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Nichol v. Stass: Ending Predictability for Foster Parents in the Law of Sovereign and Parental Immunity

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Note

Nichol v. Stass: Ending Predictability for Foster Parents in the Law of Sovereign and Parental Immunity

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I. INTRODUCTION

Jonathan Nichol was one of 486,000 children removed from his natural parents and one of the forty-nine percent placed in some type of temporary care across the United States in 1995.[1] He was two years old when he died, becoming one of 977 children across the nation who died from maltreatment, abuse or neglect.[2] Jonathan drowned in a toilet in the home of his foster parents, John and Bonnie Stass.[3] The facts of both Jonathan's entrance into the foster care system and the exact circumstances surrounding his death are unknown.[4] Despite this uncertainty, it is clear that when the Illinois Department of Children and Family Services ("DCFS") removed Jonathan from the home of his

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1. MICHAEL R. PETIT & PATRICK A. CURTIS, CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES: 1997 CWLA STAT BOOK 72 (1997).

2. *Id.* at 52; *see also* Editorial, *Foster Homes . . . or Warehouses?*, CHI. TRIB., Aug. 11, 2000, § 1, at 22, *available at* 2000 WL 3695892 (discussing the problem of abuse and stating that "[t]he vast majority of incidents of foster home abuse or neglect occur in homes with four, five, six or more foster children in foster homes . . . [and] it is up to licensers from the state child-welfare department or private foster agencies to determine how many children each parent can handle. But because the licensing process doesn't always provide enough contact or follow-up to assess that, they often are wrong") [hereinafter *Foster Homes . . . or Warehouses?*].

3. Aaron Chambers, *Justices Asked to Pierce Foster-Parent Shield*, CHI. DAILY L. BULL., May 19, 1999, at 1.

4. *Id.*

natural parents, Gregory and Ruby Nichol, it intended to prevent future harm, not to facilitate his death.[5]

Decisions affecting foster care, as shown through statistics, have the potential to impact thousands of families and children. Statistics released by DCFS indicate that Illinois currently has 30,354 children in some form of foster care.[6] Further, DCFS reported 21,104 instances of child abuse, of which foster parents perpetrated 138.[7] The Child Welfare League of America's 1995 statistics show that of the fourteen reported national fatalities to children in substitute care, three occurred in Illinois.[8]

One of the fatalities that occurred in substitute care was that of Jonathan Nichol. A suit was filed against the Stasses in response to Jonathan's death. When the case reached the Illinois Supreme Court, the issue centered on whether foster parents may be relieved of liability through application of either sovereign immunity or parental immunity.[9]

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5. Ill. Dept. of Children and Family Servs., *Child Protection, available at* http://www.state.il.us/dcfs/INPRO.HTM (last modified Sept. 28, 2000) [hereinafter *Child Protection*]. The mission statement of DCFS states, in pertinent part: "The Department of Children and Family Services shall, upon receiving reports made under this Act, protect the best interest of the child, offer protective services in order to prevent any further harm to the child and to other children in the family, stabilize the home environment and preserve family life whenever possible." *Id.* ¶ 2.

6. Ill. Dept. of Children and Family Servs., *Children Placed in Substitute Care* (2000), *at* http://www.state.il.us/dcfs/liv1.pdf. These figures reflect that 14,491 children were placed in departmental or private foster care in fiscal year 2001. *Id.* The most current DCFS statistics available only counted the number of children in care as of October 30, 2000. *Id.* Numbers from prior years may be more reflective of how many children will pass through the foster care system at the end of the year. *Id.* For example, at the end of fiscal year 1999, 39,067 children were in foster care. *Id.* In 1997, 51,331 children passed through the foster care system. By the end of 1997, 37,960 remained in care. *Id.* Statistics released by DCFS indicate that at present there are 4,404 DCFS licensed foster homes able to provide care for up to 10,904 children. Ill. Dept. of Children and Family Servs., *Licensing State Data* (2000), *at* http://www.state.il.us/dcfs/licen1.pdf. Not included in this number are just over 600 foster homes awaiting DCFS license approval. *Id.* Additionally, private agencies have 16,640 licensed foster homes able to provide care for up to 45,499 children. *Id.* Not included in this number are just over 3,000 licenses awaiting approval. *Id.*

