long-term care as we consider the impact of placement on the children, their parents and their foster families.

## B. Problems of the Foster Care Experience

### 1. The Children

It is appropriate to begin our survey with consideration of those most crucially affected by placement – the children. However great the need for removal from his or her home, a child experiences placement as a traumatic event in his life for a number of reasons.

Kline and Overstreet describe the pain resulting from separation and loss of the natural family, leaving the child increasingly vulnerable to further disrupting experiences and in desperate need of the "stabilization, reliability and continuity of key relationships."[15] The authors further describe the child's feeling of rejection and worthlessness upon separation,[16] as well as his feelings of helplessness as events over which he has no control impinge dramatically on his life.[17]

Kline and Overstreet outline the "adaptive tasks" confronting a child in the placement experience. He must come to terms with (1) loss of his family and familiar environment; (2) introduction of the agency and its personnel; and (3) introduction to a new family and environment.[18] The difficulty of completing these tasks will of course vary with the child's age, history, and individual personality – but the list does point up the problems confronting the child. The situation is further complicated by the very real possibility of replacement. Of the children in Fanshel's study, almost 30 per cent experienced replacement within the five-year period, and the likelihood of replacement increased with length of time in care. Thus nearly 43 per cent of those discharged during the fifth year had had three or more placements, and nearly 46 per cent of those remaining in care had a history of three or more placements.[19] Such findings lend sad significance to Mary Lewis's observation that "children without close and continuing ties with responsible adults are the children who have a confused sense of identity, relate shallowly, and are unable to learn to trust others."[20]

The child's difficulties are increased by the fact that his natural parents may cease to have any meaningful contact with him. Thus Maas and Engler found that in about half of the cases they studied, the parents visited infrequently or not at all.[21] In these circumstances, the child's sense of abandonment and rejection increases and his potential for forming normal relationships in the future is gradually eroded. On the other hand, if his parents remain in the picture, the child may well experience painful conflicts

of loyalty, since both sets of parents may be meaningful to him. There is grave danger that "torn by the demands of natural parents and foster parents . . . he is likely to protect himself by not committing himself to either."[22]

Finally, because of continuing agency involvement, the child is constantly reminded of the impermanence of his situation. As the separation from his natural parents continues, he may experience a growing, understandable and often mutual attachment to his parent caretakers and may come to regard them as his "real" family. However, he is confronted at every turn with reminders that he is "different." He has a different name from the family, a fact which often causes confusion and comment, particularly at school. Moreover, he has a social worker visiting him, and that person's presence on the scene not only sets the child apart from the rest of the family, but also reminds him that his situation is subject to change at the will of others. Small wonder such children are reluctant to put down roots – they are already too well aware that uprooting is a painful experience. Given stresses such as these, which would present serious difficulty even for a mature adult, it is not surprising that a high percentage of children in foster care show signs of emotional disturbance.[23]

In their controversial book, *Beyond the Best Interests of the Child,* [24] Goldstein, Freud and Solnit have emphasized the child's urgent need for stability, permanence and continuity in his relationships and take strong exception to legal and institutional principles which fail to take sufficient cognizance of these needs. Further, the authors describe the child's sense of time as very different from an adult's, so that a relatively short separation may seem very lengthy to a young child, and the damage to previous relationships may occur much sooner than courts and agencies recognize.[25] The other side of the coin is that new relationships may form with the foster family, replacing the old ties, so that the new caretakers become the "psychological parents."[26] The danger here is that courts and agencies, moved by concern with blood ties rather than with emotional realities, may return a child to his natural parents after this process has occurred, without understanding that the child is then forced to experience again the agony of separation which he has undergone in the earlier parting from his natural parents.

Thus it is clear that placement is far from being an unmixed blessing even for the child who truly needs it most. For the abused or severely neglected child, of course, placement may be literally a lifesaver, and even below this level of urgency, there will always be many children whose parents will never be able to provide care and who will need alternative arrangements. Acceptance of these realities, however, does not preclude recognition of the shortcomings of the present system as it affects the children within its care.

### 2. The Natural Parents

Relatively little attention is focussed upon the parents of children in foster care. It is nevertheless evident that placement of children for whatever reason has a significant impact upon these families.

Research consistently shows that minority and poverty-level families are overrepresented in the natural parent group. "Most of the families are poor,

and disproportionate numbers of them live in crowded, substandard housing, have severe health problems, and are headed by one parent, usually a woman."[27] In addition, although typically a specific family crisis may precipitate placement, these families in many cases have a history of marginal functioning severe enough to make breakdown under added stress fairly predictable.[28] One study of families for the year preceding placement found that a majority were receiving public assistance, and that over a third of the children were a year below grade level, and less than two-thirds attended school regularly.[29] It is illuminating to examine the major reasons for placement found by Fanshel. While these varied in relation to ethnic and other factors, the principal reasons discovered were as follows: mental illness of child-caring person; abandonment or desertion by parent; parent unwilling to continue care; family problems; and parent unwilling to assume care.[30] These categories poignantly attest to the emotional, physical and situational problems which beset these families.

Interestingly, the typical reaction of natural parents to placement of their children, however essential or earnestly sought, often parallels that of the children themselves. Thus Kline and Overstreet have described the natural parent's feelings of shame, guilt, loss and ambivalence, commenting that "just as the child experiences the placement as a rejection by the parent and confirmation of something unacceptable in him, the parent experiences it as the confirmation of his parental failure."[31] Often a parent overwhelmed by such feelings avoids consistent visiting with his child, thus exacerbating the situation and decreasing the chances of (or justification for) eventual return of the child to him. The high positive correlation between parental visiting and eventual discharge to the natural family has been noted previously.

