Fordham Urban Law Journal

Volume 6 | Number 2 Article 1

1978

Proposing Standards for Child Custody: The Proceedings, the Role of the Agency, and the Best Interests of the Child

Joseph Carrieri
O'Brien, Carrieri & Lynch

Walter Murawski
Social Services Department at St. Christopher's Home in Seacliff

PROPOSING STANDARDS FOR CHILD CUSTODY: THE PROCEEDINGS, THE ROLE OF THE AGENCY, AND THE BEST INTERESTS OF THE CHILD

*Joseph R. Carrieri**
*Walter Murawski***

I. Introduction

Proceedings involving the care and custody of children are obviously of great importance—to the natural parents, to the foster parents, to society, and especially to the child. In recent years, both the courts and the legislature have recognized that the child's interest and well-being are of paramount importance in determining care and custody, and the procedural and substantive advances made in child custody cases have reflected this recognition.[1]

In order that effective consideration be given to the "best interests" of the child[2] there must be a thorough understanding of the nature of child custody proceedings, the roles of the court and of the parties, and the standards which the courts will apply in determining the custody of the child.

This Article will discuss each of these topics, and examine the relevant sections of the New York Social Services Law[3] and recent court decisions to provide an overview of present proceedings for the placement of children in the custody of child-caring institutions. For the purposes of this Article it will be assumed that an authorized child-caring agency[4] has brought the proceeding.

---

* B.S. Fordham University; LL.B. Fordham University School of Law. Member of the New York Bar. Mr. Carrieri is a member of the firm of O'Brien, Carrieri & Lynch, Mineola, L.I., N.Y., and is author of the Practice Commentaries for McKinney's New York Social Services Law.

** B.A. St. Anselm's College; M.S.S.S. St. John's Universsity; M.S.W. Adelphi University. Mr. Murawski is Supervisor of Foster Care in the Social Services Department at St. Christopher's Home in Seacliff, N.Y., and is an adjunct instructor of Sociology at Molloy College, N.Y.

1. *See, e.g.*, Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.E.2d 821 356 N.Y.S.2d 277, (1976); Carrieri, *Development and Expansion of New York's Permanent Neglect Statute*, 5 Fordham Urb. L.J. 419 (1977).

2. N.Y. Soc. Serv. Law §§ 384-b (1)(b), 392(7) (McKinney Supp. 1977).

3. *Id.* §§ 371-392.

4. "Authorized agency" means

II. Child Custody Proceedings

The Social Services Law[5] provides three methods whereby the care of a "child"[6] may be entrusted to an authorized agency: (1) The care of a child may be transferred temporarily to an authorized agency by a parent, guardian or a person to whom a parent has entrusted the care of the child. (The *custody* of a child may be transferred only by a parent or guardian.)[8] (2) The guardianship and custody of a destitute or dependent child under the age of eighteen years may be committed to an authorized agency by a written and signed instrument known as a surrender.[9] (3) The guardianship and

---

(a) Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the board [of Social Welfare] or which shall submit and consent to the approval, visitation, inspection and supervision of the board as to any and all acts in relation to the welfare of children performed or to be performed under [Title I (Care and protection of children) of article six of the Social Services Law]. (b) Any court or any public welfare official of this state authorized by law to place out or to board out children."

N.Y. Soc. Serv. Law § 371 (10) (McKinney Supp. 1977).

5. *Id.* § 384 (Guardianship and custody of destitute or dependent children; commitment by surrender instrument); § 384-a (Transfer of care and custody of children); § 384-b (Guardianship and custody of distitute or dependent children; commitment by court order).

In addition to the provisions of the New York Social Service Law, the Family Court Act provides additional methods whereby "the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met." N.Y. Fam. Ct. Act § 1011 (McKinney 1975).

6. Section 371(1) of the New York Social Service Law defines a child as "a person actually or apparently under the age of sixteen years." For purposes of commitment to an authorized agency or foster parent by court order under section 384-b or to an authorized agency by a written surrender instrument under section 384, a child is a person under the age of eighteen years. Id. §§ 384(1), 384-b(2).

7. *Id.* § 384-a(1). The care of a child involves supervision, nurturing, guidance and education, together with the rendering of all services, including medical, which must be given to aid the social, psychiatric and remedial development of the child.

8. *Id.* Custody is the legal guardianship of a child. One entrusted with the custody of a child need not provide care for the child but must see that the child receives such care from whomever has assumed care.

9. *Id.* 384(1). This is a voluntary surrender which terminates parental rights for purposes of freeing the child for adoption. *Id.*

The surrender instrument must be signed by both parents, if living, or a surviving parent; or, if either parent has abandoned the child for the immediately preceding six months, then by the other parent; or, if the child is born out of wedlock, then by the mother of the child; or, if both parents are dead, or the mother of the child born out of wedlock is dead, then by the child's guardian, provided court approval is given and recorded. *Id.* § 384(1)(a)-(d).

custody of a destitute or dependent child may be committed to an authorized agency or authorized foster parent[10] by order of a surrogate or judge of the family court,[11] upon a proceeding brought by either the agency or the foster parent.[12] An order committing the guardianship and custody of a child under this section may be granted only upon one or more of the following grounds:[13] (a) Both parents are dead and no guardian has been appointed; (b) the par-

---

The surrender instrument can, and usually does, provide that no action may be brought by the surrendering parent, either for the custody of the child or for the annulment of the proceeding, once the child has been placed with adoptive parents and more than thirty days has elapsed since the execution of the surrender. An action may be brought, however, on the ground of fraud, duress, or coercion in the execution. *See, In re* Nicky, 81 Misc. 2d 132, 364 N.Y.S.2d 970 (Surr. Ct. 1975). If thirty days have not elapsed since the execution of the surrender instrument, or the child is not in an adoptive home, the court may order the return of the child to the surrendering parent despite the existence of the surrender instrument, upon a finding that the parent is fit and that it would be in the best interest of the child to be returned. *See, e.g.*, People *ex rel.* Anonymous v. Saratoga County Dep't of Public Works, 30 App. Div. 2d 756, 291 N.Y.S.2d 526 (3d Dep't 1968); *In re* Handler, 6 App. Div. 2d 977, 176 N.Y.S.2d 689 (3d Dep't 1958). In *In re Ruth J.*, 55 App. Div. 2d 52, 389 N.Y.S.2d 473 (3d Dep't 1976), the court returned the child to her mother, who had signed a surrender instrument in the good faith belief that the child would be returned to her when she gave notice in writing, since there was no proof that the mother was either an unfit parent, or that she had neglected the child.

In any event, a consummated adoption is unassailable. McGaffin v. Family and Children's Service of Albany, 6 Misc. 2d 776, 164 N.Y.S.2d 444 (Sup. Ct. 1957), *aff'd*, 7 App. Div. 2d 769, 179 N.Y.S.2d 948 (3d Dep't 1958).

10. An authorized foster parent within the meaning of section 384-b is one who may institute a proceeding under that section pursuant to section 392 of the Social Services Law (Foster care status; periodic family court review) or section 1055 of the Family Court Act (Placement). N.Y. Soc. Serv. Law § 384-b(3)(a) (McKinney Supp. 1977).

11. *Id.*:

> Where such guardianship and custody is committed to a foster parent, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke, modify or extend its order, if the foster parent fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent.

12. *Id.* § 384(3)(b). A section 384-b proceeding is not only a means whereby an authorized agency initially acquires care and custofy of a child. An agency can institute a section 384-b proceeding even after it has acquired care of the child (*e.g.*, through a section 384-a transfer of care, or through an article ten abuse and neglect proceeding).

13. *Id.* § 384-b(4)(a)-(d).

