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Comments

THE FOSTER PARENTS DILEMMA "WHO CAN I TURN TO WHEN SOMEBODY NEEDS ME?"

INTRODUCTION

An unwed teenager gives birth to a child she wants to keep but for whom she cannot presently provide. She feels that she can attain an adequate financial status in one or two years. A woman has a baby she places up for adoption; unfortunately, the baby has a physical defect which makes it temporarily unadoptable. Neglect and abuse of a young boy result from his parents' emotional problems. The boy is removed from the home, but the social worker from the local welfare agency feels that, with counseling, the parents' problems can be solved and that they will then be able to provide a good home for their son.

All of these situations present the problem of what to do with a child who has been displaced from his natural home and, for some reason, cannot be placed permanently in another. Foster care, consisting of temporarily providing for the child in either an institution or a volunteer private boarding home, has been the usual solution in such instances. As between institution and private home, the latter is generally favored because individual attention to the children produces fewer psychological problems and because

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it is much more economical than institutional care even though the state subsidizes private home care.¹

Unfortunately, even though private home foster care provides solutions to many problems the state encounters in caring for its children, it also provides a few problems of its own. One of these is the strong attachment that may develop between foster parent and child when the child has been in placement for a fairly long duration. While emotional attachment is desirable for proper psychological development of a child, it must be somewhat tempered in the foster care relationship because of the alleged temporariness of the arrangement. Qualified love obviously is an extremely difficult emotion to maintain, and in certain cases the developed foster parent-child cohesion becomes so great that the foster parents feel that they simply cannot give up the child when the adoption or welfare agency involved wants to terminate the relationship. If the agency refuses to allow the foster parents to retain the child by adoption, guardianship, or continued foster care, the foster parents have no alternative but to turn to the courts for assistance as legal custody of the child usually lies with the agency. In some cases, this action is taken for them, as when the agency attempts to enforce removal after the foster parents have refused to voluntarily relinquish the child. In other instances, the foster parents file a petition of adoption or guardianship with the court. As in any custody battle, the child inevitably is adversely affected by the fatiguing circumstances. He has already faced the separation experience from his natural parents and has spent, perhaps, several years in seemingly directionless limbo. Now he is faced with losing whatever identity and permanence he may have established in an unpleasant conflict among several parties, each allegedly asserting his best interests as well as their own.

Yet, one cannot help but feel compassion for the foster parents; they are merely trying to do what they feel is best for a child they love. Their rights in this regard and chances of success in asserting these rights in court will be explored in this article.

1. CALIFORNIA LEGISLATURE ASSEMBLY SELECT COMMITTEE ON SAN DIEGO FOSTER CARE PROGRAMS, REPORT ON STATUS OF SAN DIEGO FOSTER CARE (June 1973) [hereinafter cited as SAN DIEGO FOSTER CARE REPORT]; Katz, *Legal Aspects of Foster Care*, 5 FAMILY L.Q. 283, 285 n.11 (1971) [hereinafter cited as Katz].

PARTIES LIKELY TO BE INVOLVED IN FOSTER PARENT
LITIGATION AND THEIR SUPPORTIVE ARGUMENTS

Prior to a discussion of court decisions and opinions which have dealt with the foster parent problem, it will be helpful to identify the parties who may be involved in the litigation and also the arguments and rationales that are continually asserted by those parties. The foster parents are of course present, and they will undoubtedly promote the only argument favoring their position—that the removal of the child from their very capable home will cause him severe psychological trauma and that the best interests of the child can only be served by leaving him in his present well-cared-for status. Aside from emotional attachments of their own, which are in theory discarded, the foster parents have no other claim. Legal custody of the child is normally in the agency which placed him for foster care; the agency has rendered the financial support necessary to maintain the child, and the foster parents have been informed that their relationship with the child is to be temporary only.

As may be noted from the examples of various ways in which the foster status may be created, natural parents may or may not be involved in custody litigation. If they are involved the importance of biological ties will form the substance of the natural parents' argument to regain the child. The courts have historically held the natural parents' right to rear a child in high esteem, despite whatever reason led to the placing of the child in the foster status initially.

The agency will also be involved. Its position will usually be that its trained workers are in the best position to evaluate the best interests of the child and that the legislature has seen fit to delegate to it the discretion to determine the future of the child. The agency will claim that a disposition of the child contrary to its decision may not only be contrary to the best interests of the child, but such a disposition will subvert the autonomy the agency needs to carry on an effective adoption and child placement service. In addition, the agency will argue that any petition for adoption by the foster parents which is granted by the court will encourage breakdown of the foster parent system by giving it a permanent placement aspect when it necessarily must remain a temporary care program.

Finally, prospective adoptive parents with whom the child has been or will be placed subsequent to removal from the foster parents' home may also be present. Such persons normally cannot

be considered as real parties, however, as they derive their standing solely from the agency's position, and the outcome of the litigation in regard to them usually will be the same as the outcome in regard to the agency.

It would seem that the rationales of each of the parties contain merit. This hypothesis is borne out by the literally unpredictable fashion in which courts have reacted to the same set of arguments. In order to obtain the best perspective on the problem, the following method of examination will be undertaken. First, a national sampling of cases will be reviewed in an attempt to identify some consistency in reaction—some dominance of precedent. This sampling will not only confirm the lack of any consistent reaction, but it will illuminate the particular difficulties the courts have had in attempting to reconcile the relative merits of the parties. With the positions of each of the parties and the varying importance with which each has been regarded then firmly in mind, the substance of each of the arguments will be examined from a psychological and sociological point of view. This will enable the reader not only to criticize or confirm the reasoning used by the courts in cases previously reviewed, but it will provide a guide for formulating a model policy utilizing the correct considerations involved in deciding foster parent litigation.

Next, as further aid in determining a model policy, the efforts of two states, California and New York, to legislate a solution to the foster parent problem will be reviewed. Cases leading to and subsequently interpreting the legislation will be examined, and the effect of the relevant statutes and their interpretation on practice will be discussed. Finally, after some practical considerations presented by agency representatives are noted, some definitive conclusions as to the best method of preventing and dealing with the foster parent problem will be attempted.

JUDICIAL RESPONSE IN FOSTER PARENT LITIGATION ON A NATIONAL SCALE

Nowhere are the personal background and values of a judge more evident than in cases such as the foster parent type where the welfare of a child is involved. One foster parent may receive the following sympathetic reaction to the possible psychological trauma involved in removing the child from the only home it has known:

Uprooting her from these familiar surroundings, abruptly and permanently, could result in bewilderment and emotional trauma, . . . and such a step taken inadvisedly "could have a disastrous effect on her [future course]."²

Another foster parent may be told by an equally well-meaning judge:

[A]t her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.³

Mindless of some unsympathetic reaction, foster parents have continued to promote the best interests of the child, that is his emotional health, as being the controlling factor in the decision-making process. This has allowed them to triumph at times over the natural parent, as in *Commonwealth ex rel Children's Aid Society v. Gard*,⁴ and over considerations of agency autonomy and the foster parent contract, as in *In re Alexander*.⁵ In some instances, as in the latter case, however, the "best interests of the court" may also be involved where there is much publicity surrounding the case and public opinion is obviously on the side of the foster parents.⁶ The best interests test may also work to the detriment of the foster parents, as in *In re Reinius' Adoption*.⁷ There a trial court decision in favor of the foster parents was remanded because only the fitness of the foster parents' home had been considered in determining the best interests of the child; all evidence of the agency's plan for the child and its possible beneficial effect had been excluded.

In some cases, however, the emotional shock of moving the child from the foster parents' home has had amazingly little effect on the court. In *Crump v. Montgomery*,⁸ the court casually mentioned the psychological factor in one paragraph of the opinion and then spent pages painstakingly scrutinizing tiny factors concerning the apparently equally capable households of the foster parents and the prospective adoptive parents chosen by the agency.⁹ In *Ham-*

2. *In re I.M.J.*, 428 S.W.2d 18, 22 (Mo. Ct. App. 1968).

3. *Re Thain*, Ch. 676 (C.A.) (1926), quoted in Michaels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547, 568 (1967).

4. 362 Pa. 85, 66 A.2d 300 (1949).

5. 206 So. 2d 452 (D.C.A. Fla. 1968).

6. See Katz, *supra* note 1, at 296, regarding a discussion of *In re Alexander* and the effect of publicity on the decision of the appellate court.

7. 55 Wash. 2d 117, 346 P.2d 672 (1959).

8. 220 Md. 515, 154 A.2d 802 (1959).

9. The court stated: "Another matter that the Chancellors should have

mond v. Dept. of Pub. Assistance,¹⁰ the court awarded custody of the child and adoptive rights to former foster parents even though the child was no longer in their home and had in fact been in two foster homes subsequent to theirs. The agency had refused to consent to the adoption because the petitioning foster parents had been reluctant to submit the child to a tonsillectomy. The court dispensed with the agency's consent, however, because the agency could submit no other prospects for adoption of the child.

The position of the natural parent in foster parent and other adoption proceedings has been regarded with varying degrees of reverence towards the biological ties. "Courts have not hesitated to build a 'strong fortress' around the rights of natural parents to their children" ¹¹ This fortress has been held to be almost unassailable in some instances, the foster parents being able to prevail only by showing that the natural parent is unfit and that the child's welfare compels awarding custody to them.¹² In other jurisdictions, however, the welfare of the child has been held to be paramount to the natural rights of the parents and all other considerations.¹³

Finally the courts have predictably attached varying degrees of importance to the integrity of the adoption system and the sanctity of the foster parent contract. To help substantiate its holding in *Adoption of Runyon* on other grounds, the California Court of Appeals stated:

To allow persons not approved by the agency as prospective adoptive parents to file petitions for adoption would frustrate the

thoroughly considered and weighed is that the adoption of Johnnie by the Montgomerys involved a change from the home, locality and environment in which he had been, practically since birth." *Crump v. Montgomery*, 220 Md. 515, 524, 154 A.2d 802, 807 (1959). It then remanded the case to the trial court for further investigation. The trial court, upon a complete restudy of the home situations and psychological evaluation of the parties, awarded the child to the Montgomerys, the prospective adoptive parents. C. FOOTE, R. LEVY, & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 583 (1966).