Further compounding the difficulty is the now well-recognized failure of agencies to provide effective rehabilitative services to the placing families. No doubt there are many complex reasons for this failure, including the perhaps understandable tendency of agencies to focus their efforts on the child and the foster family, to the exclusion of the natural family whose inadequacy has created the need for placement in the first place.[32] One writer discusses our reluctance to accept that "living in a complex society may be more than some people can manage and that the demands of family life and raising children are beyond the capabilities of many."[33] Lacking this understanding, and influenced perhaps by our traditional belief in the unworthiness of the poor, we feel anger towards these families and may sometimes react by turning our backs on them once their children have been "rescued" from the situation.

For whatever reasons, parents of children in care for protracted periods often receive little or no agency help towards rehabilitation.[34] Thus the self-perpetuating character of the system is clearly revealed. There is little justification for returning a child to the same problems which necessitate his placement. Further, as time passes and new attachments form, agencies and judges are increasingly (and correctly) reluctant to subject the child once again to a painful and potentially destructive separation. Thus almost by default continued care may have become the only truly visible alternative for the child.

Natural parents involved in voluntary or court-ordered placements

frequently fail to grasp their "psychological importance"[35] to the child, as well as the implications for him of a lengthy separation. In addition, as will be discussed later, parents often have little or no conception of the legal implications of prolonged placement, parental failure to visit, and so forth.

In the group of natural parents there will of course be many who will never develop even minimal capacity for parenting and whose children will therefore continue to need protection and care outside the home. On the other hand, it stands to reason that many marginally functioning families might, with the services they are not now receiving, be helped to provide adequate care for these children. In such cases, where placement cannot be entirely avoided, at least it could perhaps provide assistance which is truly temporary in nature. At any rate, natural parents are very much a part of the foster care process, and even the most abusive or inadequate continue to be significant to the child and to his feelings about himself.

### 3. The Foster Parents

Foster parents are generally recruited from the community by public and private agencies who delegate to them the care of children in need of placement. Typically they sign an agreement with the agency delineating their obligations and rights *vis-a-vis* the child and the agency. In most cases foster parents receive a "board rate" for their care of the children, and medical and dental care are also provided. One writer describes the dramatic contrast between the commonly accepted social goals of foster care and the "harshly legalistic" language of the typical "contract," which emphasizes financial arrangements and legal obligations with little reference to the emotional investment required.[36] By contrast, once embarked on their role, new foster parents find much of their job very hazily defined indeed. Their role is rarely clear:[37] do they relate to the child as to one of their own? Or are they required to hold back in constant recognition that he "belongs" to someone else and overinvolvement might be dangerous for all concerned? The foster parent isn't sure how he should feel about natural parents or how they feel about him. He is often reminded of the agency's power to remove the child, a decision over which, until recently, he could expect to have little control. Even if he tries to maintain a distance which will minimize the hurt upon separation, the foster parent will find that "qualified love . . . is an extremely difficult emotion to maintain."[38] Especially if the period of adjustment has been difficult or if the child has been ill or injured and in need of special care, the conscientious foster parent by virtue of his emotional investment will often form a bond with the child unrelated to the "rights and wrongs" of the situation and will then have to cope as best he can with the power others have to intervene in this relationship. Small wonder that the ideal foster parent, in addition to meeting the usual agency criteria, needs emotional maturity, manifested in "capacity for giving and receiving; adaptability; reality testing and learning; ego identity and ego integrity."[39]

The later discussion of the legal aspects of foster care will examine the expansion of foster parents' legal rights related to children placed in their homes.

In response to the difficulty of the job, foster parents have tended

increasingly to band together in local, state and national associations. Essential mutual support is often provided by these groups, frequently along with growing militancy stemming from increasing consciousness of the crucial nature of the foster parent's role. Thus organized, foster parents can be expected to wield increasing political influence and to exert more pressure on agencies than they have in the past. Some agencies have recognized the importance of the foster parent associations through appointment of a liaison worker to facilitate communication between group and agency.[40]

Being human, foster parents doubtless handle their job with varying degrees of competence, sincerity, sensitivity and commitment. In every case, however, they constitute an essential element of the system, and their concerns must be recognized if it is to function productively.

### 4. The Agency

As noted, the social agency provides services to children through contractual arrangements with foster parents (and with institutions). The agency generally exercises broad powers in decision-making, although recently subject increasingly to judicial review. Generally, it selects its foster parents, arranges, supervises, and terminates placements (although again, often subject to court approval). It is often at least nominally the agency's job to work directly or indirectly towards rehabilitation of the child's natural family. As previously noted, agencies have not been conspicuously successful in this area.

The agency plays to a great extent the role of intermediary in the placement situation. The children, their families, foster families and the courts are all involved to a greater or lesser degree with the agency, and its role is crucial. Thus the attitudes, practices and policies of agencies can be expected to have a highly significant impact upon the way foster care actually works.