> An order committing the guardianship and custody of a child pursuant to [section 384-b] shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) of subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

Id. § 384-b(3)(g).

ent or parents whose consent to any adoption is required has abandoned the child for the six months immediately prior to the proceedings; (c) the parent or parents whose consent to any adoption is required "are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding;" or (d) the child is a permanently neglected child.[14]

The first obligation of a child-care agency to a child in its care or the care of a foster parent is to make diligent efforts to strengthen and encourage the parental relationship.[15] "The expressed policy of the law is to seek the earliest possible return of a child to his natural parents in his best interest, and the agency is mandated to assist in achieving this goal."[16] When this objective cannot be achieved and foster care must be continued, the legislature has provided procedures to reduce unnecessarily protracted stays in foster care, to assure that the rights of the natural parents are protected, and to further the best interests, needs, and rights of the child.[17]

The New York Court of Appeals has recognized the obligation of the state agencies to both parent and child, and has expanded the "best interest" criteria by, in effect, extending the statutory provisions to determine "the most desirable alternative"[18] for each child.

---

14. A "permanently neglected child" is one in the care of an authorized agency whose parent or custodian has failed during a one-year period following the child's commitment to such agency's care "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child." *Id.* § 384-b(7)(a).

For a fuller discussion of New York's Permanent Neglect Statute as a means of terminating the custodial rights of natural parents in order to free children for adoption, see Carrieri, *Development and Expansion of New York's Permanent Neglect Statute*, 5 Fordham Urban L.J. 419 (1977).

The constitutionality of New York's permanent neglect statute recently has been upheld. *In re* Carl and Annette N., 91 Misc. 2d 738, 398 N.Y.S.2d 613 (Fam. Ct. 1977).

15. N.Y. Soc. Serv. Law § 384-b(1) (McKinney Supp. 1977).

16. *In re* Lamond B., N.Y.L.J., August 26, 1977, p. 14, col. 3 (Fam. Ct. 1977).

17. N.Y. Soc. Serv. Law § 384-b(1) (McKinney Supp. 1977).

18. Bennett v. Jeffreys, 40 N.Y.2d 543, 552, 356 N.E.2d 277, 285, 387 N.Y.S.2d 821, 828-29 (1976).

In *In re Patricia Ann W.*, 89 Misc. 2d 368, 376, 392 N.Y.S.2d 180, 185 (Fam. Ct. 1977), Judge Stanley Gartenstein pointed out the probable result of *Bennett's* "sweeping language, which had the practical effect of obliterating statutory categorization, and in the process, the appli-

> [I]ntervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. It is only on such a premise that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground.[19]

Child custody proceedings may be brought by any authorized agency or foster parent in a court of competent jurisdiction,[20] and usually involve the following cases:

(1) Foster Care Review Proceedings
(2) Abuse and Neglect Proceedings
(3) Extension of Placement Proceedings
(4) Abandonment Proceedings
(5) Permanent Neglect Proceedings
(6) Habeas Corpus Proceedings

A. Foster Care Review Proceedings ("392 Hearings")

Prior to the enactment of section 392 of the New York Social Services Law in 1971,[21] there was no court review of the status of children in foster care. Because of the lack of court review, many children who should have been adopted or returned home to their natural parents, needlessly remained in foster care.[22]

---

cation of many prior holdings." Noting that *Bennett* "finally recognized the best interests criteria and the psychological parent school of thought as the overwhelming and perhaps, in practical application the only factor in deciding any case in which the future of the child is at stake, Judge Gartenstein stated:

> It is possible to read into this, and one Appellate Court has apparently done so, judicial intent that regardless of whether or not statutory grounds for certain actions involving a child's future are present, the existence of a psychological parent, or as phrased the "best interest" of that child, would mandate certain judicial action on behalf of the child.

Applying this analysis in *Patricia Ann*, the court interpreted the *Bennett* test to apply to the fact-finding hearing in a permanent neglect proceeding. *See* text accompanying notes 132-33 *infra*.

19. Bennett v. Jeffreys, 40 N.Y.2d 543, 549, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 827 (1976).

20. *See* the appropriate subsections of this Article for the specific court and county having jurisdiction.

21. 1971 N.Y. Laws, ch. 97 (McKinney 1971). The statutory procedure for foster care review proceedings has been held constitutional. Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976).

22. If the purpose of section 392, adopted in 1971, was to alleviate these inequities then

Section 392 provides that when a child has been in foster care for a continuous period of eighteen months,[23] the authorized agency must file a petition seeking review of the child's status.[24] The petition is filed in the family court of the county in which the agency has its principal office, or where the child resides.[25] The petition must set forth the disposition sought (return of the child to his natural parents, continuation of foster care, initiation of proceedings to free the child for adoption, etc.), and the reasons such a disposition is sought.[26] Thereafter, all interested parties are given notice of the review hearing, a copy of the petition and a statement of the dispositional alternatives.[27]

1. The Hearing

The purpose of the family court hearing is to review the foster care

---

it is doubtful it has served its purpose. Consider, for example, the findings of the 1976 New York State Legislature in adopting section 384-b of the Social Service Law:

> The Legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. . . . [P]rovision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such necessary stays.

1976 N.Y. Laws, ch. 666, § 1(b) (McKinney 1976).

23. N.Y. Soc. Serv. Law § 392(2) (McKinney Supp. 1977).

In an apparent attempt to limit possible subterfuge in avoiding the requirements of a 392 hearing, and in any event to prevent unfair extension of the review period, the section provides that should foster care be discontinued, and within three months thereafter the child again is placed under the care of an authorized agency, "the period during which the child was not in foster care shall not constitute an interruption of continuous foster care for the [sole] purpose of review under this section." *Id.*

24. *Id.* The petition, together with a copy of the placement instrument, may be filed by the authorized agency charged with the care and custody or the guardianship and custody of the child; by another authorized agency that has supervision of the foster care; or by the foster parent or parents in whose home the child resides or has resided during the eighteen month period. *Id.* § 392(2)(a)-(c).

25. *Id.* § 392(3)(a).

26. *Id.* § 392(3)(b).

27. *Id.* § 392(4). The following are interested parties entitled to participate in the proceeding: the authorized agency charged with the care and custody or guardianship and custody of the child; the authorized agency having supervision of the foster care; the foster parent or parents in whose home the child resided or resides at or after the expiration of the eighteen month period; the child's parent or guardian who transferred the care and custody of the child temporarily to an authorized agency; a person to whom the parent entrusted the care of the child, who later transferred the care of the child to an authorized agency; any other person as the court, in its discretion, may direct. *Id.*

status of the child to aid the court in its order of disposition.[28] At the initial hearing, each party is informed of the right to have an attorney. If the party cannot afford an attorney, one will be appointed without charge from the "18-b Panel."[29] In a contested matter the court also will appoint an attorney as Law Guardian of the child to protect the child's interest.[30] If the proceeding is uncontested, there is usually no need to appcint attorneys, and the hearing is usually informal and held immediately. For example, if the plan of the agency is to return the child to the parent in the near future, and the foster parents neither wish to adopt the child nor otherwise oppose the return, the court after hearing the parties may direct that foster care continue, and set a date for returning the child to his natural parents. On the other hand, if the agency is seeking to have the child freed for adoption, and the natural parents are opposed, the court will then appoint necessary attorneys, and adjourn the matter until a so-called "long hearing"[31] is scheduled. Prior to the secheduled hearing the court may order a psychological examination of the parents and the child by the Bureau of Mental Hygiene.

At the hearing, the court must consider the following factors in making its determination:[32]

(1) the appropriateness of the plan proposed by the authorized agency;

(2) the services which have been offered by the agency to strengthen and reunite the family;

(3) when return home of the child is not likely, the efforts which were made or should have been made to evaluate or plan for other modes of care; and

---

28. *Id.* § 392. Upon periodic family court review of foster care status, the natural parent is entitled to a plenary and evidentiary hearing. *In re* Denlow, 87 Misc. 2d 410, 412, 384 N.Y.S.2d 621, 625 (Fam. Ct. 1976). However, the court, with the consent of the parties, may dispense with the hearing and make a determination based upon the papers submitted to the court. *Id.* § 392(6). In any event, the court, in its discretion, may dispense with the attendance of the child at the hearing. *Id.*

29. N.Y. COUNTY LAW § 722 [art. 18-b] (McKinney Supp. 1977) provides for the creation of a panel consisting of qualified attorneys to provide voluntary representation of persons accused of crimes and parties before the family court. The Appellate Division of the Supreme Court assigns counsel from the panel on a rotating basis for indigent natural parents and foster parents, and Law Guardians for foster children.