10. 142 W. Va. 208, 95 S.E.2d 345 (1956).

11. *In re Adoption of Bryant*, 134 Ind. App. 480, 492-93, 139 N.E.2d 593, 600 (1963).

12. *People ex rel. Moffett v. Cooper*, 63 Misc. 2d 1005, 314 N.Y.S.2d 248 (Sup. Ct. 1970).

13. *In re Adoption by J.B.*, 63 N.J. Super. 98, 164 A.2d 65 (1960); *Commonwealth v. Kraus*, 185 Pa. Super. 167, 138 A.2d 225 (1958).

purposes of the adopting agencies and subject the child to an indefinite status, keeping him from a permanent home pending litigation that could result.¹⁴

Some courts have even regarded the administrative considerations so highly as to place them above the apparent best interests of the child in the particular litigation.¹⁵ On the other hand, it has frequently been held that contracts between the agency and the foster parents are not binding as to the welfare of the child. As stated by oft-quoted California Justice Traynor in *In re Adoption of McDonald*:¹⁶

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 this child that controls, and any agreement others may have made for custody is made subject to the court's independent judgment as to what is for the best interests of the child.¹⁷

It may be seen, then, as previously mentioned, that there has been no consistency in the courts' treatment of foster parent litigation when the courts of the nation are considered as a whole. The arguments of each of the parties have been held in high regard by some courts and in near disregard by others, resulting in a mass of conclusionary confusion. There would seem to be a need, then, to look beyond the narrow viewpoint of court justice to the studied opinions of experts in the relevant disciplines, to determine exactly what degree of importance should be accorded to the arguments advanced by each side in support of its position. Such an examination will be attempted.

PSYCHOLOGICAL AND SOCIOLOGICAL VIEWS

The demonstrated lack of consistency in interpretation of the psychological and sociological factors which purportedly underlie most foster parent decisions highlights the necessity of some interdisciplinary discussion of these factors. It is impossible to speak of sacrificing the best interests of a particular child for the sake of the foster care system without first being sure that the foster care system is worth being maintained. It is questionable if the biological ties relied upon by natural parents are awarded the correct degree of importance or if they are merely a holdover of the ancient mores which have so long restricted the development of mod-

14. 268 Cal. App. 2d 918, 921, 74 Cal. Rptr. 514, 517 (1969).

15. *Convent of Sisters of Mercy v. Barbieri*, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. 1950); *In re Adoption of Johnson*, 144 W. Va. 625, 110 S.E.2d 377 (1959); *State Dept. of Pub. Assistance v. Pettrey*, 141 W. Va. 719, 92 S.E.2d 917 (1956).

16. 43 Cal. 2d 447, 274 P.2d 860 (1954).

17. *Id.* at 461, 274 P.2d at 868.

ern family law. One wonders if agency autonomy is such a working necessity that it should be nurtured or is really a retardant which needs court supervision for an effective result.

A review of the authorities in these areas provides interesting insight into possible answers for these pertinent inquiries—answers which, without such a studied basis, can contain little degree of confidence. While the author admits to legal rather than psychological or sociological training, so do most of the judges and legislators making the decisions in question, so that this may be seen to be an advantage in perspective rather than an impediment.

As an initial point of discussion, the psychological trauma of a foster child leaving the foster family is appropriate because it is the factor against which all the other contentions are weighed. The real magnitude of this emotional shock and the factors with which it varies will certainly be relevant in assessing its importance.

The courts in the United States have not hesitated to listen to psychiatric testimony and even to appoint psychiatrists to study a particular situation and give expert opinion when it serves their purpose.¹⁸ Great respect is usually paid to the psychological trauma aspect in the latter cases,¹⁹ but where the court feels that there are countervailing considerations it usually does not appoint a psychologist and plays down any psychiatric testimony presented by the petitioning foster parent.²⁰ This downgrading of child care precepts has been heavily criticized by leading family law authorities as being subversive of the child's best interests and in direct contradiction to the theories of child development specialists.²¹ In a

18. *Anonymous v. N.Y. Foundling Hosp.*, 61 Misc. 2d 137, 304 N.Y.S.2d 837 (Sup. Ct. 1969); *Mary I— v. Convent of Sisters of Mercy*, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951).

19. In *Anonymous v. N.Y. Foundling Hosp.*, 61 Misc. 2d 137, 304 N.Y.S.2d 837 (Sup. Ct. 1969), the stipulation by the foster parents to the testimony of the court appointed psychiatrist, who heavily emphasized the psychological trauma aspect, actually worked against them. By the time of appeal, the child had been in the home of the prospective adoptive parents selected by the agency for eleven months, and the court decided that to avoid further emotional scars the child should be left there.

20. See, e.g., *In re Jewish Child Care Association*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

21. Katz, *supra* note 1, at 296. Katz specifically criticizes the decision in *In re Jewish Child Care Association*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

recent California case, however, perhaps indicative of a forward trend, an appellate judge went so far as to not only acknowledge the appropriate testimony of the witnesses at the trial level, but also to participate in a lengthy discussion of the psychological trauma aspect of separation and to cite various sociological, psychological, and family law authorities to support his conclusions.²² Indications are that the courts of England are very skeptical in their consideration of medical evidence of the psychological trauma situation involved in separation of care.²³ "It has been noted how the courts in both adoption and custody cases have sought to find ways of lessening the apparent severity of the evidence, and even where it has been admitted that the medical evidence was indeed compelling, the judges have on the whole shrunk from the conclusion that such evidence could in itself be sufficient foundation for the judgment of the court."²⁴

There are numerous psychological and sociological authorities in which the emotional trauma of a break in continuous care is described, assessed, dissected, and explained.²⁵ Although there are some differences of opinion as to the exact psychological mechanics involved,²⁶ there is general agreement as to the great extent of the crisis entailed and as to the child's usual reaction. In a pamphlet which is used extensively by adoption and welfare agencies and their workers,²⁷ Dr. Ner Littner, consultant psychiatrist to the Illinois Children's Home and Aid Society, describes a separation experience for the child as a series of four psychological tasks. These tasks consist of

- 1) mastering the feelings aroused by the actual separation from his own parents; 2) the problem of mastering the feelings initially stirred up by being placed with the new parent figures; 3) the subsequent separation from these new parents, and 4) the future problem of mastering the threat of closeness to them.²⁸

Littner emphasizes that children under six seem to be the most

²² *In re B.G.*, 32 Cal. App. 3d 365, 386, 108 Cal. Rptr. 121, 134-35 (1973).

²³ Hopkins, *The Progress of Adoption Law*, 12 MED. SCI. & LAW 21, 26 (1973). Michaels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547 (1967).

²⁴ Michaels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547, 568 (1967).

²⁵ See, e.g., those cited in *In re B.G.*, 32 Cal. App. 3d 365, 386 n.11, 108 Cal. Rptr. 121, 135 n.11 (1973); Katz, *supra* note 1, at 296 n.42, 43.

²⁶ See Kaufmann, *Psychological Costs of Foster Home Care*, in FOSTER CARE IN QUESTION 250, 252-53 (Child Welfare League of America, 1970) for three major schools of thought.

²⁷ N. LITNER, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT (Child Welfare League of America, 1973).

²⁸ *Id.* at 7.

vulnerable to the effects of a separation²⁹ and that having more than one separation experience tends to multiply the effects of the psychological tasks on the children.³⁰ Because of this, he strongly recommends that whenever possible the first placement should also be the last placement.³¹ Also noted by Littner is the importance of the positive and active participation by the parent figures from whom the child is going to be separated. "The worst thing that can happen, psychologically, is for the child to be torn from the unwilling arms of angry parents who never see him again after placement."³² Unfortunately, this is probably just the case in most instances where foster parents are the losers in their litigative attempt to keep the foster child.

In their book on the subject, two recognized leaders in the field of foster care cite several variables upon which the degree and kind of traumatic impact on development and the prognosis for recovery of previous functioning levels are dependent:

- A. The child's unique constitutional endowment and age of development;
- B. His internal conflicts;
- C. The conditions surrounding the loss;
- D. The human environment in which the loss occurs;
- E. The kind of help he is offered in this crisis and thereafter.³³

It is easily seen that the very presence of a litigious situation would affect the last three variables in a manner adverse to the child. These authors strongly recommend that when a move is resisted by the surrogate parents, "the damage to the child is so great that replacement under these conditions should be avoided if the agency has any available option."³⁴ They intimate that in most instances such conditions reflect a service process that has gone awry before the initiation of the decision regarding the child's placement.³⁵

It is thus seen that the separation experience does present a

29. *Id.* at 20. Littner excludes newborn infants from this category because they have not had the opportunity to form a close relationship with the mother.

30. *Id.* at 22.

31. *Id.* at 24.

32. *Id.* at 26.

33. D. KLINE & H. OVERSTREET, *FOSTER CARE OF CHILDREN: NURTURE AND TREATMENT* 71 (1972).

34. *Id.* at 290.

35. *Id.* at 289.

psychological trauma for the child and that this trauma may be magnified by tender age, adverse conditions at the time of separation, and previous such experiences. Such an experience should be avoided when possible, but there are some other factors which have been said to make the separation experience the lesser of evils.