Burdened by heavy caseloads, turnover in personnel and generally insufficient funds, agencies frequently are able to do little more than counterpunch. Thus much time is spent merely in reacting to emergencies rather than in proceeding on the basis of thoughtful planning.[41] Further, agencies may perceive themselves as under pressure from many directions – the natural families, the foster families, the courts, and simply the complexity and apparent hopelessness of situations with which they contend daily. They may thus tend to react defensively to criticism, particularly from the courts. Thus one writer observing agency hostility towards the regular foster care reviews, mandated in New York by Social Services Law § 392, was moved to urge that this process be seen as a "collaborative effort that endeavors to ensure the welfare of children" rather than as an indictment of agency performance.[42]

Social agencies, in common with other institutions, run the risk of losing sight of their original objectives in an effort to preserve their area of authority and control. There have been some cases, for example, where courts have endorsed removal of a child from a foster home apparently on a purely contractual basis. In one such decision, the parents' agreement with the agency to cooperate in termination of the placement took precedence

over human factors, such as the "excessively" strong bond between foster parent and child which prompted the agency decision.[43] Here the court was evidently at pains to uphold agency authority in the face of all other considerations. As will be seen, this approach is not unusual for courts compelled by the adversary system to think in terms of rights of contending parties.

The agency works within the framework of a pre-existing system for the delivery of services. Thus the agency response to family problems is skewed in the direction of placement, since this is the solution which is relatively available and manageable. There are other elements as well. Agencies, being composed of human beings with their own (overwhelmingly middle class) values and attitudes, may be tempted to "rescue" a child through foster placement from a situation, unaware that "some 'dirty homes' may seriously endanger a child's growth and well-being, but most may merely offend middle-class sensibilities."[44]

Agencies have generally concurred in the characterization of foster care as temporary in purpose and nature and have been reluctant to face the fact that large numbers of children grow up in such "temporary" situations. Recently, however, agencies have become increasingly aware of this disparity between theory and practice, particularly with enactment of new statutes which demand formulation of explicit plans for children and continuous assessment of their efficacy.

In summary, agencies have often fallen down in working with natural families and in making careful and constantly reviewed plans for children, and have sometimes operated on the basis of personal biases. That such failures have occurred despite the best efforts of a great many dedicated professionals points up the enormous difficulties in administering foster care programs. In addition, these deficiencies underline the need for basic reform if foster care is to become the truly constructive experience for children which, properly used, it could be. An examination of legal handling of foster care situations may suggest possible areas where improvements can be made.

## III. FOSTER CARE AND THE COURTS

### A. Case Law

Until quite recently, child custody matters involving contests between natural parents and third parties were decided largely on the basis of the "parental rights" doctrine, an outgrowth of property law which viewed children as the chattels of their parents. Under this rule, the commonly accepted presumption in favor of the natural parent could normally be rebutted only by evidence of "unfitness." Typically, unfitness "may be demonstrated by evidence that the child had been abandoned by the natural parent, or that the moral character of the natural parent is unsatisfactory, or that the home environment offered by the natural parent is unsuitable."[45] A Pennsylvania case, *In re Adoption of Austin*,[46] provides a florid example of the parental rights doctrine in full flower. The court in *Austin* returned a five-year-old child to her natural mother over the protests of the foster parents who had cared for the child for three years following the separation of her parents. Characterizing the child as its mother's "most treasured

possession," the court decided the case exclusively on the basis of parental fitness and expressed absolutely no concern for the welfare of the child.

Two New York cases further illustrate the doctrine in its most extreme and rigid form. The court in *In re Jewish Child Care Association*[47] removed a five and a half year old child from a foster placement of over four years' duration, over the protests of the foster parents who wished to adopt. The court was persuaded by the agency's insistence that the foster parents had become over-attached to the child and that for that reason another placement was advisable. Carrying the property analogy to its logical conclusion, the court deferred to the "parental custodial right" and perceived the agency "in a representative capacity as the protector of Laura's mother's inchoate custodial right."[48]

More recently, in *People ex rel Scarpetta v. Spence-Chapin Adoption Service,* the New York Court of Appeals ordered return of a year-old child to the natural mother from the prospective adoptive parents.[49] The natural mother in that case had apparently regretted her surrender of the child and requested its return shortly thereafter. The court cited *People ex rel Kropp v. Shepsky,* concerning a parental right "superior to all others,"[50] and added that "material advantages which the adoptive parents might offer cannot outweigh a mother's tender care and love unless it is clearly established that she is unfit."[51]

Property doctrines were not the only unlikely legal theories to surface in child custody cases. Also in evidence were elements of contract law. At issue here was the agreement or "contract" which governed the relationship between agency and foster parents. Thus in *In re Jewish Child Care Association,* the court found that "the appellants have conducted themselves in a fashion inconsistent with their agreement"[52] and referred disapprovingly to the "parent-like love and possessiveness"[53] which the foster parents had wrongly allowed to develop despite the agency insistence upon a neutral emotional atmosphere. A later case reiterated this concern for undue attachment to the child, speaking apprehensively of "love and affection grown too deep" and exhorting the foster parent to "keep his proper distance at all costs to himself."[54] Interestingly enough, the cost to the child of such an arrangement was not mentioned.

The cases cited make amply clear the shortcomings of the "parental rights" doctrine in the resolution of child custody disputes. In the first place, the doctrine relegates the child's welfare to an insignificant position. The necessity for proving parental "unfitness" in order to rebut the presumption in favor of natural parents serves a useful function, in that it limits the discretion of courts and agencies who could otherwise remove children from their parents to provide, for instance, a higher material standard of living without regard to the emotional cost which such separation might involve. On the other hand, the fitness or unfitness of a parent who is a stranger to a child seems irrelevant. In such cases, there is danger that the child may be awarded to the parent almost as a prize for good behavior, a resolution which pays little heed to the child's needs.