7. Ill. Dept. of Children and Family Servs., *Child Abuse and Neglect Statistic Annual Report-Fiscal Year 1999, at* http://www.state.il.us/dcfs/CANTS99Cont.htm. Not included in the above number are 2,794 instances of sexual abuse, of which foster parents perpetrated eleven. Ill. Dept. of Children and Family Servs., *Indicated Sex Abuse Reports Perpetrators* (2000), *at* http://www.state.il.us/dcfs/CANTS99T25.htm#Table25. *See generally* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 205 (1988) (providing general information on situations in which foster parents have been the perpetrators of abuse and cases that have questioned whether this is a violation of foster children's constitutional rights).

8. PETIT & CURTIS, *supra* note 1, at 54 tbl.2.2: Maltreatment Related Fatality Cases, 1995.

9. Nichol v. Stass, 735 N.E.2d 582, 584 (Ill. 2000).

The majority concluded that the Stasses could not receive the benefit of sovereign immunity.[10] The majority also held, however, that foster parents could receive some of the benefits conferred by parental immunity.[11]

This Note begins with a discussion of relevant Illinois statutory law and the level of control the state maintains over foster parents.[12] Next, this Note reviews a brief history of case law in Illinois and other jurisdictions that have addressed whether sovereign immunity applies to foster parents.[13] This Note then presents a brief review of the history of parental immunity, including case law in jurisdictions that have addressed the application of parental immunity to foster parents.[14] Next, this Note examines the case of *Nichol v. Stass*, including a discussion of both the majority and dissenting opinions.[15] This Note then argues that the majority in *Nichol* correctly decided that foster parents are not entitled to sovereign immunity. Further, this Note argues that foster parents should maintain an independent duty to the foster children in their care. It will also argue that the majority incorrectly decided that foster parents are entitled to parental immunity.[16] Next, this Note argues that the dissent correctly concluded that the accepted principles of parental immunity are not applicable to foster parents.[17] This Note then argues that denying foster parents the protection of sovereign and parental immunity is based on sound policy.[18] Finally, this Note will show that accepted principles of "reasonable care" should be imposed upon foster parents and also the positive effects of holding foster parents to this higher standard.[19]

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10. *Id.* at 587.

11. *Id.* at 590-91; *see also infra* Part III.C (discussing the reasoning employed by the court to arrive at its holding).

12. *Infra* Part II.A (discussing Title 89 of the *Illinois Administrative Code*, which establishes the intricate rules and regulations imposed upon foster parents by the state).

13. *Infra* Part II.A.

14. *Infra* Part II.B.

15. *Infra* Part III (discussing in detail the reasoning and holding of *Nichol v. Stass*).

16. *Infra* Part IV.

17. *Infra* Part IV (arguing that the court properly considered the question of sovereign immunity and incorrectly designated foster parents as candidates for parental immunity).

18. *Infra* Part IV (discussing that denying sovereign and parental immunity can only encourage more qualified foster parents to continue to offer their homes and discourage those individuals who are only minimally qualified from continuing to act as foster parents).

19. *Infra* Part V.

II. BACKGROUND

Since the foster care system's inception in the early twentieth century, foster parents have played an important role.[20] Despite this important role, foster parents' legal rights and parental status remain unclear.[21] Throughout the development of the foster care system, the state has subjected foster parents to intense regulation while questioning their status as non-parental caretakers.[22] While statutes have attempted to resolve whether foster parents are entitled to immunity either as state employees or as individuals standing *in loco parentis*, foster parents' rights remain ambiguous.[23]