Today, in a majority of the state jurisdictions, the "best interests of the child" seemingly determines custody issues between parents and third parties. The old concept of the "child as a chattel" has been giving way to a growing concern for the child as an individual and a great emphasis on the rights of the child vis-à-vis others, even including the rights of the parents themselves. The societal interests in the development of the child and parental desires for the gratifications and challenges of parenthood may often be in conflict.³⁶

Such an assessment of the state of the law in a recent California case is comforting to one who favors a de-emphasis of the old parental rights test and praises progressive decisions which take into account the best interests of the child as the primary factor. Nevertheless, a number of jurisdictions would still adhere to the older tests,³⁷ in spite of public criticism of their decisions.³⁸

That the natural parents of the child should be afforded any special rights in litigation against third persons, especially those that have been caring for the child for a substantial period of time, would seem to be susceptible to question. Certainly there must be some consideration given to the position of the natural parents. A foster child, unless placed very quickly after birth, has already been through one separation experience. The child's ability to overcome the first psychological task associated with that separation, as described by Dr. Littner, is greatly determined by the amount of positive participation by the natural parents prior to enduring the separation. Since the desired result in many foster care placements is the eventual return to the natural parents, the active participation of the natural parent during the placement is also greatly stressed. Studies have shown that the length of time and number of placements in foster care is related to the incidence of behavioral problems, but such incidence is less among children whose own parents maintain contact with them during the placement. Apparently the child's feelings of having been rejected and abandoned are

36. *In re B.G.*, 32 Cal. App. 3d 365, 382, 108 Cal. Rptr. 121, 132 (1973).

37. Notably New York, although this has recently been corrected by express statutory provision. N.Y. Soc. WELFARE LAW § 383.5 (McKinney Supp. 1973).

38. This aspect, too, is discussed by Katz in his criticism of *In re Jewish Child Care Association*. See note 21, *supra*.

lessened in such cases.³⁹

It has been suggested that the child needs repeated assurance from his own parents about his background so that he may relate to his parents and form an adequate self-image at an early age.⁴⁰ There is also some evidence that removal of children from their own homes adversely affects their ability to form an adequate sense of identity, especially in boys.⁴¹ Psychologists note the lack of continuity of the child's experience and a potential lack of stability in foster care as the source of these difficulties.⁴² It is suggested that the maintenance of the parent-child relationship, including parental visits to the foster home and even visits by the child to his natural home, is a possible answer to the identity formation difficulties.⁴³ Studies attempting to determine the effect of visitation by natural parents upon the well-being of children have had mixed results, however, and no real conclusion can yet be made as to the actual effect of parental visits.⁴⁴

Even where the child was separated from the natural parents shortly after birth and has no contact with them personally whatsoever, it is still argued that he attaches emotional importance to them because of the value attributed to natural parenthood in most cultures. "The development of a consciousness of personal identity is closely connected with the growth of the child's understanding of the special ties of kinship."⁴⁵

As a final consideration in examining the role and rights of natural parents of children in foster care, one cannot ignore the effect of the agency. In their study of the parents of children in foster care in New York City,⁴⁶ Jenkins and Norman express two theories in this regard: 1) that the sense of loss of the natural parents for their children diminishes over prolonged separations and that the

39. MacIntyre, *Adolescence, Identity, and Foster Family Care*, 17 *CHILDREN* 213, 214 (1970).

40. *Id.* at 215.

41. *Id.*

42. *Id.*

43. *Id.* at 216.

44. See a discussion of the studies of Weinstein, O'Reilly, Mech and Holman in V. GEORGE, *FOSTER CARE* 184-86 (1970).

45. *Id.* at 184.

46. S. JENKINS & E. NORMAN, *FILIAL DEPRIVATION AND FOSTER CARE* (1972).

need for expedited reunions should thus be emphasized;⁴⁷ and 2) that there is a lack of accountability on the part of the agency: "Who is the consumer of child care services?" Removal from and return to parental care many times may reflect arbitrary, discriminatory, or capricious decisions, sometimes destroying the possibility of a reunited parent-child relationship.⁴⁸ They stress the need for immediate work with the natural parents for return of the child to them or formation of alternative plans, a suggestion also strongly recommended by the California State Social Welfare Board in its report on foster care in September, 1972.⁴⁹

Thus, it may be concluded that the natural parents must be given consideration in litigation concerning the custody of their child. Because of the traditional ties of kinship this is so even though the parents may not have seen the child since birth. It is suggested, however, that such consideration not be thought of in terms of an absolute parental right, but rather as another factor in determining the best interests of the child. Therein, appropriate weight may be given to the kinship matter, the amount of participation by the natural parents in the placement looking towards return of the child, the time of separation from the natural parents, etc. While the term "parental right" may have some meaning, it should be the function of the court in foster parent litigation to act as the *parens patriae* of the child and to act accordingly in the child's best interests.

The final argument involved in foster parent litigation to be considered is that of the sanctity of the foster care system and the necessity for independence of the relevant agencies. It is impossible to discuss the merits of this argument without having at least some knowledge of the foster care and agency systems, the extent and results of their various programs, and the problems likely to be caused by attempted foster parent adoptions. For this purpose the state of California, particularly San Diego County, will be viewed as being somewhat typical of area agencies participating in such service.⁵⁰ Because of the limited availability of well-

47. *Id.* at 270.

48. *Id.* at 272-73.

49. CALIFORNIA STATE SOCIAL WELFARE BOARD, REPORT ON FOSTER CARE, CHILDREN WAITING (Sept. 1972) [hereinafter cited as CALIFORNIA FOSTER CARE REPORT]. This study consisted of a random sampling of 553 foster care children from the seven largest counties in California.

50. Such services will be sufficiently indicative for the purpose of this article, but for an analysis of foster care in a particular area, that area's own procedure should be determined. "One characteristic about foster care in this country that could be detected from all these discussions is the diversity in rules, regulations, and practices among the states, counties within the states, agencies within counties, and perhaps even social workers

kept statistics, the results of sample studies and estimates given during personal interviews⁵¹ will be used. The figures thus adopted, while not sufficiently accurate for meaningful practice conclusions, will be indicative enough for the purposes of this article.

In June, 1972, there were approximately 33,550 children in foster care boarding homes and institutions in California.⁵² In San Diego County in June, 1973, there were approximately 1,600 children placed in foster homes.⁵³ About half of these children were placed voluntarily⁵⁴ and more than that percentage were expected to return to their natural parents at the time of placement.⁵⁵ There are some very significant statistics in the California 1972 foster care study.

- 1) Almost 39% of the children had been in placement five years or more.
- 2) Over 49% of the children were ten years of age or younger.
- 3) The most frequent primary reason for placement of the child was neglect.
- 4) In 28.5% of the cases it was not known the number of times the child had been placed in different facilities. Of the remaining cases in which this information was known, 64.3% of the children had been placed in two or more facilities.
- 5) In 15.6% of the cases, the length of stay in the current facility was unknown. Of those cases in which this information was known, almost 25% had been in placement five years or longer.

within agencies." Close, *An Encounter with Foster Parents*, 18 CHILDREN 138, 141 (1971).

51. Interviews with representatives, San Diego County Welfare Department, July and October 1973 [hereinafter cited as Interviews (1973)]. The estimates and appraisals are based on the personal experience of the representatives and limited statistics available. An indication that San Diego may be a typical foster care area is that it was considered so by the California Legislature Assembly Select Committee on San Diego Foster Care Programs in its REPORT ON STATUS OF SAN DIEGO FOSTER CARE (June 1973), and, as a result of this report, San Diego will probably be used as a testing ground for new foster care procedures. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 97-105.

52. CALIFORNIA FOSTER CARE REPORT, *supra* note 49, at 6.

53. Interviews (1973), *supra* note 51.

54. CALIFORNIA FOSTER CARE REPORT, *supra* note 49, at 7.

55. Interviews (1973), *supra* note 51.

6) In the agency's plan for the child, 13.5% were considered as temporary placement with return to natural parents expected. In another 20% the child had no family to return to. Of this group, 80% were considered for long-term foster care. Another group, consisting of 47.5% of the children, were seen as unlikely to return to their parents. Of these, 85% were being considered for long-term foster care. In the remaining 19% of the cases the plan was either "other," "none," or "unknown."⁵⁶

Thus, though foster care is alleged to be a temporary short-term arrangement, it appears that in practice it is not. Not only were almost half the children in placement for five years or more, but for a great majority of the children the long-term plan consisted of continued foster care or no plan whatsoever. What is even more alarming is that in a large percentage of the cases, information concerning the child's placement was neither recorded in his records nor known by the social worker involved. San Diego County Welfare representatives admit that these statistics probably correlate to the situation in their area and opine that the situation is attributable to four factors: 1) most of the children have some expectation of return to their natural parents, but there is no pressure or emphasis by the agency or its supervisors on preparing the home of the natural parents sufficiently for the return of the child or on making a reasonably immediate decision as to alternative plans for the child, such as adoption; 2) most of the placement workers are not sufficiently trained so that they feel confident enough about the situation involving the child to make the high-risk decision to initiate procedures to free him from the control of his parents for ultimate adoption; 3) the caseload for each worker is so high that he cannot devote sufficient time to each child; 4) even if the worker does become sufficiently familiar with the child's situation so as to make possible such a decision, there is such a high turnover in workers that before the worker has a chance to initiate the procedure, he is removed and a new worker totally unfamiliar with the situation takes his place. Thus, a usual situation is that the child is in a state of flux created by the reluctance of his natural parents and the agency to take any positive action.⁵⁷

Officials note that the situation where a newborn baby is relin-

56. CALIFORNIA FOSTER CARE REPORT, *supra* note 49, at 7-9. Similarly discouraging statistics were reported in a study of foster care in New York City cited in SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 25.