Contract theory is also a highly inappropriate vehicle for dealing with child placement problems. Justice Traynor firmly rejected contract notions in *In re Adoption of McDonald,* asserting that

> in a proceeding such as this the child is the real party in interest and is not a party to any agreement. It is the welfare of the child that controls, and any agreement others have made for its custody is made subject to the court's independent judgment as to what is for the best interests of the child.[55]

In the words of one commentator,

> It is shocking to find modern courts applying the conceptualistic principles of commercial law to the human problems involved in placement cases. There should be no covenant running with the child, and the child's actual best interests ordinarily should be decisive.[56]

Thus it is evident that concepts of property and contract law are of little assistance and may lead to disastrous results when applied to the complex problems of child placement cases. It is thus not surprising that courts have turned increasingly to the "best interests of the child" as a standard more likely to produce humane decisions in this difficult area.

As long ago as 1925, the New York Court of Appeals, reviewing a custody dispute between husband and wife, refused to put their interests ahead of the child's, holding that "equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child."[57] More recently many courts have considered the child's welfare as a very important element in reaching custody decisions.

The "best interests" criterion may subsume many considerations, among them

> moral fitness of the competing parties; the comparative physical environments offered by the parties; the emotional ties of the child to the parties and of the parties to the child; the age, sex and health of the child; the desirability of maintaining continuity of the existing relationships between the child and third parties; and the articulated preference of the child.[58]

Increasing judicial cognizance of the child's needs is obviously a healthy development. The test, however, is how the standard is actually applied by the courts. In this regard it is of interest that the decision in *Spence-Chapin Adoption Service v. Polk*, cited above as resting upon the foster parents' contract obligations and the primacy of parental rights, also paid lip service to the "best interests" standard, commenting in separating a child from the only parents she had ever known that "this does not mean the child's rights and interests are subordinated" and referring to the "generally accepted view that a child's best interest is that it be raised by its parent unless the parent is disqualified by gross misconduct."[59] Similarly, in *Marchese v. New York Foundling Hospital*, the court ordered a four-year-old child removed from a foster home where she had been placed at two weeks of age. The foster parents had sought to adopt this legally available child, but the court concurred with the agency that the child needed a "more contemporary environment" (younger parents) and that her "intellectual development and emotional needs

must be given careful consideration without sentimentalism."[60] Rising to startling heights of insensitivity, the court conceded that the parting had been "heartrending," adding "whether they will meet again I know not. If they do, no doubt it will be a joyful reunion."[61] This opinion was ostensibly founded upon the best interests standard, although it reveals also a strong undercurrent of support for agency decision-making authority.

If decisions such as those above can be predicated upon consideration of the child's "best interests," surely an irreproachable standard, what has gone wrong? The defect lies in the almost total subjectivity of the doctrine, which gives free rein to the values and biases of individual agency workers and judges. *Painter v. Bannister*[62] is a classic illustration of the problem, resting ostensibly on concern for the child's best interests but actually decided on the basis of the court's subjective evaluation of competing life styles. In addition, while deriving from praiseworthy concern for the child, the "best interests" standard as applied by the courts is often indistinguishable from the doctrine of parental rights. Courts may, for example, operate on the presumption that the child's welfare is best served by retention by or return to the natural parents, thus neatly sidestepping any real investigation into the child's actual situation and needs. One writer observes that "in effect, the courts seem to have created a continuum from a neutral determination of the best interest of the child to a disguised application of the parental rights doctrine."[63]

The difficulties inherent in the "best interests" standard have been intelligently confronted in a recent highly significant decision by the New York Court of Appeals. *Bennett v. Jeffreys,*[64] decided in 1976, concerned a fifteen-year-old unmarried mother who, under family pressures, placed her newborn child with a former classmate of the child's grandmother. At the age of twenty-three the natural mother, soon to be graduated from college, requested return of the child to her. Despite some ambiguity as to the mother's contacts with her child during this eight-year period, the trial court found neither surrender, abandonment (as defined by statute) nor unfitness. Nevertheless, the Family Court held that the child should remain with her present caretaker. The Appellate Division reversed, awarding custody to the natural mother.

The New York Court of Appeals reversed and remanded to Family Court for further hearings on the question of what disposition would serve the child's best interests, holding that the relative "qualifications and backgrounds"[65] of the contesting parties had been insufficiently explored below to make this determination.