30. N.Y. FAM. CT. ACT §§ 241-249 (McKinney Supp. 1976).

31. A "long hearing" is a colloquialism for a hearing expected to last more than two hours.

32. N.Y. SOC. SERV. LAW § 392 (5-a)(a)-(d) (McKinney Supp. 1977).

(4) any other efforts which have been or will be made to promote the best interests of the child.

In order to have the child freed for adoption, the agency must show, through the testimony of its caseworkers and by the case records, that the child is, in effect, permanently neglected.[33] The usual method of proof is production by the agency of a written progress report outlining the basic facts, the status of the case, the agency's recommendations and the basis for the recommendations.[34] This report should outline all affirmative acts on the part of the agency to strengthen parental ties with the child, including but not limited to:

(1) encouraging visits by the parent, and when necessary, bringing the child to the parents for a home visit;

(2) aiding the parent to obtain satisfactory housing, a job or public assistance;

(3) assisting the parent in obtaining needed medical assistance;

(4) counselling the foster parents and enlisting their aid in strengthening the ties between the child and his natural parents;

(5) counselling the child to accept a parent who for whatever reason is no longer a parental figure to the child.

In opposing the agency position, the natural parent will attempt to show that the parent did visit and plan for the child, or if the parent did not, that he or she was physically or financially unable to do so, or that the agency did not use its best efforts to strengthen the parental ties. In most cases, the foster parents appear in support of the agency position, and the child is also present. If the child is old enough, the court will obtain permission of the attorneys to

---

33. For the purposes of a foster care review hearing the standard employed in determining whether a child is permanently neglected is that promulgated by section 384-b(7)(a) of the New York Social Services Law:

> [A] "permanently neglected child" shall mean a child [*i.e.*, a person under the age of eighteen years, N.Y. Soc. Serv. Law § 384-b(2) (McKinney Supp. 1977)] who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

34. This report will be offered and received in evidence and will permit the judge to ascertain the agency's position. It therefore forms part of the record. The written report prepared in advance is usually well-developed and may be more reliable than oral testimony in a situation where the court is faced with a long calendar and is short on time.

interview the child in chambers. Some judges prefer to have the Law Guardian present during the interview, and permit him to ask questions of the child.[35] The results of any court-ordered psychological examinations of the parents are also entered into the record during the hearing.

At the conclusion of the hearing, the court makes an immediate order of disposition in accordance with the best interests of the child as shown by the evidence produced at the hearing.[36] The disposition order must do one of the following:

(1) direct that foster care of the child be continued because it would not be in the best interests of the child to be returned home to his parents;[37]

(2) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian, or relative, direct that the child be returned to such parent, guardian or relative;[38]

(3) in the case of a child who has been committed temporarily to the care of an unauthorized agency by a parent, guardian, or relative, direct that the agency institute a proceeding to free the child for adoption;[39]

(4) in the case of a child whose guardianship and custody have been committed to an authorized agency by court order or a surrender instrument, direct that the child be placed for adoption in the foster family home where he resides or has resided, or with any other designated person or persons.[40]

The court retains continuing jurisdiction after handing down its order of disposition, and must rehear the matter "whenever it deems

---

35. "The court may, in its discretion, dispense with the attendance of the child at the hearing . . . ." N.Y. Soc. Serv. Law § 392 (6) (McKinney Supp. 1977).

36. *Id.* § 392(7). The order of disposition must include findings in support of the court's determination that the disposition is in the child's best interests. Gaskin v. Harlem Dowling Children's Services, 54 App. Div. 2d 641, 387 N.Y.S.2d 586 (1st Dep't 1976). "If the court promulgates separate findings of fact or conclusions of law, or an opinion in lieu thereof, the order of disposition may incorporate such findings and conclusions, or opinions, by reference." N.Y. Soc. Serv. Law § 392(7) (McKinney Supp. 1977).

37. *Id.* § 392(7)(a).

38. *Id.* § 392(7)(b).

39. *Id.* § 392(7)(c).

40. *Id.* § 392(7)(d). The court on its own motion may substitute the foster parents for the agency in a proceeding to terminate parental rights, when the agency which had commenced the proceeding at the direction of family court failed to pursue it. *In re* Lisa M., 87 Misc. 2d 826, 387 N.Y.S.2d 46 (Fam. Ct. 1976).

necessary or desirable, or upon petition by any party . . . . but at least every twenty-four months."[41]

B. Abuse And Neglect Proceedings

When parents threaten a child's physical, mental and emotional well-being by injury or mistreatment of the child, the state may intervene against the parents' wishes on behalf of the child.[42] Article Ten of the New York Family Court Act[43] establishes a procedure to meet the needs of the abused or neglected child. The family court of the county in which the child or his custodian resides or is domiciled has exclusive original jurisdiction over the proceedings.[44]

Essentially, an abused child is one less than sixteen years of age upon whom his parents inflict or permit the inflicting of physical injury.[45] A neglected child is one under eighteen years of age who has been abandoned by his parents or whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of his parents' failure to exercise a minimum degree of care in supplying either food, clothing, shelter, or education.[46]

In an article ten proceeding, the issue is not whether parental rights to the child will be terminated permanently, thereby releasing the child for adoption, but whether the child has been abused or neglected, and if so, whether the child should be returned to the home or placed with an authorized agency or other person. The proceeding is therefore divided into two hearings: the fact-finding hearing and the dispositional hearing.

1. The Fact-finding Hearing

A proceeding under article ten is initiated by filing a petition which alleges facts sufficient to establish that a child has been

41. N.Y. Soc. Serv. Law § 392(10).

42. N.Y. Fam. Ct. Act § 1011 (McKinney 1975).

43. *Id.* §§ 1011-1074.

44. *Id.* §§ 1013, 1015.

45. *Id.* § 1012(e). Examples of abuse are the inflicting of serious physical injury other than by accident, and criminal sex offenses committed against the child.

46. *Id.* § 1012(f). Examples of neglect are leaving a small child at home alone, or on the streets unguarded or unattended: the use of alcohol or drugs by the parent to such an extent that he loses self-control; the inflicting of excessive corporal punishment; or any other acts of a similarly serious nature requiring the aid of the court.

abused or neglected.[47] When the petition alleges abuse, the court issues a summons, together with a copy of the petition, requiring the appearance within three court days of the child's parents, or other person legally responsible for the child's care or with whom he is residing.[48] When the petition alleges neglect only, the summons and petition issued to the child's parents or person legally responsible for the child's care will designate a time and place for the court appearance (which need not be within three court days of service).[49] In either case, the court may also require the person summoned to produce the child at the time and place named.[50]

At the fact-finding hearing, the court is concerned only with the alleged abuse or neglect of the child. Testimony is taken and evidence submitted solely on that issue, and the court's sole determination is whether or not the child is abused or neglected.[51]

2. *The Dispositional Hearing*[52]

Based on its findings of fact the court determines if the child should be returned to the parent or placed with the Commissioner of Social Services, an authorized agency, or some other suitable person. The dispositional hearing usually commences immediately after the court makes its required findings of fact.[53] The court will consider evidence[54] with respect to the parents' rehabilitation, their

---

47. *Id.* § 1031.

The following may originate a proceeding under this article:

(a) a child protective agency, or

(b) a person on the court's direction.

Id. § 1032.

48. *Id.* § 1035(a). The petition and summons must be served within two days of their issuance, and at least twenty-four hours before the time stated thereon for appearance. *Id.* § 1036. The summons must be marked clearly on its face, "Child Abuse Case". *Id.* § 1035(a).

49. *Id.* § 1035(b).

50. *Id.* § 1035(a), (b). In abuse cases, the court must direct that the child be brought before the court, unless dispensed with for good cause shown. *Id.* § 1036.

51. *Id.* § 1044. Any determination that the child is abused or neglected must be based on a preponderance of the evidence. *Id.* § 1046(b).

52. *Id.* § 1045.