57. Interviews (1973), *supra* note 51. One reason commonly noted for the high turnover of children in foster care homes is the lack of training provided for foster parents. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 63.

quished for adoption and ends up remaining in long-term foster care is no longer prevalent. They attribute this to the fact that there are currently far more prospective adoptive parents than there are infants available. In fact, the great majority of the infants relinquished for adoption are placed within three months and only 4.5% wait longer than 18 months before being adopted.⁵⁸ This situation then, which has created a great amount of the foster parent type of litigation, is not likely to occur in the present state of affairs. Nevertheless, because of the long-term placements which do occur for so many children placed in foster status for other reasons, it is seen that the attachment of foster parents to a particular foster child is likely. Many of the authorities in the field of foster care regard such attachment, however, as a blessing rather than as something to be discouraged.⁵⁹ The current trend of authority is to call for long-term care by design rather than by default⁶⁰ and stresses the need for adequate emotional care of children as well as the physical care heretofore typical of the system.⁶¹ This would involve in many cases the treatment of foster parents as co-workers rather than just as volunteers to be used,⁶² or a re-classification of them as something on the order of "family life counselors"⁶³ rather than foster parents. This would also call for immediate prediction of possible long-term care cases⁶⁴ so that appropriate

58. State of California Department of Social Welfare, *Relinquishment Adoptions in California (1969)* (Tables IV and V).

59. *See generally*, regarding the history of foster care, selection methods and the modern role of foster parents, natural parents whose children are in foster care, placement of children, etc.: R. DINNAGE, *FOSTER HOME CARE* (1967); D. FANSEHL, *FOSTER PARENTAGE* (1966); V. GEORGE, *FOSTER CARE* (1970); S. JENKINS & E. NORMAN, *FILIAL DEPRIVATION AND FOSTER CARE* (1972); D. KLINE & H. OVERSTREET, *FOSTER CARE OF CHILDREN: NURTURE AND TREATMENT* (1972); M. WOLINS, *SELECTING FOSTER PARENTS* (1963); D. ZIETZ, *CHILD WELFARE, SERVICES AND PROSPECTIVES* (2d ed. 1969).

60. Watson, *Long-Term Foster Care; Default or Design? The Voluntary Agency Responsibility*, 47 *CHILD WELFARE* 331 (1968) [hereinafter cited as *Long-Care—Watson*]; Weaver, *Long-Term Foster Care; Default or Design? The Public Agency Responsibility*, 47 *CHILD WELFARE* 339 (1968) [hereinafter cited as *Long-Care—Weaver*].

61. Solomon, *Foster Parents' Perceptions of Foster Child's Roles*, 48 *CHILD WELFARE* 202 (1969).

62. Mannheimer, *A Demonstration of Foster Parents in the Co-workers Role*, 48 *CHILD WELFARE* 104 (1969).

63. Bigley, *What Direction for Children in Limbo—Foster Home or Family Life Home?*, 47 *CHILD WELFARE* 212 (1968).

64. Murphy, *Predicting Duration of Foster Care*, 47 *CHILD WELFARE* 76

placement can be made where most needed.⁶⁵ Many times these long-term plans might include adoption by the foster parents⁶⁶ and/or other arrangements not presently in use.⁶⁷

While there are certainly many long-term foster care arrangements in California and San Diego County at this time, indications are that these are the result of default rather than design. Agency representatives indicate that this discrepancy between journal and practice is largely due to an insufficient funding so that a continuity of trained caseworkers may be maintained. However, they concede that emphasis is not made by either the agency or supervisors in the direction of these modern trends.⁶⁸ It has been suggested that "too often procedures are developed for the convenience of the caseworker and the agency rather than for the efficient and effective transmission of services to the people who need them."⁶⁹

As may be easily discerned from the foregoing, neither is the foster care system sanctimonious, nor is the independence of the agency any guarantee of effectiveness. The argument then, that the best interests of a particular child must be sacrificed for the maintenance of an effective placement system rather loses its weight. In fact, that argument should have the opposite effect so as to promote rather than discourage courts from interfering with the decision of an agency, whether it be questionable because of insufficient funding or failure of the agency to develop and emphasize proper

(1968) (noting factors such as (1) mother's age at placement, (2) number of children at home, and (3) amount of separation from husband or child prior to placement as related to predictability); Miller, *Some Similarities Between Foster Mothers and Unmarried Mothers and Their Significance for Foster Parenting*, 47 CHILD WELFARE 216 (1968).

65. Madison and Schapiro, *Permanent and Long Term Foster Family Care as a Planned Service*, 49 CHILD WELFARE 131 (1970) (a major deterrent to foster parent applications is the possibility of "losing" the foster child. If an extended arrangement is not established within a reasonable time, problem areas for foster parents include insecurity vis-à-vis the child, hesitation about disciplining the child, and hostility toward the natural parents); Maas, *Children in Long Term Foster Care*, 48 CHILD WELFARE 321 (1969); *Long-Care—Watson*, *supra* note 60; *Long-Care—Weaver*, *supra* note 60.

66. Neeley, *Adoption by Foster Parents*, 48 CHILD WELFARE 163 (1969).

67. *Long-Care—Weaver*, *supra* note 60. (Some of these relationships include: (1) Subsidized Adoption—for families who want to adopt but cannot afford it at first; (2) Quasi-Adoption—for foster parents that would make good adoptive parents but who are afraid of adoption at first; (3) Subsidized Foster Homes—extra money for foster homes with excellent long term aspects (which makes the foster parents and the agency feel more like co-employees, work closer together, and require more of each other) or for families which have to provide special needs for children; (4) Group Homes).

68. Interviews (1973), *supra* note 51.

69. *Long-Care—Weaver*, *supra* note 60, at 341.

procedures. This is not to intimate that the welfare agencies are entirely inept or even usually so. In fact, as far as adoption by foster parents, at least, they are probably usually correct in their decisions and far more sympathetic than the cases might indicate. In San Diego County, for example, in the fiscal year 1972-73, 32 children were adopted by their foster parents. In only two cases were formal adoption requests turned down. This does not reflect, of course, the number of foster parents who indicated an interest in adopting a foster child but were discouraged by the agency and never reached the point of formal application. Yet, it may be seen that, at least in San Diego County, adoption by foster parents is an efficient method of placing children,⁷⁰ especially those that are hard to place.⁷¹ Nevertheless, the availability of judicial review of the agency's decisions in these matters is necessary to prevent the possible ruining of a child's life by inefficiency or arbitrariness of the agency, however infrequently it may occur. That it does occur in some cases cannot be disputed, for courts have not hesitated to severely criticize the agency at times in their opinions for actions which they see as unwarranted and severely detrimental to the welfare of the particular child.⁷² Most writers who have considered the agency argument have indicated preference against it,⁷³ although some have not.⁷⁴

From the discussion heretofore, it seems fairly obvious that the standard to be applied in foster parent type litigation should necessarily be that of the best interests of the particular child involved. Included in a determination in this regard would, of course, be the effect on the child of the separation from the foster parents, the relationship and presence of the natural parents, if applicable, and arguments by the agency in support of the decision they had previously made. Each of these should be given appropriate weight,

70. Interviews (1973), *supra* note 51.

71. Most of the children were over five years old at the time of adoption and were considered hard to place. Interviews (1973), *supra* note 51.

72. *C.V.C. v. Superior Court*, 29 CAL. APP. 3d 909, 106 Cal. Rptr. 123 (1973); *Crump v. Montgomery*, 220 Md. 515, 154 A.2d 802 (1959); *Anonymous v. N.Y. Foundling Hosp.*, 61 Misc. 2d 137, 304 N.Y.S.2d 837 (Sup. Ct. 1969).

73. Katz, *supra* note 1; Bodenheimer, *The Multiplicity of Child Custody Proceedings-Problems of California Law*, 23 STAN. L. REV. 703 (1971); Note, *Adoption Agencies in California: Lack of Adequate Control?*, 5 U.C.D.L. REV. 512 (1972).

74. H. CLARK, *LAW OF DOMESTIC RELATIONS* 599, 644 (1970).

and when the evidence is such that the agency's decision appears contrary to the child's best interests, that decision must be overruled. Only by having such judicial review can the, perhaps isolated, but nevertheless singularly important cases in which an agency, for whatever reason, makes a ruinous decision be corrected.

LEGISLATIVE EFFORTS TO REMEDY THE PROBLEM:
TWO CONTRASTING APPROACHES

While a majority of the nation's jurisdictions have continued to allow their courts to handle foster parent litigation in the haphazard manner exemplified previously, a few state legislatures have attempted to establish guidelines for the judiciary by appropriate statutory enactments. The states of New York and California are a study in contrast in that regard. New York, in response to several well publicized cases involving foster parents, has attempted to raise the status of those persons to a level such that they may have their side of the story heard and adjudged commensurate with their established relationship with the child. California, on the other hand, has attempted to ease the burden on its judiciary and give autonomy to its welfare and adoption agencies by eliminating the forum in which foster parents may be heard. By necessity, examination of these attempted remedies will involve different methods of analysis. Looking to New York, the emphasis will be on reviewing the cases which prompted the relevant legislation. As may be expected from the fact that such legislative efforts are positively inclined, and indeed in line with many of the conclusions reached here in the previous section of this article, there has been little negative reaction to the statutes. In California though, as might be predicted when rights of a group already discriminated against are further circumscribed, the essence of inspection will be toward the challenges that have been made against the appropriate statute—its effectiveness and constitutionality as well as its desirability. The results of the comparison of these two modes of solution will be an invaluable tool in forming conclusions as to model remedies.