The *Bennett* court, in an important development of the law in this area, held that the presumption in favor of the natural parent is rebuttable by evidence of "surrender, abandonment, persisting neglect, unfitness *or other like extraordinary circumstances.*"[66] (Emphasis added.) Included in the latter category was, in this case, the "prolonged separation of mother and child for most of the child's life."[67] When any of these specified conditions exists, the presumption in favor of the natural parent disappears, and the court must then proceed to a determination based solely upon the best interests of the child. Since *Bennett* concerned a private placement arrangement, the statute did not apply, but the court found a basis for its

holding in common law principles, noting that "in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody,"[68] and referring to the "modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest."[69]

Thus *Bennett* proposes a two-step process in child custody disputes between natural parents and third parties. First, there must be a determination as to whether the natural parent has forfeited his or her prior right through "extraordinary circumstances" such as surrender, abandonment, neglect, or prolonged separation (without regard to the "fault" of the parent). If such a forfeiture is found, the court proceeds to a consideration of the child's best interests on the basis of a factual inquiry, with no presumption that these interests will be better served by placement with either of the contending parties. *Bennett* goes a long way towards focussing attention upon the child as the real party in interest in a placement case. At the same time, in its initial consideration as to whether the natural parent's prior claim has been forfeited, the court avoids a serious pitfall. Without this preliminary consideration, a court could separate children from their natural families in order to provide them with greater material advantages, superior educational opportunities, or any other benefits which the court in its wisdom found desirable. Certainly most of us would not countenance such a drastic intrusion of the state into our private lives. Thus *Bennett's* primary concern for the child is constrained by the court's implicit reluctance to intrude upon real and fuctioning family relationships which do not put the child at risk. *Bennett* has been widely followed since it was decided[70] and can be expected to have significant impact on future child placement cases in New York and elsewhere. In cases involving agencies, the more typical foster care situation, *Bennett* is reinforced in New York by statutes which are focussing increasingly upon the welfare of the child.

Thus it appears, on the basis of these New York decisions, that foster care questions in this state will increasingly be resolved in accordance with the "best interests of the child" standard. At the same time, the prior right of the natural parent will give way before evidence of failure to fulfill the parental role, however involuntary this failure may be. This erosion in the parental rights doctrine clearly operates to the advantage of foster parents, who, with the standing granted by recent statutes, now have an opportunity to establish that the child's best interests would be served by retention in the foster home.

Any discussion of foster care in the courts would be incomplete without reference to *OFFER v. Dumpson*,[71] an important case recently argued before the Supreme Court of the United States (at this writing, the decision is still pending).

*OFFER* is a class action brought originally by the Organization of Foster Families for Equality and Reform, which challenges New York statutory provisions allowing removal of a foster child from a foster home (where he had lived for at least a year) without a prior hearing, allegedly in violation of due process rights of the children and their foster parents. The case involves many procedural complexities, including the trial court's appointment of independent counsel for the children as well as the intervention of natural

parents. Counsel for the children aligned herself with the defendants, opposing the proposed hearing as potentially destructive for the children involved, and arguing that an adversary proceeding was an inappropriate forum for resolution of child placement questions.

Nevertheless, the trial court held that the challenged statutes "as presently operated unduly infringe the constitutional rights of foster children"[72] and enjoined defendants from removing any foster children in the certified class from their foster homes without a pre-removal hearing conducted in accord with principles of due process. The court held that the pre-removal conference afforded foster parents under present law "fails to satisfy even the most minimal requirements of due process,"[73] and that even the hearing provided by recently revised New York City regulations was defective in that it was not automatic but had to be initiated by the foster parents.

*OFFER*, although decided by the District Court on the basis of rights of the foster children, attests to the growing power of foster parents with regard to their foster children *vis-a-vis* both agencies and natural parents. The District Court decision, which preceded *Bennett* by six months, nevertheless embodies *Bennett's* recognition of the child's need for continuity and stability of relationships, commenting that "the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment," and that this is "especially true for children . . . who have already undergone the emotionally scarring experience of being removed from the home of their natural parents."[74]

Thus it appears that the New York courts are moving steadily in the direction of greater concern for the children in placement cases. Nevertheless, despite the most enlightened judicial treatment, the difficulties of resolving such matters through the adversary process are evident. Even the most superficial consideration of the problem leads to the conclusion that the child old enough to offer an opinion (a difficult determination to begin with) should at least be consulted as to his or her wishes. The child in this situation, however, may feel unable to state a preference because of his conflicting allegiances to both sets of parents. Some courts have resorted to *in camera* interviews with the child[75] in an effort to supply greater privacy and encourage communication of the child's real feelings. This seems a step in the right direction, but clearly the situation remains very painful for the child, the natural parents and the foster parents, pitted against one another as they are in the adversary setting. Judges surely need the wisdom of Solomon to resolve such questions, and even if adequate information is available (as it often is not), the subjectivity of the "best interests" standard leads necessarily to inconsistent decisions and unpredictable results, hardly a desirable situation from a legal standpoint.

As noted, the Legislature in New York has taken increasing cognizance of the legal problems presented by child placement cases and has reacted with some progressive legislation in an effort to ameliorate the situation. A discussion of these statutory responses is thus essential to an understanding of the current legal status of foster family care in this state.

## B. Legislative Approaches

Foster care in New York is governed by a rather complex network of provisions of the Domestic Relations Law, the Family Court Act, and the Social Services Law. The most significant of these provisions will be described and their effect upon the foster care system assessed.

Children come into agency care through voluntary placement by their parents or guardians, as well as involuntarily upon court order following a finding of abuse or negelct, abandonment, death or mental illness of the natural parent, and so forth. Voluntary placements are governed by Social Services Law § 384-a, whereby care and custody of a child are transferred via written instrument to an authorized agency.[76] The statute provides for return of the child upon written notice to the agency[77] and affords the remedies of show-cause order or writ of *habeas corpus* upon agency refusal to return the child.[78] The instrument must give clear notice of the parent's *right* to visit and to have the child returned to him or her, as well as the parent's *obligation* to visit with and plan for the child, to contribute to his support, and to keep in contact with the agency. The instrument must also give notice of the possible legal consequences of failure to meet these obligations, as well as the right to private or appointed counsel.