53. *Id.* § 1047(a). After the fact-finding hearing, the court may adjourn the proceedings to enable it to inquire into the surroundings, conditions and capacities of the person involved. *Id.* § 1048(b).

54. Any reports prepared for the court's use are deemed confidential, and the court, in its discretion, may withhold any or all of the information contained in the reports from the Law Guardian, counsel, party in interest or any other person. These reports may not be furnished to the court before the completion of the fact-finding hearing—they are to be used only at the dispositional hearing. *Id.* § 1047(b).

living conditions, and the feelings and wishes of the child, if the child is old enough to articulate these.[55] Medical and psychological reports may also be considered.

At the conclusion of the dispositional hearing, the court enters an "order of disposition", which may:[56]

(1) suspend judgment for a period of one year,[57]

(2) release the child to the custody of his parents or the person legally responsible for the child's care;[58]

(3) place the child for an initial period of eighteen months in the custody of a relative or other suitable person, the Commissioner of Social Services, or an authorized agency suitable for child placement;[59]

(4) issue an order of protection setting forth reasonable conditions of behavior to be observed for a specified time by the parent or person legally responsible for the child's care;[60]

(5) place the parent under supervision of a child protective agency or authorized agency for a period up to eighteen months.[61]

C. Extension Of Placement Proceedings

Eighteen months after the court places a child with the Commissioner of Social Services or an authorized agency following an abuse or neglect proceeding, the agency must file a petition for extension of placement.[62] Otherwise, the court loses jurisdiction, and the parent may assume full control and custody of the child.[63] No placement may be extended or continued unless a hearing is held concerning the need for extending or continuing the placement.[64] At the hearing, the agency must show that the parent is not a fit parent to receive the child, and that it would be in the best interests of the child to remain in placement.[65] The agency, usually through the

55. N.Y. Soc. Serv. Law § 348-b(k) (McKinney Supp. 1977).

56. N.Y. Fam. Ct. Act § 1052(a). The court must state the grounds for any disposition ordered. *Id.* § 1052(b).

57. *Id.* § 1053(b).

58. *Id.* § 1054.

59. *Id.* § 1055(a), (b).

60. *Id.* § 1056.

61. *Id.* § 1057.

62. *Id.* § 1055(b)(ii).

63. *Id.* § 1055(b)(i).

64. *Id.* § 1055(b)(ii).

65. *Id.* § 1055.

testimony of the caseworker assigned to the case, must submit evidence on the lack of meaningful parental visitation during the initial eighteen month period; the caseworker's visits to the parental home and observations of the living conditions or any familial problems; and the agency efforts to ameliorate any problems which stand in the way of the return of the child to the parents.[66]

The child's natural parents, any other person responsible for the child's care, and the foster parents also are entitled to participate in the placement extension proceeding, and may submit evidence and examine the agency's witnesses.[67]

Upon conclusion of the hearing, the court issues an order either extending or terminating the placement. An extension of placement may be for no longer than one year, after which another review proceeding is required.[68]

In addition to an order of extension, or in lieu of it, the court may order the agency to "undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child."[69] The court may order also that the agency initiate proceedings to free the child for adoption.[70]

D. Abandonment Proceedings

A child is deemed abandoned by his parent if the child is under eighteen years of age, and his parent "evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency."[71]

Determination of a child's abandoned status is made solely on the basis of the parent's conduct toward the child and the agency. It is not encumbent upon the agency to encourage and stengthen the

66. *Id.*

67. *Id.* § 1055(b)(ii).

68. *Id.* § 1055(b)(i).

69. *Id.* § 1055(c). The order of the court may include a "specific plan of action" and may require the agency to assist the parent or other person responsible for the child's care in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment." *Id.*

70. *Id.* §§ 1055(d).

71. N.Y. Soc. Serv. Law §§ 371(2), 384-b(5) (McKinney Supp. 1977).

parent's interest in the child in the absence of the parent's own acts—the only obligation of the agency is to refrain from preventing or discouraging such action.[72]

The burden of proof to show that the parent abandoned the child without good reason is on the agency.[73] Through the testimony of the assigned caseworker, the agency usually presents evidence as to the lack of parental contact. The caseworker will testify to conversations with the parents, and recount his professional observations concerning the parents and their residence. He also will testify that the parents did not: (1) visit the child; (2) support the child; (3) send the child letters, cards or presents; or (4) contact the agency to inquire about the child for at least the six months prior to the filing of the petition for an abandonment hearing by the agency.

Although no longer necessary in abandonment proceedings,[74] the caseworker may also testify about agency attempts to help reunite the parent and the child. The caseworker may point out, for example, that the parent was encouraged to visit, and if visiting was difficult, that the agency provided money for transportation or offered to bring the child to the parent's home.

The child's foster parents, if any, also are entitled to participate in the hearing. They usually appear in support of the agency petition to show that the child generally is receiving good care, and that the child's best interests are served by his remaining in foster care. On the other hand, the natural parents, by their attorney, will at-

---

72. In making its determination, "the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified . . . ." *Id.* § 382-b(5)(b). *See also, In re* Anonymous, 40 N.Y.2d 96, 351 N.E.2d 707, 386 N.Y.S.2d 59 (1976), which held that an authorized agency need not allege nor prove that it used diligent efforts to encourage and strengthen the parental relationship when it attempts to gain legal custody of the child based upon abandonment under a section 384 proceeding.

73. However, this burden is met by a mere showing that the parent failed to visit the child or communicate with the agency although able to do so. In the absence of evidence to the contrary, the ability of the parent to do so is presumed. *Id.* § 382-b(5)(a). *But, compare, In re* Amy S., 89 Misc. 2d 42, 390 N.Y.S.2d 530 (Fam. Ct. 1976). In *Amy S.*, the court held that, under the principles announced in *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976), a parent could lose legal custody of a child through an abandonment proceeding when the child has been separated from the parent for a lengthy period, and it was in the best interest of the child to remain with the psychological parent. The court then concluded, "By inference, therefore, the requirement of finding omission to act without good reason contained in section 371 (subd. 2,, par [c]) [of the Social Service Law] may be rendered inoperative." 89 Misc. 2d at 49, 390 N.Y.S.2d at 535-36.

74. *See* text accompanying note 72 *supra.*

tempt to show that (1) there were parental visits, or some contact such as cards, letters, or telephone calls, or a relative kept in touch with the child; (2) the parent was physically unable to visit the child; (3) the agency favored the foster parents over the natural parents; (4) the foster parents undermined the child's relationship with his natural parents; (5) the natural parents were on welfare and could not give the child adequate financial support.

When the child is over fourteen years of age, the court also may consider the wishes of the child in determining his best interests.[75]

If the court is satisfied by a fair preponderance of the evidence[76] that the child has been abandoned, it will sustain the petition and issue an order of commitment. The order of commitment gives the guardianship and legal custody of the child to the authorized agency, with the power to consent to an adoption without further notice to or consent of the natural parent, subject to court approval.[77]

E. Permanent Neglect Proceedings

If a court determines that a child has been permanently neglected by his parent, it may commit the guardianship and custody of the child to an authorized agency or foster parent.[78]

> A permanently neglected child is defined as: a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.[79]

---

75. N.Y. Soc. Serv. Law § 382-b(3)(k) (McKinney Supp. 1977).

76. *Id.* § 382-b(3)(g).

77. *Id.* § 382-b(3)(e).

If successful, the attorney for the agency will draft a proposed Order with Notice of Settlement, and serve it on the attorney for the parent, giving two days notice (three days if it is served by mail). After the order is signed, the Order with Notice of Entry is served on the parent's attorney to start the time to appeal running. After receipt of the Order with Notice of Entry, the parents have thirty days within which to appeal the Order of Commitment.

78. *Id.* § 384-b(7). For a discussion of the proceedings involving permanently neglected children in New York see Carrieri, *Development and Expansion of New York's Permanent Neglect Statue*, 5 Fordham Urb. L.J. 419 (1977).

79. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney Supp. 1977). Section 384-b(7) also provides:

Only the Family Court has jurisdiction over permanent neglect proceedings.[80] Venue is in the county in which the child or the parent of the child resides or is domiciled, or in which the authorized agency has an office for the regular conduct of business.[81]

The proceeding to permanently terminate the parents' custody of the child on the ground of permanent neglect is originated by petition, which must allege that:

(1) the child is under eighteen years of age;

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and corporation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health.

80. *Id.* § 384-b(3)(d).

81. *Id.* § 384-b(3)(c).

(2) the child is in the care of an authorized agency;

(3) the agency has made diligent efforts to encourage and strengthen the parental relationship, specifying the efforts made or averring that such efforts would be detrimental to the best interests of the child, and giving the reasons for that assertion;

(4) the natural parent, although physically and financially able to do so, did not maintain contact with the child during the one year period following the child's placement with the agency, despite the diligent efforts by the agency to foster a relationship between the child and the natural parent; and

(5) it is in the child's best interest that custody of the child be committed to an authorized agency or foster family.[82]

As in the case of abuse and neglect proceedings,[83] an inquiry into the parents' permanent neglect of a child is divided into two hearings: the fact-finding hearing[84] and the dispositional hearing.[85]

1. The fact-finding hearing

Upon timely service of the summons and petition upon the parent or person legally responsible for the care of the child,[86] a hearing on the petition is held in the family court.[87] The agency must support the allegations in the petition by a fair preponderance of the evidence,[88] and "[o]nly competent, material and relevant evidence may be admitted" in support of the agency position.[89] The fact-finding hearing proceeds on the basis of the allegations contained in the petition, and the agency must prove each of the five elements enumerated in the statute to meet its burden of proof.[90]

In essence, the court must determine whether the agency and the

82. N.Y. FAM. CT. ACT § 614(1) (McKinney Supp. 1977). "Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief." *Id.* § 614(2).

83. *See* text accompanying notes 43-62 *supra.*

84. A fact-finding hearing is a hearing to determine whether the allegations in the petition are supported by a fair preponderance of the evidence. N.Y. FAM. CT. ACT § 622 (McKinney Supp. 1977).

85. A dispositional hearing is a hearing to determine what order of disposition should be made in accordance with the best interests of the child. *Id.* § 623.

86. *Id.* § 617.

87. *See* text accompanying notes 80-81 *supra.*

88. N.Y. FAM. CT. ACT § 622 (McKinney Supp. 1977).

89. *Id.* § 624.

90. *See* text accompanying note 82 *supra.*

natural parents have discharged their respective duties, namely (1) the agency obligation to use diligent efforts to strengthen parental ties;[91] and (2) the parental obligation "substantially and continuously . . . to maintain contact with or plan for the future of the child."[92]

If the court is satisfied that the natural parent has permanently neglected the child despite the diligent efforts of the agency, it will sustain the petition and order a dispositional hearing to determine whether the interests of the child require that the parents' custody be terminated permanantly.[93]

2. The dispositional hearing

Upon completion of the fact-finding hearing the dispositional hearing may commence immediately.[94] Its sole purpose is to determine whether the child's best interests will be served by permanently terminating parental custody, and thus any order purporting to terminate custody entered before the dispositional hearing will be reversed as premature.[95]

At the hearing, the court may consider testimony of the agency, the foster parents, and the natural parents, and accept medical, psychological or other reports prepared by the probation service or the agency.[96]

---

91. N.Y. Soc. Serv. Law § 384-b(7)(f) (McKinney 1971); *see also* note 79 supra.

92. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney Supp. 1977).

93. N.Y. Fam. Ct. Act § 625(a) (McKinney Supp. 1977). ". . . [i]f all parties consent the court may . . . dispose with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing." *Id.*

94. *Id.*

95. *In re* Lewis, 41 App. Div. 2d 619, 340 N.Y.S.2d 841 (1st Dep't 1973). In *Lewis* a proceeding to terminate custody of an allegedly permanently neglected child was brought by the school in which the child had been placed. The family court then entered an order purporting to terminate permanently custody by the natural parent. The evidence at the fact-finding hearing amply justified the finding of permanent neglect, according to the appellate division; however, the court struck from the order the paragraph terminating custody and remanded the proceeding for a dispositional hearing, holding that permanent termination of custody was premature. Although the family court order provided for a future dispositional hearing, the disposition itself was made in that very order, and the appellate court held this may not be done until the conclusion of a dispositional hearing to determine the child's best interests. Thus, while accepting the factual finding of permanent neglect, the court nevertheless remanded for proper completion of the proceedings.

96. N.Y. Fam. Ct. Act § 625(b) (McKinney Supp. 1977). These reports are deemed confidential information which the court, in its discretion, may "withhold from or disclose in whole or in part to the Law Guardian, counsel, party in interest, or other appropriate person." *Id.*

At the conclusion of the dispositional hearing, the court may enter an order:[97]

(1) dismissing the petition;[98]

(2) suspending judgment for a period not to exceed one year;[99] or

(3) permanently terminating custody of the parent and awarding custody to the authorized agency.[100]

The order of disposition must be made solely on the basis of the best interest of the child,[101] and there is no presumption that this interest will be promoted by any particular disposition.[102]

F. Habeas Corpus Proceedings

Whenever there is a dispute over the custody of a child, the party seeking custody may institute a habeas corpus proceeding seeking court determination of the custody issue.[103] For example, if a child has been placed in foster care with foster parents, and the foster parents refuse the agency request that the child be returned either to it or to the natural parents, the agency or natural parents may petition the court to order the production of the child and litigation of the child's cutody.

In such a situation, the court proceeding is grounded on the premise that the natural parent has the right to custody superior to all others in the absence of extraordinary circumstances.[104] This principle was enunciated in the landmark decision of the New York State Court of Appeals, *Bennett v. Jeffreys*,[105] which held that a mother's

---

The reports may not be submitted to the court during the fact-finding hearings, their use is restricted to the dispositional hearing and the dispositional order. *Id.*

97. *Id.* § 631.

98. *Id.* § 632.

99. *Id.* § 633. The court will establish "permissible terms and condition" which the parent or other person legally responsible for the child must follow during the period of suspended judgment. *Id.* The initial one year period may be extended upon a judicial finding of exceptional circumstances. *Id.*

100. *Id.* § 634. The court may order this commitment subject to any conditions it deems proper. *Id.*

101. *Id.* § 631. *See, e.g., In re* Clear, 65 Misc.2d 323, 318 N.Y.S.2d 876 (Fam. Ct. 1970); *In re* Stephen B, 60 Misc.2d 662, 303 N.Y.S.2d 438 (Fam. Ct. 1969).

102. N.Y. FAM. CT. ACT § 631 (McKinney Supp. 1977).

103. *Id.* § 651.

104. *In re* Giliberto, 4 App. Div. 2d 692, 163 N.Y.S. 2d 802 (4th Dep't 1957), *aff'd*, 3 N.Y.2d 915, 145 N.E.2d 874, 167 N.Y.S.2d 930 (1957).

105. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

efforts to regain custody of her child could only be thwarted by the mother's surrender or abandoment of the child; persistent neglect by the mother; the mother's unfitness; "or other like extraordinary circumstances" such as prolonged separation of the mother from the child, combined with the mother's lack of an established household of her own, her unwed state, and an attachment of the child to the custodial foster parent.

Thus, when the natural parent requests the return of the child from a foster parent, it is not simply a contest as to which would make the better parent. Absent extraordinary circumstances, if the natural parent can show he or she is a fit parent and did not abandon or neglect the child, then the court will award custody of the child to the natural parent even if the foster parents could provide a better home.[106]

The two questions which the court must consider in a habeas corpus proceeding are:[107]

(1) Are there "extradornary circumstances" within the *Bennett* guidelines which vitiate the natural parent's ordinarily paramount right to custody?

(2) If the answer to this question is in the affirmative, what are the "best interests" of the child?

In such a proceeding, the agency, through the caseworker assigned to the child, will be called upon not so much to distinguish between which is the better home, but to state whether the natural parent is a fit parent.[108] Given this pivotal role, the agency is charged with investigating any extraordinary circumstances and protecting the best interests of the child. At a minimum, this would seem to require[109] first-hand knowledge of the parties; an in-depth study or personal observation of either the foster parents' or natural parents' home status; a review of the child's best interests; a physical and psychological examination of the natural parents, where indicated; an interview of the foster parents, the natural parents, the child and any physicians or caseworkers assigned to the case; and an in-depth study of the child in his or her relations with the natural parents and foster parents.