New York—The Positive Approach

The state of the law in New York up to the early 1950's is best exemplified by two cases decided within a year of each other, *Convent of Sisters of Mercy v. Barbieri*,⁷⁵ and *Mary I . . . v. Convent*

75. 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. 1950).

of *Sisters of Mercy*.⁷⁶ The court in *Barbieri* indicated that although the best interests of the child would probably be served by leaving him with the foster parents, such an action would impair the effectiveness of placement in adoption programs of the public and private welfare agencies; it therefore returned the child to the agency. In similar circumstances in *Mary I*, however, the court gave the child to the foster parents over the agency based upon their good home and the psychological factor involved in the transfer of the child. The court specifically rejected the placement system argument of *Barbieri* and entertained evidence from a court-appointed psychiatrist and a priest concerning the psychological trauma of the movement of the child from an established home. It also dismissed the fact that foster parents were slightly beyond the age standards of prospective adoptive parents. Thus, New York too, is an example of the evolution of conflicting decisions in foster parent litigation as a result of the difficult weighing of one argument of merit against another.

In 1959, in *In re Jewish Child Care Association*,⁷⁷ the New York Court of Appeals came to grips with what might be called the epitome of foster parent litigation. The case involved a five and one-half year old girl who had been with her foster parents for over four years pending her natural mother's being able to provide care for her. During the four-year period her natural mother had seen her only twice. The Child Care Association had demanded the return of the child because the foster parents had become very attached to her and had expressed repeated desires to adopt her. Thus, all the conflicting interests repeatedly arising in foster parent litigation were present. The Court of Appeals, in a four to three decision, decided in favor of the agency. The opinions of the courts at both levels are painstakingly analyzed and the decisions heavily criticized by a leading authority on foster care and the law, Sanford N. Katz.⁷⁸ Katz feels that the child's best interests (which he actively promotes should be the deciding factor in foster parent litigation) in this case were subverted by the overriding concern of the court for three considerations: "the preservation of the natural mother's rights; the sanctity of the placement contract;

76. 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951).

77. 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

78. Katz, *supra* note 1.

and the maintenance of the Agency's prestige and authority in the community."⁷⁹

In 1966, in another much-publicized conflict between foster parents and an agency, a New York family court judge decided that although the immediate short-term needs of the child involved might be best served by her remaining in the custody of her foster parents, her long-term needs required her return to physical custody of the Commission of Public Welfare for placement for adoption; he concluded that the long-term needs should be the deciding factor.⁸⁰ The case was later reversed because the judge was the first cousin of the wife of the Commissioner of Public Welfare.⁸¹ Finally, because of public opinion, the agency gave up and allowed the child to remain with her foster parents.⁸² In 1967, perhaps as a result of this case,⁸³ the New York legislature enacted legislation which provides for a hearing at the administrative level within thirty days subsequent to a decision by the Commissioner of Public Welfare concerning the custody of the child.⁸⁴ Apparently similarly motivated was a 1969 act which allows foster parents, who have cared for a child continuously for a period of two years or more, to apply for adoption of that child; their application is to be given preference and first consideration by the agency involved if the child is eligible for adoption.⁸⁵ The latter statute was relied upon not long after its enactment by foster parents in *Anonymous v. The New York Foundling Hospital*.⁸⁶ Unfortunately, the foster parents had waited until several months after the agency had removed the child from their home before they instituted adoption proceedings. The court, while extremely sympathetic to their request, decided that removal of the child from the home of the prospective adoptive parents with whom it had been placed after removal from the foster parents would cause further emotional trauma to the child and that the interests of the child were best served by leaving it with the prospective adoptive parents. The court severely chastized the Foundling Hospital, however, for executing "its public trust as if it were a cold and heartless business."⁸⁷ It also warned that

79. *Id.* at 294.

80. *Fitzsimmons v. Liuni*, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (Fam. Ct. 1966), *rev'd on other grounds*, 26 App. Div. 2d 980, 274 N.Y.S.2d 798 (1966).

81. *Fitzsimmons v. Liuni*, 26 App. Div. 2d 980, 274 N.Y.S.2d 798 (1966).

82. Katz, *supra* note 1, at 295 n.39.

83. *Id.*; Foster and Freed, *Family Law*, 19 SYRACUSE L. REV. 478, 479 (1967).

84. N.Y. SOC. WELFARE LAW § 400.2 (McKinney Supp. 1973).

85. N.Y. SOC. WELFARE LAW § 383.3 (McKinney Supp. 1973).

86. 61 Misc. 2d 137, 304 N.Y.S.2d 837 (Sup. Ct. 1969).

87. *Id.* at 140, 304 N.Y.S.2d at 839.

. . . this case has presented such a shocking display of the misuse of the unfettered discretionary power granted to the respondent Hospital and similar agencies by statute that it is the court's opinion that the Legislature might be well-advised to review such practices and the law which sanctions them.⁸⁸

The legislature heeded the warning of the court in *Anonymous* and subsequently enacted a statute providing for family court review of the foster-care status of a child on a twenty-four month periodic basis at the request of either the agency charged with the care of the child, another authorized agency having the supervision of such foster care, or the foster parents in whose home the child had resided for the period of twenty-four months.⁸⁹ As a result of such review, the court may make any disposition of the child it deems in his best interests, including the legal freeing of the child from its natural parents with a view to subsequent adoption by the foster parents.⁹⁰

In the early 1970's, the New York courts affirmed the right to a hearing to determine whether removal of infants from foster parent's custody was in the best interest of the children, although it stated that the right belonged to the children and not the foster parents.⁹¹ The courts also strongly upheld the view that in the absence of an already legally permanent relationship with others, a natural parent's right to custody can be defeated only by showing the natural parent to be unfit and that the child's welfare compels awarding custody to the non-parent.⁹² This anachronous adherence to the idea of natural parents' superiority was eliminated by statute in 1972, however, and the best interests of the child were declared to be the sole permissible basis for awarding custody.⁹³ Foster parent proceedings were also given preference over all other causes in all courts.⁹⁴

88. *Id.*, 304 N.Y.S.2d at 840.

89. N.Y. Soc. WELFARE LAW § 392.2 (McKinney Supp. 1973).

90. N.Y. Soc. WELFARE LAW § 392.7 (McKinney Supp. 1973).

91. *Kurtis v. Ballou*, 33 App. Div. 2d 1034, 308 N.Y.S.2d 770 (1970).

92. *People ex rel. Moffett v. Cooper*, 63 Misc. 2d 1005, 314 N.Y.S.2d 248 (Sup. Ct. 1970); *In re Stephen B.*, 60 Misc. 2d 662, 303 N.Y.S.2d 438 (Fam. Ct. 1969) (custody awarded to foster parents over natural mother, but only because she was unfit).

93. N.Y. Soc. WELFARE LAW § 383.5 (McKinney Supp. 1973).

94. N.Y. Soc. WELFARE LAW § 383.4 (McKinney Supp. 1973). In a related matter, it was held that a prospective adoptive parent has no due process rights in litigation between the natural parent and the agency

So it may be seen that though the same considerations continue to plague foster parents in courtroom litigation against welfare agencies and natural parents, the state of New York has recognized some of these problems. Further, it has enacted legislation which gives the foster parents at least some ammunition in their efforts to keep children which they have grown to love and, more importantly, children which have grown to love and depend on them, in their homes.

California—The Negative Approach

That the decisions of California adoption agencies should be subject to judicial review based upon the independent judgment of the court was the conclusion reached in *In re Adoption of McDonald*⁹⁵ in 1954. As a result of *McDonald*, however, and the “damaging effect on the agency system of the agency’s not having the power to withhold approval of adoptive placements and therefore of adoption petitions,”⁹⁶ certain legislative amendments were made to Section 224n of the California Civil Code⁹⁷ which severely limited the court’s jurisdiction and gave the agency broad powers.⁹⁸ Section 224n now extinguishes the power of the California Superior Court to hear a petition for adoption by foster parents. To demonstrate how complete an effect this lack of jurisdiction might have on foster parent litigation, a brief examination of the traditional bases of jurisdiction for judicial review in such cases is in order.

The main jurisdictional vehicle through which foster parent litigation has been brought to the courts has been the writ of habeas corpus. In most cases the writ is sought by the agency attempting to regain physical custody of the child from the foster parents.⁹⁹ In fewer cases, the writ has been sought by the natural

charged with the care of the infant. The case would seem to be applicable by analogy to the foster parent situation. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

95. 43 Cal. 2d 447, 274 P.2d 860 (1954).

96. TenBroek, *California’s Adoption Law and Programs*, 6 HASTINGS L.J. 261, 332 (1955).

97. CAL. CIV. CODE § 224n (West Supp. 1972).

98. For a detailed discussion of *In re Adoption of McDonald* and subsequent amendments to CAL. CIV. CODE § 224n, see Note, *Adoption Agencies in California: Lack of Adequate Control?*, 5 U.C.D.L. Rev. 512, 527-29 (1972).