Commitment by court order is covered by a new Section, Social Services Law § 384-b, which became effective January 1, 1977. This provision is of particular interest in that it contains a rather lengthy statement of legislative purpose. The statement recognizes the child's need for a normal family life, with his own parents wherever possible, and asserts the state's obligation to prevent the need for placement through delivery of supportive services to families.[79] When, however, "it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child."[80] The Legislature, finding that "many children who have been placed in foster care experience unnecessarily protracted stays,"[81] endorses termination of parental rights, freeing the child for adoption, where appropriate to prevent such unplanned long-term care.

Section 384-b is of particular interest in that it allows foster parents to institute proceedings under the Section and to petition for guardianship of a child who has been in the home for at least eighteen months in order to free the child for adoption by foster parents.[82] This right accrues to foster parents when the agency has failed to act to free the child. There are several grounds for initiating a proceeding under § 384-b. These include death of both parents, abandonment for six months immediately prior to initiation of the action, mental illness or retardation of the parent which prevents his caring for the child, and permanent neglect. The definitions of abandonment and permanent neglect were modified by the new statute. Moving away from the common law requirement of a "settled intent" to abandon, the Legislature defined abandonment objectively, in terms of the parent's behavior, for example, his failure to visit with the child.[83] Subjective intent is thus no longer determinative in establishing legal abandonment,[84] and the agency is no longer required to prove diligent efforts to encourage the

parent to fulfill his obligations in such cases.[85]

Similarly, permanent neglect, an adjudication which results in termination of parental rights, is defined as parental failure for more than one year following placement "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child."[86] The new law demands that contacts with the child be more than token in nature, and those which "overtly demonstrate a lack of affectionate and concerned parenthood" will be insufficiently "substantial" to preclude a finding of permanent neglect.[87] The agency is relieved of its burden of showing diligent efforts to strengthen the relationship where the parent has failed for six months to keep the agency informed of his or her location.[88]

Children also come into care following an adjudication of abuse or neglect, pursuant to Family Court Act § 1011 *et seq.* Family Court Act § 1012 defines a neglected child as "one under eighteen years of age whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" as a result of parental failure to provide adequate food, shelter, education, medical care and supervision.[89] "Impairment of emotional health" is further defined extremely broadly in terms of such elements as "failure to thrive" and "incorrigibility,"[90] and the list is intended to be descriptive rather than exclusive, so that the provision seems highly vulnerable to attack as unconstitutionally vague. This definition allows the court the kind of unfettered discretion which is likely to make personal biases a significant factor in an adjudication of neglect. Children found abused or neglected may be removed from the home under a temporary order either with or without parental consent,[91] or in an emergency, without court order.[92] This initial step must be followed by return of the child or by a petition by the appropriate agency to continue the placement for the protection of the child.[93]

Once the child is in care, the court continues to exercise its supervisory powers by way of Social Services Law § 392, which provides for mandatory judicial review of a child's foster care status where the child has been in care for eighteen months, and thereafter every twenty-four months. Authorized agencies are required to file petitions for such review, and must provide the court with a recommended disposition and the reasons therefor.[94] Section 392 contains provisions for notice of proceedings to natural parents, foster parents, the authorized agency, and other appropriate parties, who must be apprised of the dispositional alternatives.[95] The possible dispositions include continued care, return to the parent or other relative, institution of a § 384-b proceeding to free the child for adoption, or placement for adoption of a child already legally available.[96] Of particular interest is the provision allowing foster parents to institute a § 384-b proceeding where the court has ordered this disposition and the agency has failed to take action for over ninety days.[97]

Rights of foster parents are also reinforced through Social Services Law § 383, which provides that where foster parents have cared for a child continuously for two years or more, they may apply to adopt, and where the child is legally free, "the agency shall give preference and first consideration to their application over all other applications."[98] This Section also permits foster parents "who have had continuous care of a child for more than

twenty-four months, through an authorized agency, to intervene as a matter of right as interested parties in any proceeding involving custody of the child."[99] Section 383 is also significant in that it mandates decisions of child custody cases "solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition."[100]

Two pieces of proposed legislation are also relevant to our discussion here. The first is the Proposed Opportunities of Adoption Act, § 1593, aimed at promoting "the health and welfare of children in need of adoption by facilitating their placement."[101] This bill is presently under consideration by the Subcommittee on Children and Youth of the United States Senate. The proposed statute deplores the fact that "many thousands of children remain in institutions or foster homes because of legal and other obstacles to their placement in permanent adoptive homes,"[102] and recognizes both the child's need for permanence and the scarcity of children available for adoption. Accordingly, the proposed Act aims at elimination of obstacles to adoption through uniform state regulations and a program of grants with a two-fold purpose: first, to "enhance the ability of families at risk to care for their children in their own homes and to prevent the inappropriate or lengthy placement of children in foster care;"[103] and second, to provide all necessary assistance where parents are found appropriate to adopt "but for their financial inability to meet the child's needs."[104] Also of interest are the Model State Subsidized Adoption Act and Regulations developed by the Children's Bureau in the Office of Child Development, a division of the Department of Health, Education and Welfare.[105] This Act aims at establishment of a permanent adoption subsidy program within state Departments of Social Services which would provide necessary financial assistance where a child has developed close ties with his or her prospective adoptive parents, as in prolonged foster care, as well as when adoptive placement will be difficult because of special needs of the child. Such assistance would be based on existence of such conditions and would not depend upon financial need. The subsidy would terminate when the child's special need (for example, medical problems), if any, ended. Where foster parents adopt, the agency would not be required to prove diligent efforts to locate a nonsubsidized placement.