---

106. *Id.* at 549, 356 N.E.2d at 283, 387 N.Y.S.2d at 826.
107. *In re* Spence-Chapin Svce., N.Y.L.J., Oct. 24, 1977 p. 11, col. 5 (Sup. Ct. 1977).
108. *Id.*
109. *Id.* at p. 12, col. 2-3.

The court makes its determination based on a fair preponderance of the credible evidence submitted at the hearing. It may reserve decision or announce the determination immediately; in any event, the court must announce the basis for its determination.

III. Applicable Standards After Bennett v. Jeffreys

Since the early 1970's greater emphasis has been placed upon the best interest of the foster child in his own well-being. This emphasis has included newly-enacted legislation aimed at protecting a child in foster care and assuring his future well-being by removing barriers to the termination of parental rights and freeing the child for adoption. For example, in 1971 the legislature enacted section 392 of the Social Service Law[110] which for the first time mandated that the family court review the status of every child in foster care at least every twenty-four months. As a result of these review hearings, the family court has been successful in freeing many children for adoption, or in appropriate cases, returning children to their natural parents.

In 1976, the New York State Court of Appeals decided three cases which have made it easier for agencies to free foster children for adoption. All emphasized the "best interests of the child" as the controlling principle in child custody cases. The first, *In re Anonymous,*[111] held that an agency which applies for guardianship can prove abandonment, without also proving its own diligent efforts to encourage and strengthen the parental relationship; the second case, *In re Orlando F.,*[112] held that parental failure to plan adequately for the future of a child in agency custody is sufficient to support a determination of permanent neglect; the third case, *Bennett v. Jeffreys,*[113] established the "best interests of the child" principle as the standard controlling parental rights to custody.

Prior to this series of cases, it had been settled case law that abandonment arose only from a complete repudiation of parenthood[114] or from "a settled purpose to be rid of all parental obligations, and to forego all parental rights."[115] The court has progressed

110. N.Y. Soc. Serv. Law § 392 (McKinney 1971).
111. 40 N.Y.2d 96, 351 N.E.2d 707 386 N.Y.S.2d 59 (1976).
112. 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976).
113. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).
114. In re Maxwell, 4 N.Y.2d 429 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).
115. *Id.*, at 433, 151 N.E.2d at 850, 176 N.Y.S.2d at 283. *See also,* Spence-Chapin Adop-

a long way since its pronouncement that even where "the flame of parental interests was reduced to a flicker, the courts may not properly intervene to dissolve the parentage."[116] Rather than jealously guarding the natural parent's right to his child, the court recently has recognized that parental rights may be terminated even without fault on the part of the natural parent, on the principle that it is in "the best interests of the child" to do so.[117]

In establishing standards in the determination of the custody of children, the courts must look to the landmark case of *Bennett v. Jeffreys.*[118] In *Bennett,* the court enunciated the principle that the state may deprive the natural parent of custody of his child when that parent has either surrendered, abandoned or permanently neglected the child; where he has been found to be unfit; or where extraordinary circumstances exist. This last basis for loss of custody was espoused formally for the first time in *Bennett.* The court found extraordinary circumstances existed in that: (1) there was a prolonged separation between mother and child; (2) the mother lacked an established household; (3) the mother was unwed; and (4) the child was attached psychologically to the non-parent custodian. The court held that these extraordinary circumstances "trigger[ed] the 'best interests of the child' test."[119] Thus, once the court finds extraordinary circumstances, the natural parent may lose custody of the child without any unfitness or fault on his part, since disposition of custody is now controlled by the best interests of the child.

However, the *Bennett* case involved only physical custody of the infant, and not legal custody or the termination of parental rights. Still, the principles enunciated have had wide-reaching effect, and have been cited in almost all types of cases relating to the physical

---

tion Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971); People *ex rel.* Anonymous v. Anonymous, 10 N.Y.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1968).

Neither *Anonymous, Orlando F.* or *Bennett* specifically overruled *Maxwell* or *Polk.* This was done by section 384(6) of the New York Social Service Law (*added* 1975 N.Y. Laws, ch. 704, § 1, *repealed* 1976 N.Y. Laws, ch. 666, § 2). *See, e.g., In re* Goldman, 41 N.Y.2d 894, 362 N.E.2d 619, 393 N.Y.S.2d 989, *aff'g,* 51 App. Div. 2d 282, 381 N.Y.S.2d 71 (1st Dep't 1976. *See also,* note 116 *infra.*

116. *In re* Susan W., 34 N.Y.2d 76, 80, 312 N.E.2d 171, 174, 356 N.Y.S.2d 34, 38 (1974). *Contra: In re* Amy S., 89 Misc. 2d 42, 390 N.Y.S.2d 530 (Fam. Ct. 1977) holding that the "flicker of interest" rule is no longer applicable.

117. *In re* Sanjivini K., 40 N.Y.2d 1025, 359 N.E.2d 1330, 391 N.Y.S.2d 535 (1976).

118. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S. 2d 821 (1976).

119. 40 N.Y.2d at 548, 356 N.E.2d at 283, 387 N.Y.S.2d at 826.

or legal custody of the infant. In this regard, *Bennett* has to some extent contributed to the confusion in custody proceedings. Most of the confusion centers around the fact-finding hearing in permanent neglect proceedings brought under section 384(b) of the Social Service Law.[120] The question is whether the *Bennett* principles apply to permanent neglect and abandonment proceedings in which the natural parent may lose both physical and legal custody (*i.e.*, all rights and obligations toward the child).

While most courts readily have cited the "best interests of the child" principle as the basis for determining custody, it is apparent that the citation has been at best no more than an acknowledgement of *stare decisis*, and at worst a means by which the courts have given themselves free rein in establishing their own *ad hoc* guidelines. The resultant confusion may be illustrated best by the recent case of *In re Sanjivini K.*[121]

In *Sanjivini*, the Department of Social Services instituted a "392 hearing" to review the foster care status of the illigitimate child of an Indian alien. The mother who was in the United States on a student visa, voluntarily placed the child in temporary foster care with the department three weeks after her birth in 1966. Since 1968 the child had been in a foster home.[122] During the course of the child's foster care, the mother's visa expired and she faced deportation. A 1968 proceeding bought by the agency declared the child permanently neglected, and the agency succeeded in extending placement, although this was apparently only a sham administrative step to forestall deportation.[123] Thereafter, the placement was extended periodically. A 1974 family court order was appealed by the mother, but was dismissed for failure to prosecute. In February, 1975, the family court, after a "392 hearing", found that the best interest of the child required that her permanent status be ascertained as soon as possible, and directed the prompt institution of a

120. N.Y. Soc. Serv. Law § 384(b) (McKinney Supp. 1977).

121. 53 App. Div. 2d 863, 385 N.Y.S.2d 350 (2d Dep't 1976), *rev'd*, 40 N.Y.2d 1025, 359 N.E.2d 1330, 391 N.Y.S.2d 535 (1976).

122. "It is quite clear that the environment in that home is warm, constructive, and wholesome, that Sandy has been happy and is thriving there, and that she would even like to be adopted by the foster parents." 53 App. Div. 2d at 864, 385 N.Y.S.2d at 351.

123. "The order expressly stated . . . that, 'the Court has no finding concerning any acts of the mother that might have constituted a neglect. Therefore, that matter is not determined at all." 53 App. Div. 2d at 865, 385 N.Y.S.2d at 352.

proceeding to free her for adoption. The mother appealed.

While the appeal of the family court's order was before the appellate division, a second independent permanent neglect proceeding in the family court declared the child permanently neglected.