99. *In re Jewish Child Care Association*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959); *Fitzsimmons v. Liuni*, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (Fam. Ct. 1966), *rev’d on other grounds*, 26 App. Div. 2d 930, 274 N.Y.S.2d 798 (1966); *Commonwealth ex rel. Children’s Aid Society v. Gard*, 362 Pa. 85, 66 A.2d 300 (1949).

parents¹⁰⁰ or even the foster parents themselves,¹⁰¹ although the jurisdictional basis for the latter is somewhat questionable.¹⁰² The institution of habeas corpus proceedings against the foster parents will usually inure to their benefit because it allows the court to explore the question of the welfare of the child beyond the legal right to custody.¹⁰³ In some cases, a petition for adoption is considered in the proceedings;¹⁰⁴ however, the court may be thwarted in its attempt to grant such a petition by the limits of local statute.¹⁰⁵ The transfer of legal custody by the court from the agency to foster parents is impractical when the court cannot also exercise its jurisdiction to grant a petition of adoption because it would theoretically extinguish any feasible long-term plan of placement.¹⁰⁶ California courts, however, have even disregarded this factor to compensate for their lack of jurisdiction to grant foster parent adoptions.¹⁰⁷

Section 224n gives the agency complete custody, control, and responsibility for a child relinquished to it for adoption. It also gives the agency the right to terminate any arrangement for temporary care at any time prior to the granting of a petition for adoption and demands the return of the child to the agency promptly after such

100. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

101. *Anonymous v. N.Y. Foundling Hosp.*, 61 Misc. 2d 137, 304 N.Y.S.2d 837 (Sup. Ct. 1969).

102. "Had the Gards released the child to the Society, upon request, as agreed, they would have no standing to maintain habeas corpus to regain custody. Their position would be that of a mere stranger or volunteer who is in no way entitled to the custody, or responsible for the welfare of the child, and the question of best interests of the child would not be considered in such a proceeding. *Commonwealth ex rel. Ebel v. King*, 162 Pa. Super. 533, 537, 58 A.2d 484." *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. 85, 101, 66 A.2d 300, 308 (1949) (dissenting opinion).

103. Katz, *supra* note 1, at 291-92; see *Roussel v. State*, 274 A.2d 909 (Me. 1971) for a detailed discussion of the means by which the equity jurisdiction of the court is invoked to determine the best interests of the child when habeas corpus proceedings are instituted by the party having legal right to custody.

104. *Fitzsimmons v. Liuni*, 51 Misc. 2d 96, 113, 272 N.Y.S.2d 817, 836 (Fam. Ct. 1966), *rev'd on other grounds*, 26 App. Div. 2d 980, 274 N.Y.S.2d 798 (1966).

105. *Id.*

106. *Id.*

107. *McKenzie v. Darnell*, No. 351702, Super. Ct. of Cal., County of Alameda (1972).

termination.¹⁰⁸ In addition, Section 224n states:

No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency.¹⁰⁹

That Section 224n deprives the Superior Court of jurisdiction to entertain a petition for adoption by foster parents was the conclusion reached in *Adoption of Runyon*.¹¹⁰ *Runyon* is typical of the foster parent cases which have continually brought sympathy pouring forth from onlookers. The Callahans, the foster parents involved, took the Runyon baby three days after birth, aware that he was not available for adoption. Three weeks later they were informed by the Welfare Department that the child had a heart defect, and they were given the option of returning him or continuing to care for him. They chose to do the latter, saw him through heart surgery, and continued to care for him until he was eight years old. At that time, the Welfare Department removed the child from the foster parents' home and placed him in the home of prospective adoptive parents. The Callahans' subsequent petition for adoption of the child was dismissed for lack of jurisdiction by the trial court, and that decision was affirmed by the California Court of Appeals based upon the wording and legislative intent of Section 224n.

108. CAL. CIV. CODE § 224n (West Supp. 1972).

109. *Id.* The entire text of § 224n reads as follows:

The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency.

No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. After the petition for adoption has been filed, the agency may remove the child from the prospective adoptive parents only with the approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is not in the best interest of the child.

110. 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (1969).

Upon reading the opinion in *Runyon*, one is immediately struck by its brevity. The fact that an event having such a dramatic effect in the life of a child can be disposed of so succinctly is symbolic of the lack of importance placed upon child welfare by the legislature and the tragic inefficiency that must necessarily result in a system borne from the absence of appropriate concern. Next, one can't help but note the use of the well-worn "agency independence" argument to beef up the court's affirmative conclusion as to the constitutionality and desirability of Section 224n. The court states:

To allow persons not approved by the agency as prospective adoptive parents to file petitions for adoption would frustrate the purposes of the adopting agencies and subject the child to an indefinite status, keeping him from a permanent home pending litigation that could result.

[T]he legislative scheme for placement of relinquished children should progress unhampered by extrinsic matters and with assurance that proper proceedings may consummate a valid adoption.¹¹¹

The court seems to have forgotten that the "extrinsic matter" involved in *Runyon* was the removal of the child from the only home he had known for the eight years of his life. If the "legislative scheme for placement of relinquished children" is hampered by such a matter, perhaps the legislative scheme needs revision. As for frustrating "the purposes of the adoption agencies," it would seem that the purposes of the adoption agencies lie in effective placements of relinquished children and that these purposes could only be assisted by court supervision in questionable cases. At any rate, a reminder of the previous discussion of the effectiveness of the adoption agencies in California, especially in regard to foster care, should be enough to discredit the arguments of the court in that regard.

Finally, the fact that the opinion of the court in *Runyon* does not adequately answer the allegation of the unconstitutionality of the statute demands notice. Although a brief statement as to the satisfaction of equal protection requirements of the law is made,¹¹² the due process argument is not addressed in any form. Thus, though *Runyon* purports to stand as affirmance of the constitu-

111. *Id.* at 921, 74 Cal. Rptr. at 517.

112. *Id.*, 74 Cal. Rptr. at 516.

tionality of Section 224n, the question of whether or not it satisfies the due process requirements of the Constitution is still open. Another question which is of obvious concern as a result of *Runyon* is whether there are any other ways in which foster parents can receive review of an agency's determination against them as prospective adoptive parents so as to circumvent the restrictions of the statute. Possible answers to these questions may be drawn from two post-*Runyon* cases discussed *infra*.

The argument of the presence of a due process procedural right in the foster parent situation has been presented in numerous cases nationally and has, for the most part, been rejected.¹¹³ The argument has received recognition in some cases, however. In *Kurtis v. Ballou*,¹¹⁴ the Appellate Division of the New York Supreme Court reversed a Family Court decision to deny a hearing to determine whether the best interests of the children involved were served by their removal from their foster parents, mentioning a "right" to a hearing as a basis for the reversal. However, the Court cautioned that "whatever 'right' to a hearing there may be, it belongs to the children of the court, not to the foster parents" ¹¹⁵

The California courts' use of the due process argument to atone for the lack of a statutory procedure for review of agency decisions is reflected in two California Appellate Court cases decided since *Runyon*. In *Rodriguez v. Superior Court*,¹¹⁶ a Superior Court decision to dismiss for lack of jurisdiction a petition for adoption by prospective adoptive parents with whom the child involved had been placed was considered. The Court of Appeals sustained the trial court's conclusion that it had no jurisdiction to hear the petition under Section 224n because, even though prospective parents had filed the petition, the notice of termination of the placement by the agency preceded the filing.¹¹⁷ The court, however, found it difficult to live with the fact that the declaration of the case worker, which was the basis for the disruption of the adoptive parent-child status after a year and a half, gave absolutely no reason for terminating the placement except the worker's conclusions about her feelings.¹¹⁸ The court noted: "The manifest importance

113. See, e.g., *Roussel v. State*, 274 A.2d 909, 927 (Me. 1971), where Justice Wennick described the argument as "novel and lacking in support of direct authority or strong analogy, as well as potentially disastrous in . . . practical consequences"

114. 33 App. Div. 2d 1034, 308 N.Y.S.2d 770 (1970).

115. *Id.* at 1034-35, 308 N.Y.S.2d 771-72.

116. 18 Cal. App. 3d 510, 95 Cal. Rptr. 923 (1971).

117. *Id.* at 513, 95 Cal. Rptr. at 925.

118. *Id.*, 95 Cal. Rptr. at 924.

of an adoption to the welfare of a child, as well as the importance to the prospective parents and to the state, impel us to conclude that the administrative action of the agency in pre-adoption placement should be subject to judicial review."¹¹⁹ While conceding that there was no provision for such a review in Section 224n, the court held that an order by an adoption agency to terminate an adoptive parent-child placement status was a reviewable administrative order within the traditional mandate proceedings of Sections 1084 and 1085 of the California Code of Civil Procedure.¹²⁰

A number of observations may be made about *Rodriguez*. The first is that the case, if followed, has significant impact on the jurisdictional limitations of Section 224n. The court's conclusion that it had no jurisdiction to hear a petition by prospective adoptive parents with whom the child had been placed when the agency gave notice of termination prior to filing of the petition would seem to greatly limit the number of persons able to avail themselves of the statute. Normally, the only knowledge that prospective adoptive parents have of the statutes which regulate adoption agencies is that gained from the adoption agencies. Their petition for adoption is usually completed with the consent of and at the direction of the agency. The only persons, then, who would have an available court review of a termination decision would be those who anticipated a termination notice by the agency and were able to complete and file a petition for adoption prior to that notice. Although a careful reading of the statute does not necessarily lead to that conclusion, the *Rodriguez* court eliminated nearly all of the judicial review that was allowed under the statute.

This result leads to a second observation. In its decision to differentiate between certain types of adoptive parents depending upon when they filed the petition for adoption, the court also eliminated the differentiation between most prospective parents, *i.e.* those who fail to file prior to notice of termination, and foster parents. In each case a child is placed with those persons, and they are given physical custody. Furthermore, they are each without statutory recourse as to an agency's decision to terminate the placement for whatever reason, if any. Although the *Rodriguez*

119. *Id.*

120. *Id.*

court specifically directed its decision as to the availability of mandamus proceedings to prospective adoptive parents, and although no court subsequent to *Rodriguez* has extended this decision to foster parents, it is certainly arguable that the decision should be applied to foster parents by analogy. The separation experience for the child may be just as traumatic, and the agency's decision just as arbitrary, regardless of what the administrative designation of the substitute parents is at the beginning of the placement.¹²¹

As a final observation, it is important to note that although the court decreed a hearing to review a declaration of denial of due process and the demanding of a reversal of an agency decision, the court in such review could only order a different result if the agency's action was determined to be arbitrary.