New York State presently provides for subsidy to foster parents, as well as to other parents adopting children with special needs.[106] Many foster parents who would previously have been unable to adopt legally available children for economic reasons have done so with this assistance. Except for handicapped children and others with special physical and psychological problems, the statute limits subsidy to families below specified income levels and requires periodic proof of continuing eligibility. The proposed federal statute would be a step forward in its recognition of the supreme importance of continuity and permanence for the child, although indications are that the proposed legislation is making its way very slowly through committee and enactment does not seem likely in the near future.

This overview of statutory responses to the many complex dilemmas of foster care indicates that in New York, at least, foster parents' rights have been considerably expanded, and foster parents now have standing to

intervene in legal proceedings involving children in their care for a significant period of time. The rights of the child have also been enhanced, in that if fourteen years of age or older, he may be heard at the discretion of the court as to his preference.[107] On the other hand, the presumption in favor of natural parents is apparently a dead letter as far as the Legislature is concerned, and the "best interests of the child" is officially established as the basis for decision (though still subject, of course, to the interpretive difficulties previously considered).

Furthermore, the statutes give clear recognition to the child's need for stability and permanence in relationships, and insist that where the parents are unwilling or unable to assume their responsibilities, the child should be freed for adoption as soon as possible, so that he will have a chance to grow up in a permanent home.

The foster care review provisions of Social Services Law § 392 have undoubtedly had a salutary effect in militating against unplanned long-term care, since agencies must now regularly spell out and justify their plans for the child. An interesting study by Trudy Bradley Festinger, of the New York University School of Social Work, reviewed dispositions in § 392 proceedings in New York City and found over a four-year period a steady increase in dispositions ordering children freed for adoption, with a corresponding increase in agency efforts to free such children.[108] Also noted was growing judicial reluctance to endorse an agency recommendation for continued care without careful scrutiny of the reasons for this recommendation.[109] This study also points up, however, some of the shortcomings in the actual operation of § 392, since it reveals that agency petitions were often late and hearings often delayed because of heavy agency workloads and backlogs on court calendars. Nevertheless, § 392 is a valuable step in the direction of preventing prolonged foster care by default rather than as a planned outcome.

In addition, the recent revisions of the abandonment and permanent neglect statutes are positive developments, since they facilitate termination of rights of those who for whatever reason are parents in name only. There remains of course the danger that the apparently inevitable delays involved in judicial resolution of child placement problems will cause grave harm, no matter how enlightened the eventual decision, because of the child's unique sense of time. Overall, however, the New York statutes reflect increasing concern for the child, together with growing sensitivity to the weaknesses of the foster care system as presently constituted. There is a commendable effort to curb the inappropriate use of foster care which drastically limits its effectiveness as a remedy for family problems. Even with this progressive legislative approach, however, many problems remain, and it is important to recognize these and to consider possible alternative ways of dealing with the problems of families who will not or cannot care for their own.

## IV. THE THRESHOLD QUESTION: IS THIS PLACEMENT NECESSARY?

Our investigation to this point leads inevitably to the conclusion that placement of a child, however necessary, is a remedy fraught with hazards

for all concerned. Placement will always be essential for some children, and it will sometimes for a variety of reasons need to be long term. However, in view of the risk involved, it seems essential that only necessary placements be made, and that whenever possible placements be truly temporary. Further, when the placement will be long term, serious consideration should be given to terminating parental rights to free the child for adoption, thus ensuring the sense of permanence essential to healthy emotional growth.

In determining whether placement is necessary, perhaps the most productive approach would be to consider this alternative a last resort.[110] The great value of this approach is that it mandates a realistic assessment of the child's family situation as well as provision of supportive services to families where placement can thus be prevented. Needless to say, some families will be beyond retrieval, but our present approach gives woefully inadequate consideration to those families which might be helped. A massive effort is required to deliver services to families which appear to have potential for at least adequate functioning. Homemakers, visiting nurses, day care centers, counselors and other similar services are urgently needed to help marginal families learn the skills of parenting, and continued public assistance and medical benefits would often continue to be essential to enable the family to keep going. Babysitting should be provided from time to time so that hard-pressed parents may have the "break" all of us need from time to time, for the sake of all family members. Borderline families need education in managing their limited resources to best effect – and it is a well-known fact that people least able to afford unwise expenditures are often most victimized by those who take advantage of their desperation and/or lack of sophistication. Such services are costly, but as one writer has pointed out, any expenditure up to the level of the cost of foster care can be justified, if all the difficult problems surrounding placement can thereby be avoided.[111]

Frequently families may urgently pursue placement for their children because they feel so hopeless and pressured that this may look like the only way out. Even when their children must be placed, parents must be helped to maintain "a sense of responsibility and dignity" and a consciousness of their continuing importance to the child.[112] Avoiding rescue fantasies if we can, we need to recognize also that we have often failed to understand the importance of natural parents to a child and have been perhaps too ready to separate children from families, assuming that it is best to let the old ties wither away. It is important to understand that we can substitute for, but not replace, natural parents, and we should think long and hard before we resort to so drastic a remedy as placement. Finally, parents should be very clear about the legal and psychological implications of placement which make it appropriate only as a "last ditch" measure.