The appellate division unanimously reversed the family court's order directing that the child be freed for adoption, and directed that the child be returned to the mother immediately. Recognizing that "[t]he determination of whether the foster care should have been continued hinged upon whether it was 'in accordance with the best interests of the child,' "[124] the appellate court said:

> The record certainly does not establish that [the mother] abandoned her child or is an unfit mother. To the contrary, under the most trying circumstances, [she] manifested qualities of courage, industry, pesistence, and intelligence, and those characteristics cannot be turned against her to indefinitely deprive her of her child. Under all the circumstances herein, it is in accordance with the best interests of the child that she be returned to, her natural mother.[125]

The appellate division decision was handed down in July, 1976, after *Bennett v. Jeffreys* had been argued, but before it had been decided by the court of appeals. The appellate division relied on the historic New York view that "[t]he reasons for denying a mother's claim to custody must be weighty . . . and compelling."[126]

The court of appeals reversed the appellate division and reinstated the family court order, stating, "What is paramount . . . is the proper resolution of the interests of a young girl, her natural mother and her foster parents . . . [which] will best be served by resolving the status of the child and the rights and obligations of the parties in conformity with the [*Bennett*] standards . . . ."[127]

While this language may be read as equating the interests of the child with those of the natural parents and the foster parent, it is apparent that any conflicting interest must be resolved in the child's favor. This the appellate division failed to do, notwithstanding the language in its opinion that its resolution was "in accordance with the best interests of the child."[128]

---

124. *Id.* at 864, 385 N.Y.S.2d at 351.
125. *Id.*, at 865, 385 N.Y.S.2d at 352.
126. *Id.*, at 866, 385 N.Y.S.2d at 353.
127. 40 N.Y.2d at 1026, 359 N.E.2d at 1331, 391 N.Y.S.2d at 537.
128. 53 App. Div. at 865, 385 N.Y.S.2d at 352.

Thus, *Sanjivini* holds that the "best interests of the child" principle applies to a permanent neglect proceeding and, therefore, a natural parent now may lose legal custody of a child without a court finding of neglect. Moreover, as Judge Gabrielli's dissent in *Sanjivini* suggests, such a termination even may be made despite an affirmative finding that the natural parent had not been neglectful.[129]

The court, then, has created a "no-fault" appendage to the legislative standards for terminating parental custody rights, which has both complicated and confused child custody proceedings by blurring the distinction between the fact-finding hearing and the dispositional hearing. The result is a series of family court cases which have gone far beyond the legislative mandate.

In re Amy S.[130] involved an abandonment proceeding in which the authorized agency sought to free the child for adoption. In remanding the case for a new fact-finding hearing, Judge W. Denis Donovan said;

> [I]t appears to this Court that the Court of Appeals in *Matter of Bennett v. Jeffreys* may have added a new and independent basis for termination of parental rights by its definition of "extraordinary circumstances". It now appears to this Court that under the criteria enunciated in *Matter of Bennett v. Jeffreys* prolonged separation of the natural parent and child, particularly a separation which commences in early childhood, mandates a consideration of the best interests of the child. Such consideration . . . may then be found to require sustaining the psychological parentage which has formed between the child and the foster parents by freeing the child for adoption . . . . By inference, therefore, the requirement of finding omission to act without good reason . . . may be rendered inoperative. . . .
>
> In short, it may well be the present state of the law that termination of the parental rights of the natural mother may in the proper circumstances solely be a sequel of a finding that it is in the best interests of the child to remain within the psychological parentage in which the child developed with the termination of the natural mother's rights requiring no independent basis of fact-finding.[131]

Thus, *Amy S.* holds that in an abandonment proceeding, a parent may lose legal custody of his child even though the parent had good reason for not visiting the child. This is no-fault termination of parental rights to the child.

---

129. 40 N.Y.2d at 1027, 359 N.E.2d at 1334, 391 N.Y.S.2d at 540 (Gabrielli, J., dissenting).
130. 89 Misc. 2d 42, 390 N.Y.S.2d 530 (Fam. Ct. 1976).
131. 89 Misc. 2d at 49-50, 390 N.Y.S.2d at 535-36.

In *In re Patricia Ann,*[132] Judge Stanley Gartenstein interpreted the *Bennett* test to apply to the fact-finding hearing in permanent neglect cases. Judge Gartenstein stated:

> We hold therefore that the import of *Bennett v. Jeffreys* is to mandate a limited consideration of the best interests of the child at the fact-finding stage and that the line of demarcation between the two separate hearings contemplated by FCA section 622 and section 623 has been judicially erased, to an extent yet to be determined by appellate hearings. At this stage, lacking any other guide, we hold that any consideration of the child's best interests at the fact-finding hearing over and above that permitted herein would infringe upon the statutory scheme contemplating a separate dispositional hearing. We are still of necessity, unsure of the ultimate effect this line of authority will have on the statutory privilege against consideration of dispositional matter as contained in FCA, section 625, but we prognosticate that with such changes effectuated in the statutory scheme, appellate authority should be forthcoming relatively quickly as a result of clarifying litigation.[133]

As indicated in *Patricia Ann,* it is not now certain to what extent, if at all, the best interests of the child test should invade the fact-finding hearing.

In *In re "Male" Chiang,*[134] Judge Shirley Kram dismissed an agency petition after a fact-finding hearing, but held that the best interests of the child test is applicable to a permanent neglect proceeding at the fact-finding stage where extraordinary circumstances exist, stating:

> Ultimately, the Court must consider the issues in the light of what is best for the child, Chiang. The prolonged separation from his natural mother is the extraordinary circumstance which triggers a thorough consideration by this Court of the best interests of the child.[135]

Since *Bennett, Orlando F.,* and *Sanjivini* were decided by the court of appeals before the effective date of the new comprehensive foster case law, including section 384(b) of the Social Service Law,[136] it is no longer certain whether the "best interests of the child" test is relevant to the fact-finding hearing, and, if it is, to what extent it is relevant.

---

132. 89 Misc. 2d 368, 392 N.Y.S.2d 180 (Fam. Ct. 1977).
133. *Id.* at 377, 392 N.Y.S.2d at 184.
134. N.Y.L.J., June 30, 1977, p. 13, col. 2 (Fam. Ct. 1977).
135. *Id.*
136. N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1977).

Since section 384(b)(7)(a)[137] has been taken substantially from section 611 of the Family Court Act,[138] the principles enunciated in *Bennett, Orlando F.*, and *Sanjivini* should still apply. Based upon these cases, the "best interest of the child" test should be considered at the fact-finding hearing; thus, a parent may lose legal custody of the child without a finding of unfitness or fault. Furthermore, every aspect of the natural parents' and foster parents' background and custodial qualifications would have to be reviewed at the fact-finding hearing, together with a review of the needs and interests of the child.

As a result of the present state of confusion in child custody proceedings, it is possible for an agency or foster parent to be successful in freeing a child for adoption depending solely on which judge is sitting. For example, some judges apply the *Bennett* principles to their full extent in permanent neglect fact-finding hearings.[139] The result is that, when extraordinary circumstances exist, the court can find permanent neglect without a finding of fault or unfitness of the natural parent, and without determining whether the agency had used diligent efforts to work with the parent for the child's return.[140] Other judges refuse to apply *Bennett* at the fact-finding hearing, and do not permit any evidence concerning the best interests of the child. They are concerned only with the failure of the parent to plan for the future of the child, or to have substantial contact with the child during foster care, and with the diligent efforts of the agency to promote the parental relationship. Still other judges apply *Bennett* to a limited extent at the fact-finding hearing.[141]

The result of these variances is confusion and uncertainty among the courts, attorneys, child-care agencies, parents and children, in an atmosphere which encourages forum-shopping and breeds loss of confidence in the legislature and the courts.

---

137. *Id.* § 384-b(7)(a).

138. N.Y. FAM. CT. ACT § 611 (McKinney 1971).

139. *See, e.g., In re* Ray, 90 Misc. 2d 35, 393 N.Y.S.2d 515 (Fam. Ct. 1977).

140. *See, e.g., In re* Suzanne Y. 92 Misc. 2d 652, 401 N.Y.S.2d 529 (Fam. Ct. 1978), in which the court held that "no fault" termination of parental rights was warranted, despite the complete absence of statutory grounds for the termination, since it was in the best interest of the child.