The due process question was finally met head on in *C.V.C. v. Superior Court*.¹²² In this case, the placement of a child with Mr. and Mrs. C. for their second adoption was terminated by the agency as a result of an anonymous phone call alleging that Mr. C. had engaged in drinking and was attending therapy sessions at an alcoholic rehabilitation center. Only superficial investigation was accomplished for the termination decision, and nothing but hearsay statements were presented in the mandate proceedings at the trial level. While conceding that the Superior Court proceedings supplied judicial review of the placement agency's actions, the Court of Appeals asserted that "[p]etitioners, nevertheless, had a status entitling them to procedural due process. The lack of a hearing on the merits at the agency level and the narrowness of review at the judicial level did not comply with due process demands. It is necessary to explicate the review concept described in *Rodriguez*" ¹²³ In characterizing pre-adoptive status as a fundamental right, the court labeled an enforced removal of the child as a "grievous loss" stating:

Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and a mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the "closest conceivable counterpart of the relationship of parent and child."¹²⁴

121. CAL. CIV. CODE § 224n discusses termination by the agency of both adoption and temporary care placements, indicating that such decisions should be viewed, or reviewed, in the same light. Note, *Adoption Agencies in California: Lack of Adequate Control?*, 5 U.C.D.L. REV. 512, 533 n.91 (1972).

122. 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973).

123. *Id.* at 915, 106 Cal. Rptr. at 127.

124. *Id.* at 916, 106 Cal. Rptr. at 128.

The court recognized the weighty government interest in elevating the placement agency's discernment of danger above the interest of the prospective parent. It noted, however, that such policy omits any safeguard against an arbitrary agency decision.

Constitutional realities obtrude. The public interest to be weighed in the balance is not the need for terminating the placement but the need for terminating it without prior notice and hearing When the child's disadvantage is potential or ultimate, the public interest may with equanimity afford the time and effort consumed by due process.¹²⁵

The court observed that there was no hearing available at the administrative level and that, though traditional mandamus proceedings as outlined in *Rodriguez* are sufficient for the normal review of an administrative decision, when a status is elevated to a fundamental right, "no less than a de novo, independent judgment review is permissible."¹²⁶

Although this decision was also specifically directed to prospective adoptive parents, the considerations involved seem to apply equally to foster parents. The "emotional investment" no more awaits the ultimate decree of adoption in foster parent situations than in prospective adoptive situations. And no less does "love and mutual dependence set in ahead of official cachets." The objective of de novo judicial review, as stated by the court, would also seem to be equally applicable to the foster parent situation:

The objective of a de novo judicial review is not to supplant the adoption agency or to denigrate the expertise of trained social workers. Their decisions and their expert opinions should be received with respect. Rather, the objective is to prevent arbitrary judgments; to guard against placement terminations generated by the subjective inclinations of case workers and supervisors untaught in the analysis of evidence and not doctinated in the concept of fair hearing; to promote fairness by interposing a law-trained judge between the agency and prospective parents; to insure that the ultimate decision is firmly hinged to the only permissive criterion—the welfare of the child.¹²⁷

It would be difficult to deny to foster parents who have experienced a lengthy placement with a child the same due process right if the considerations expressed by the court are those that are deemed to be the important and deciding ones.

125. *Id.* at 917, 106 Cal. Rptr. at 128.

126. *Id.* at 919, 106 Cal. Rptr. at 130.

127. *Id.*

The decision in *C.V.C. v. Superior Court* leaves the adoption processes in somewhat of a state of confusion. It must be noted that the court, while providing for the necessity of a due process review of an agency's decision to terminate a pre-adoptive placement, did not declare Section 224n of the California Civil Code unconstitutional. This means that even though a court could declare that an agency's decision to terminate was wrong and was, therefore, ineffective, it would still not have jurisdiction to hear the prospective adoptive couple's petition to adopt a child. Similarly, if foster parents were able to convince the court that the due process right involved was indeed as inherent in their relationship as in the prospective adoptive placement, a petition for adoption by them would also be without a court's jurisdiction if the agency would not consent to identify them as prospective adoptive parents. If the agency refused to consent to such a designation, the foster parent's only alternative would be to attempt to seek guardianship which, although it might have advantages even over adoption,¹²⁸ might be precluded due to restrictions which allow such petitions only when agencies are negligent or unsuccessful in their efforts towards permanent placement.¹²⁹ California courts have, in fact, awarded custody without adoption when they felt it necessary in the interests of the welfare of the child.¹³⁰

Whether or not there exists a due process right in the foster parents which demands a review of agency decisions, the best interests of the child would be better served by having all interested parties heard on the matter. It would seem that the obvious solution to the present problem would be in a legislative revision of Section 224n, especially in view of the courts' reluctance to relinquish their power of judicial review, so that the best interests of the child in a given situation are not thwarted by agency shortsightedness¹³¹ or inability to perform.

128. Taylor, *Guardianship or "Permanent Placement" of Children*, 54 CAL. L. REV. 741 (1966).

129. See *Guardianship of Henwood*, 49 Cal. 2d 639, 320 P.2d 1 (1958) where the California Supreme Court held guardianship proceedings for a child relinquished to an agency are precluded in absence of showing the agency to be unfit or that it is improbable that the child will be adopted.

130. *McKenzie v. Darnell*, No. 351702, Super. Ct. of Cal., County of Alameda (1972).

131. "Although adoption agencies are supposed to be guided solely by what is most beneficial to the child entrusted to them, it is only natural that they develop the conviction at times that their decisions and choices concerning a child's future are superior to others." Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703, 717 (1971), quoted in *San Diego County Dept. of Pub. Welfare v. Superior Court*, 7 Cal. 3d 1, 10, 406 P.2d 453, 459, 101 Cal. Rptr.

SOME OTHER CONSIDERATIONS¹³²

While San Diego County welfare workers readily admit that there are imperfections in the foster care and adoption programs and while they seem relatively sympathetic to the needs and desires of foster parents, they express an easily discernible uncertainty as to the advisability of giving the foster parent too much power in the long range decision making process for the foster child. Such doubts are not easily dismissed; these people have actually worked with foster parents, seen their abilities or disabilities, and know what kinds of problems can really arise. They know that there are some underlying factors which at times must be taken into account in the decision of whether or not foster parents should be allowed or encouraged to adopt a foster child.

For example, the actual motivation of the foster parents in wanting to adopt a child may be questionable. Often the motivation may be an actual parental love and feeling that the best interests of the child will be served in the foster home. It is advised, however, that at times when a child is freed from his parents, foster parents are motivated to adopt the child primarily by feelings of guilt; that is, a child is now up for adoption, he is now in their home, and not to adopt him would be to turn him away. Such feelings as a basis for a parent-child relationship will usually result in traumatic effects for the child at a later period.

Officials note that at times the foster parent system is used by couples who have failed to qualify as prospective adoptive parents in an attempt to circumvent the normal adoptive processes. They express fear that an increase in foster parent rights to petition for adoption would also result in an increase in misuse of the system.¹³³

541, 547 (1972), quoted in *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 919 n.14, 100 Cal. Rptr. 123, 130 n.14 (1973).

132. Interviews (1973), *supra* note 51.

133. Even beyond the differences which exist in the prescribed standards for foster parents and adoptive parents, the fact that a "seller's market" exists in adoptions, i.e., more people wish to adopt than there are children available, permits higher standards to be imposed without interfering with the adoptive placement rate. A study of the grounds for the differences in prescribed standards and intensification of foster parent recruitment efforts have been urged in order to reduce the number of instances where good foster parents are not also considered good adoptive parents. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 83-85.

In other cases, the foster parents' desire to adopt a child may actually come from the agency itself. When a worker knows certain children will be hard to place when eligible for adoption, he may put pressure on the foster parents concerning the possibility of their adopting the children. Thus, the foster parents may become brainwashed into thinking that they want to adopt a child when actually their primary desire was solely to provide foster care service.

The number of such problems may be increased by the scarcity of applicants for foster parenthood, particularly for children in higher age groups. Thus, while the standards for foster parents in some areas must be maintained, those in others, such as emotional fitness, may be shaded somewhat as to provide as many foster homes as possible.¹³⁴ Such a factor might also result in taking unnecessary advantage of rights to intervene in custody litigation if foster parents were given such rights.

Welfare officials contend that if foster parents are really motivated to adopt a child, they can express this motivation by arranging with the child's natural parents for an independent adoption. The foster parents can see, however, that this requires them to convince the natural parents to consent to the adoption, and to obtain a favorable report from the welfare agency.¹³⁵ Also, although foster parents may have the desire to adopt, they are very unlikely to "rock the boat" as long as the child remains in their home and there is no termination in sight.

Officials state that one source of problems in foster parent adoption is the situation where a natural parent is having psychological difficulties.¹³⁶ The agency does not like to place the child for adoption in such cases because the parent knows where the new adoptive home of the child will be. There have been numerous cases where the emotionally troubled natural parent has harassed the child both at home and at school causing severe psychological problems for the child. In such cases, even though the foster home

134. See CAL. ADMIN. CODE, Tit. 22, Ch. 4, Subch. 1 (1972) for the foster home licensing requirements. Fire regulations, fingerprinting, etc., are the non-waivable standards, and these are the ones considered by many to be unrealistic in some instances. One of the great problems in foster parent recruitment is the unwillingness of the authorities to budget any money for advertisement, even at bargain rates. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 8, 75.