When a child, for whatever reason, must be moved from his home, an evaluation of his situation should be made at the earliest possible date. If it seems clear that the parents cannot be a real resource and that the child is likely to grow up in placement, an early effort should then be made to terminate parental rights and provide the child through adoption with the permanence and continuity he needs for healthy growth. Where an older child or adolescent is placed, even non-functioning parents may be important

enough to him that he should be allowed to retain his connection with them, and a possible alternative in such cases would be what Goldstein calls "foster care with tenure,"[113] a legal status which would prevent removal of the child from the home, thus providing the necessary continuity, while allowing the child to retain his old name and some contact with his natural parents. In either case, the objective would be the kind of permanence which would free the child to complete developmental tasks in an atmosphere of security.

If a placement can realistically be expected to be temporary, every effort should be made to sustain the ties with natural parents through visiting, and the legal and psychological importance of these contacts should be made very clear to parents. Periodic court review at frequent intervals is indispensable to provide assurance that short-term care will not become long term except by carefully considered plan. The child should wherever possible be placed within his old neighborhood, as research has shown that such placements, through facilitating connection with the family, are most likely to lead to reunion.[114] Foster parents, who have been pretty well insulated from contact with natural families and have often felt reluctant to respond to the child's concern about his parents, must be helped to recognize the continuing importance of his family to the child. Agency workers can help foster parents cope with their understandable fears and resentments in this area. When placements are truly temporary, all involved will be better able to see the job as a team effort to restore the child to his family with the least possible damage to him and with important relationships intact.

Foster parents' growing consciousness of the importance of their job could well pave the way for the professionalizing of foster family care.[115] Training courses for foster parents would better equip them for their challenging role. Also essential would be willingness of agencies to treat foster parents as respected employees and to be sensitive to their concerns, complaints and suggestions for change. Some sacrifice of agency authority might be required, but the resulting true partnership of professionals should pay valuable dividends where the children are concerned. Where foster care is validly the treatment of choice, reduced alienation between the various parties involved will clearly redound to the child's benefit.

On the other hand, where courts become involved in placement decisions, the adversary structure militates against cooperative efforts at dealing with the problem. The question arises whether courts as presently structured are really appropriate forums for resolution of placement issues. In arguing against the administrative hearing mandated in *OFFER v. Dumpson*, counsel for the foster children asserted that such a formal adversary proceeding would be unlikely to "elicit the sensitive and personal information requisite to a decision with respect to the child's best interests."[116] In the same vein, another commentator has observed that

> jurisprudence oriented towards individualistic concepts of rights, privileges, duties, disabilities and immunities, with an historical emphasis on issues of substance, and courts employing adversary procedures, hearing narrow issues, and offering limited remedies, are not suitable for many of the multi-dimensional problems of contemporary life where there is urgent social concern and a need for

problem-solving and planning for the future.[117]

One writer has suggested the possibility of putting child placement decisions in the hands of "a psychiatrist, a panel of experts, medical, legal and religious" or leaving such decisions to social agencies.[118] The task of any decision-maker will be complicated by the subjectivity of the "best interests" standard, and far clearer guidelines are needed so that this criterion may be more consistently applied. Perhaps the "least detrimental alternative" standard proposed in *Beyond the Best Interests of the Child* is a step in the right direction, since it recognizes the child's vulnerability in this situation and mandates decisions which maximize "in accord with the child's sense of time . . . his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent."[119] At any rate, given the present judicial handling of these questions, several improvements could be made. First, children should be afforded independent legal representation in all matters affecting their custody and placement.[120] Second, children at an appropriate age should be consulted as to their preferences in as tactful and nonthreatening a manner as possible. Third, Family Court judges and lawyers working on placement cases should assume responsibility for becoming conversant with fundamental principles of child development, so that they can adjudicate and represent in an enlightened manner. A reading of *Beyond the Best Interests of the Child* would be an excellent starting point, despite or perhaps because of its controversial proposals.

## V. CONCLUSION

Reforms in our handling of foster care are clearly needed. Our review of the development of child placement law in New York illustrates the kind of change which is needed, although much remains to be done. For example, while the new statutory provisions and recent decisions, particularly *Bennett v. Jeffreys,* are positive steps, further efforts are essential to ensure that foster care will be treated as a "last resort" and concomitant efforts made through work with natural families to prevent placement wherever possible. When placement is the reasoned "treatment of choice," it should be truly temporary in nature when feasible. In other cases, an early effort should be made to terminate parental rights and ensure permanence through adoption (or in some cases through "foster care with tenure"). Alternatives to the present adversary treatment of placement questions should be explored with a view to facilitating a nonpunitive, productive and cooperative approach most likely to result in sound planning for a child.

Writing of the unfulfilled promise of foster care, Mary Lewis reminds us that though for many children placement has been a failure, still "the promise is there if the [social work] profession, the social agencies, and the communities pursue a dedicated, thoughtful approach to its fulfillment."[121] The legal profession should of course be added to this list.

Foster care will be most productive for the children it serves when it is most appropriately used. We may hope that a more thoughtful and realistic philosophy of placement will enable foster family care to provide in certain situations one valuable approach to a complex and difficult social problem.

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