141. *See, e.g., In re* Patricia Ann, 89 Misc. 2d 368, 392 N.Y.S.2d 180 (Fam. Ct. 1977), in which Judge Stanley Gartenstein permitted testimony concerning the best interests of the child in the fact-finding hearing of a permanent neglect proceeding, to a "limited" extent.

IV. The Role Of The Social Worker As A Witness In Child Custody Proceedings

A. Preparation

When a social worker is called in any of the proceedings discussed in section II, he must be fully prepared to give clear and convincing testimony. Nothing can take the place of thorough preparation before the hearing. It is essential that the caseworker and agency attorney meet prior to the hearing and prepare for both direct and cross-examination. Prior to the meeting with the attorney it is important for the worker to review the case record thoroughly.

After the caseworker has reviewed the case, he and the case supervisor should meet with the attorney to prepare their presentation. The preliminary preparation should include the following information:

(1) Name and date of birth of each child.

(2) Date of placement for each child, and the reason for the placement.

(3) The circumstances for placement (abuse, neglect, abandonment, court order, etc.).

(4) Was the child placed directly with the agency, or with a foster home?

(5) What emotional or medical problems, if any, did the child have when he initially came into foster care?

(6) How did the child adjust to the institution?

(7) While the child was at the institution, were any psychiatric, psychological, neurological or E.E.G. examinations administered? What were the results and follow-up of each?

(8) Did the child go to a foster home? Give the dates, names of foster parents, and number of foster homes in which the child has been placed. What were the adjustments in the foster home?

(9) What school did the child attend? What were the dates and reasons for transfers, if any? How did the child adjust to school? Give the child's grades at each school and correlation with type of placement.

(10) While the child was placed in the foster home, were any psychiatric, psychological or neurological examinations administered? What were the results and follow-up of each?

(11) Did the natural parents visit the child during placement? How often? Were these visits initiated by the agency or the natural

parents? How did the child respond before, during and after these visits?

(12) Were letters sent to the natural parents? How often? Are there copies of these letters? Were they acknowledged by the parents?

(13) Were there meaningful contacts with the natural family? Were the natural parents interviewed? In testifying about agency contacts with the natural parents, the caseworker should know: (a) dates of all contacts, including all visitation letters written to the family, and all contact dates made prior to the interview; (b) an evaluation of the interview; (c) assistance offered and follow-up by the agency; (d) efforts made by the agency to encourage and strengthen the parental relationship; (e) physical and mental examinations of the parents, if any; (f) the dates and outcome of any staff conferences, including any recommendations.

(14) How many contacts has the worker had with the child? What other contacts, interviews and examinations has the agency had with the child? What are the agency's goals for the child? What efforts have been made by the agency in meeting these goals?

(15) Who are the foster parents? What were the circumstances of placement with the foster parents? How old are they? Are there any natural children living at home with the foster parents? What is the relationship among the foster parents, any natural children and the foster child? What kind of family activity do they participate in? What are the general living conditions in the foster home? What kind of discipline do the foster parents utilize with their own children and with the foster child?

(16) Can the worker, if qualified, give an opinion as to the child's best interests? For example, if a termination proceeding, should the child be freed for adoption?

B. Testimony

Because of frequent turnovers in the foster care field, the caseworker who will be testifying at the hearing often will not have complete personal knowledge of all the facts. These facts, however, are recorded in the case record. Therefore, it is important to have the child's entire case record admitted into evidence since it is the best evidence of the child's history.

The introduction of case records should precede the caseworker's testimony. The case supervisor should identify the case records and

testify that: (1) it is the regular course of the agency's business to keep records; (2) the case records of the child in this proceeding were made in the regular course of business; (3) the entries contained in the case records were made contemporaneously with the events described therein; and (4) the records were kept under the supervision and control of the supervisor.

With this foundation laid, the entire case record can be admitted in evidence, and the caseworker can testify from the records concerning events that he did not observe, or which occurred prior to his employment. In addition to the case records, the caseworker may use notes to refresh his memory.

C. Testimony at the hearing

The attorney for the agency usually will call two witnesses: the case supervisor and the caseworker. Usually the supervisor will not be personally familiar with the case, having had less contact with the parties than the caseworker.

The case records will be placed in evidence after a proper foundation has been laid, and the case supervisor can testify from the records, subject to cross-examination by the attorney for the natural parents and the Law Guardian. A case supervisor can be qualified as an expert and may then give his opinion on the best interests of the child. Generally, the case supervisor will testify that it is the best interests of the child to be freed for adoption. He will also testify that the agency was diligent in attempting to encourage and strengthen the parental ties, but despite the agency's best efforts, the parent neglected either to visit or to plan for the child's return.

The caseworker for the natural parents will testify that he was assigned to work with the natural parents with the ultimate goal of reuniting parent and child. He will outline all the attempts made to encourage and strengthen the parental ties, such as mailing regular visitation notices to the mother, making monthly home visits, encouraging the parent to visit the child, and if necessary, supplying the natural parents with carfare to visit the child or bringing the child to the parents' home. The caseworker should be able to testify that he assisted in other ways, such as aiding the parents in receiving public assistance, enrolling in a drug or alcohol treatment program or obtaining employment or larger living quarters. If the caseworker cannot show diligent effort to strengthen and encourage the parental relationship, he must be prepared to testify that it would

have been detrimental to the interests of the child to do so. For example, if the parent abused the child during the initial visits, or the child had nightmares after each visit, the agency would be justified in not continuing to strengthen the parental ties.

The caseworker assigned to the foster family and the child, if different from the worker assigned to the natural family, will also be called. He will testify to the type of care the child receives at the foster home, to the physical condition of the child and to the progress he has made since being placed with the foster family. When indicated, the agency psychiatrist or psychologist who examined the child may testify that it would have been detrimental to the moral and temporal welfare of the child to encourage or strengthen the parental relationship.

The attorney for the natural parents will attempt to show that the caseworker did not make diligent efforts to encourage and strengthen the parental relationship, but instead favored the foster parents over the natural parents. The parents may testify that the agency caseworker talked only of freeing the child for adoption and did little or nothing to aid the natural parents, or that they did not plan for the return of the child because they were financially unable to do so. There may have been a period when a parent was out of work and public assistance payments were insufficient. The natural mother may testify that she could not visit or plan for the child because of some physical problem or hospitalization.

Because of the adversarial nature of all child custody proceedings, the testimony of the caseworker is extremely important. It is only through meticulous preparation and close cooperation among the agency, the caseworker and the attorney that a fair and accurate representation of the child's history can be presented to aid the count in its determination.

V. Conclusion

It is incumbent on the legislature to amend section 614 of the Family Court Act, and section 384(b) of the Social Services Law to state clearly whether the "best interest of the child" test has any relevancy at the fact-finding stage, or whether there must be an independent finding at the fact-finding hearing of neglect or fault on the part of the parent before the "best interest of the child" test is applied at the dispositional hearing.

The weight of authority suggests that the best interests of the

child must be a factor at all stages of a child-custody proceeding, including the fact-finding hearing, when extraordinary circumstances exist. However, the legislature must give the judiciary guidance in determining the "extraordinary circumstances" which trigger the best interest test. At the least, a presumption of extraordinary circumstances should exist when the child has been in a foster home for a continuous period of two years.

Finally, the legislature must define "best interest of the child" to put an end to the uncertainty and inconsistency which pervade current child custody proceedings.

At a minimum, the test should consider the following elements:

1. the length of custody by the foster parents.
2. the possible psychological trauma to the child if he were to be removed from the foster home.
3. the present environment and living conditions of the foster parents and the natural parent.
4. the qualifications of the foster parents and the natural parent.
5. the background and circumstances of the foster parents and the natural parent.
6. the religious affiliation of the foster parents and that of the child and natural parent.
7. the race of the foster parents and that of the child.
8. the probability of eventual adoption by the foster parents as opposed to potential reunion with the natural parent.

In enacting such reforms and tightening the overbroad legislative mandate, the legislature would give much-needed guidance to the courts and the child-caring agencies, and contribute to the best interests of the children in their care.