135. CAL. CIV. CODE § 226.1-226.8 (West Supp. 1972).

136. Mental illness of the nurturing parent was found to be a leading cause of voluntary placement into foster care in San Diego. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at 30.

may be best otherwise for the child, the possibility of such occurrences would greatly detract from that value.

Some county officials even express concern over whether or not they would get a "fair shake" against foster parents in court. Since the culmination of an adoption is one of the few happy things that happens in a family court type of situation, a judge may be prejudiced towards the granting of an adoption, even where the foster home is considered to be barely adequate. This would be especially true where the agency had no immediate prospects to offer as adoptive parents. While not always so, it may be seen how this might be against the child's best long-term interests.

In summary, then, the general position of the welfare agency is that although the giving of more rights to foster parents may prevent some problems and injustices, it would certainly also create some problems not presently encountered by the agency.

There were some suggestions advanced by welfare workers to prevent or alleviate some problems in the foster parent-child relationship. One was that there should be an eighteen month limit on the amount of time that a child would be held pending possible return to his natural parents. This would put pressure on the agency and the natural parents to either work for a permanent relationship between the child and his parents or to declare the child free from the control of his parents if they were thought to be unfit. Although extensions might be granted at times, this proposal would effectively limit the duration of foster care for most children. This, in turn, would greatly reduce the number of cases where the attraction between foster parent and child would become so great that the desire for a permanent relationship would be established.

It is contended that some judges harbor deep personal biases as to child rearing which make it impossible to render a well-founded, objective judgment. Therefore, it has been suggested that, if judicial review of foster care and other adoption cases is to be made available, a judge who is not only law-trained, but who is also trained sociologically and is familiar with the practices, procedures, and problems of the welfare agency should sit on the reviewing court. This would enable him to make an impartial, yet not so sterile, approach to the review problem.

It was also pointed out that California has made recent advances toward alleviating the foster parent problem by issuing directives for the welfare agencies to follow which incorporate some of the actions established in New York statutes. These provide, for example, for the availability of a hearing and appeal within thirty days in front of the State Board of Social Welfare when foster parents dispute the termination of the foster care relationship.¹³⁷ Although the effectiveness of these regulations is yet to be determined, it is evident that the welfare agencies' actions are not in keeping with the spirit of the regulation. For example, agencies have developed the practice of routinely requesting, and receiving, a waiver of the right to the hearing from the foster parents prior to the establishment of the foster care relationship. Agency representatives expressed skepticism as to the effectiveness of such an administrative hearing, especially in view of the time and money consumed by it, when the result may be subject to de novo judicial review.

It may be seen then, that the welfare agency realizes that there are many problems caused by the limitations on its ability to provide totally effective service, but that it also considers increased rights for foster parents a further limitation on its abilities rather than a solution to its problems.

CONCLUSIONS

From the observations made in this article it seems apparent that there is a need for progressive reform at more than one level in the foster parent process. First, there needs to be improvement in the foster care placement system to reduce the number of long-term default foster care cases. By reducing this unnecessary number, the maintenance of the foster care system as a temporary care system would be greatly facilitated. This would also necessarily make more foster homes available, thereby easing the selection and licensing burden for the foster care agency.

Perhaps a periodic review by a board or panel of psychologists, sociologists, and agency representatives, with an aggressive view toward taking some stand as to a long-term plan for the child, would

137. These new procedures are presently in the form of a directive to the welfare agencies and provide specifically for ten day notice of termination of placement to the foster parents, a hearing before the county welfare officer or his designee within seven days, and an appeal from that hearing to the State Social Welfare Board within thirty days. The procedures are subject to revision prior to being adopted as regulations pending public hearings and a review of their effectiveness. SAN DIEGO FOSTER CARE REPORT, *supra* note 1, at App. II.

be a solution. This might force timely action on the part of both the natural parents and the caseworker so that a child could not become forgotten and be placed in a state of limbo. Since the foster care system is the source of the problem discussed in this article, it would seem to be the logical place to begin to find a solution.

A second place where progressive actions would seem to be warranted is at the adoption level. Foster parents do in many instances make excellent adoptive parents and should be realistically appraised as such by the adoption agencies. As indicated previously, San Diego county has made effective use of foster parents in their adoption programs, even though not statutorily required to do so. Action by the legislature, however, would further emphasize the desirability of such actions and for that reason it is strongly recommended. A review of the New York statutes on the subject give an indication of the type of progressive legislation that is needed. If a child has been in foster care with the same foster parents for over twenty-four months, any petition by those foster parents for adoption should be given first consideration if the child is eligible for adoption. If the child is ineligible, the foster parent should be given consideration as permanent guardian of the child.¹³⁸ While adoption of a child by his foster parents may not be in the child's best interests in every situation, the family relationship that has been established between them should certainly be given weighty consideration in determining the long-term plan for the child.

Finally, and most pertinent to the considerations of this article, there is certainly a need for aggressive action in terms of what should happen when the agency and the foster parents are in adamant disagreement as to whether the latter should continue to act as parent figures for the child. Divergent views have certainly been expressed as to what rights the foster parents should have in such a situation. We have seen how, in New York, foster parents are able to intervene as a matter of right in any custody proceeding concerning the child.¹³⁹ Also, any decision to terminate the placement of a child in a foster care situation where the child has been present in care for more than twenty-four months is reviewable at the administrative level within thirty days of the notice of termin-

138. See N.Y. SOC. WELFARE LAW § 383.3 (McKinney Supp. 1973).

139. N.Y. SOC. WELFARE LAW § 383.3 (McKinney Supp. 1973).

ation.¹⁴⁰ And in appropriate cases, de novo review by the court is available and is given priority over all other cases when necessary.¹⁴¹

We have also noted the expressed concern of California welfare officials that the giving of such rights to foster parents would place still another limitation on their ability to effectively complete child care placement. California has indeed given its agencies a great deal of authority in that it allows them to be the sole selectors of prospective adoptive parents for a child relinquished to the agency for adoption. California courts, however, have been unwilling to act as allies of the legislature and the agency in this regard and, as agency representatives readily admit, have gone to great lengths to be able to review agency decisions in not only foster care but a variety of other adoptive situations. In order to accomplish this, litigation is sometimes drawn out over a far longer period than would be necessary were there a statutory remedy provided; this, in most cases, has an inevitably detrimental effect on the child. It would seem that the attempt by the California legislature to circumscribe the role of the courts in adoption and child care is not only ineffective, but also injurious to the system it is attempting to protect. The obvious solution, then, would appear to be the establishment of an effective system of review of agency decisions.

Welfare officials express dismay at the thought of administrative review boards, describing them from their experience as time and money consuming, relatively ineffective, and usually overshadowed by subsequent judicial review at any rate.

They noted equal concern, however, for judicial proceedings which provide objective, but tragically untrained, decisions in situations where objectivity is not enough. It might be proper for such purposes, then, to establish something other than the traditional units of review. A family court, where the judges are trained not only in family law but in the sociological and psychological aspects of the family unit might be a possible solution. Such a court would not only handle foster parent and adoptive type cases, but other cases involving the family unit. Available to such a court would be a battery of experts in the related fields to assist in its decision making process.¹⁴² Upon the establishment of such a

140. N.Y. SOC. WELFARE LAW § 400.2 (McKinney Supp. 1973).

141. N.Y. SOC. WELFARE LAW § 383.4 (McKinney Supp. 1973).

142. The idea of a Family Court has been around for many years, and there is much literature on the subject. See, e.g., Dyson and Dyson, *Family Courts in the United States*, 8 J. FAMILY L. 505, cont. 9 J. FAMILY L. 1

unit, foster parents or prospective adoptive parents who were faced with a termination decision by the agency with which they disagreed would immediately appeal it to a stated head man or panel at the agency. If the higher authority affirmed the agency's lower level decision based upon a review of the files involved, then an expeditious hearing would be held in the family court at which all parties would be required to seek whatever judicial relief they might ever desire to obtain, knowing that a decision by the court would be final with the exception of a normal appeal to a court of appeals on matters of law only. This system would provide an effective judgment by appropriate persons, thereby creating the least limitation on the agency's ability to function while at the same time giving all parties their say in the determination of a long-term plan for the child. A family law court would satisfy the due process requirement owed to foster parents, if it indeed exists, and at the same time give priority to the paramount consideration involved, the best interests of the child. How better could such interests be served than by having all interested parties air their views in front of a trained decision maker in the field?

Whether or not such a solution would be adopted, the present situation in California seems to be untenable. Regressive legislation, such as California Civil Code Section 224n, represents an abdication by the state legislature of its responsibility to provide for the care and welfare of the children of the state. The unwillingness of the courts to be accomplices to this disregard of responsibility is evidence of the need for change. Not only should the California legislature consider the necessity of judicial review in cases of child welfare, but it should also make a complete review of the child placement system as indicated in the State Social Welfare Board report on foster care and the California Assembly Commit-

(1968), where courts already established in Hawaii, Rhode Island, and New York are discussed. A Family Court proposal for California was introduced in legislation accompanying that which eventually resulted in the California marriage dissolution statutes, although the Family Court itself never passed. The proposed court plan dealt only with marriage dissolution problems, however, merely incorporating the present juvenile court as a subdivision. For a description of the California plan see Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205 (1968) and THE REPORT OF THE CAL. GOVERNOR'S COMM'N ON THE FAMILY (1966). The latter also contains an extensive bibliography of literature on family courts.

tee report on San Diego foster care. Foster families of this nation have too long been positioned in a degraded status; the victims of such a designation are not only the unfortunate foster children, but the people of the nation who must deal with them as social problems when they become adults.

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