A. Sovereign Immunity and Foster Parents

DCFS is a state agency vested with the duty to safeguard the interests of children in Illinois.[24] To complete this duty, DCFS must investigate all reports of child abuse or neglect. Moreover, DCFS must take a child into protective custody if he or she is in immediate risk of harm.[25] Once the child is taken into protective custody, DCFS may require a foster parent to assume responsibility for the child until he or she is either returned home or released for adoption.[26] When a foster parent assumes

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20. Michael J. Bufkin, Note, *The "Reasonable Efforts" Requirement: Does it Place Children at Increased Risk of Abuse or Neglect?*, 35 U. OF LOUISVILLE J. OF FAM. L. 355, 355 (1996). The mission statement of all child welfare agencies must be to reunite the natural family and some of the resultant rights granted to foster children. *Id.* at 359. For example, according to the Adoption Assistance and Child Welfare Act of 1980 and an Illinois case, *Suter v. Artist M.*, the Adoption Assistance and Child Welfare Act does not create a private right of action against the state for the failure to use reasonable efforts to reunite the natural family. *Id.* at 368 (quoting Suter v. Artist M., 503 U.S. 347, 354 (1992)). In another case, the United States Supreme Court defined foster care as "a child welfare service which provides substitute family care for a planned period of time when [the child's] own family cannot care for him for a temporary or extended period." Smith v. Org. of Foster Families, 431 U.S. 816, 823 (1977).

21. *Infra* Parts II.A, B (discussing the varying Illinois and nation-wide decisions on the questions of both sovereign immunity and parental immunity).

22. *Infra* Parts II.A (discussing the relevant sections of the *Illinois Compiled Statutes* and *Illinois Administrative Code*), II.B (discussing foster parents' status as non-parental caretakers appointed by the state).

23. *Infra* Parts II.A (discussing the effect of foster parents being named as state employees in particular sections of the *Illinois Compiled Statutes*, but not in other sections), II.B (discussing the definition of *in loco parentis* and its potential application to foster parents); *infra* note 93 and accompanying text (discussing *in loco parentis*).

24. *In re* C.J., 652 N.E.2d 315, 318 (Ill. 1995). The court stated that, "DCFS . . . is a legislatively created agency charged with the duty to protect and promote the welfare of children of Illinois." *Id.; see also* 20 ILL. COMP. STAT. 505/1 (1998) (mandating the creation of DCFS and detailing the purposes of the agency).

25. *Child Protection, supra* note 5.

26. Ill. Dept. of Children and Family Servs., *Adoption*, *at* http://www.state.il.us/dcfs/ADOPTmain1.HTM (last modified Nov. 22, 2000).

the role of caretaker, it is unclear whether he or she qualifies as a state "employee."

1. General Principles of Sovereign Immunity

Sovereign immunity precludes suits against the government and its employees.[27] The state, however, cannot use the theory of sovereign immunity to avoid liability if its employees or independent contractors are regulated.[28] In fact, the state may be subject to a type of strict liability[29] when the duties of the employee or independent contract are mandated by statute.[30] Foster parents must abide by state regulations imposed to ensure the safety of children placed in the foster care system.[31] These regulations maintain certain duties of the state to children who are removed from their natural parents' home.[32] Therefore, when the state employs the foster parent, it is not relieved of liability.[33]

Illinois sets forth a variety of laws to control the foster parent-child relationship.[34] For example, the "Foster Parent Law" provides foster

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27. BLACK'S LAW DICTIONARY 753 (7th ed. 1999); *see also generally* RESTATEMENT (SECOND) OF AGENCY §§ 214, 251 (1957); RESTATEMENT (SECOND) OF TORTS §§ 339, 343, 343B, 424 (1965). While not necessarily the established law of any state, the Restatements of the Law invariably provide a solid basis upon which to gain an understanding of a particular area of the law. Cases that have addressed the question of whether foster parents are entitled to sovereign immunity, particularly *Nichol v. Stass*, have drawn from the Restatements of both Torts and Agency. Nichol v. Stass, 735 N.E.2d 582, 588 (Ill. 2000).

28. RESTATEMENT (SECOND) OF TORTS § 424.

29. Strict liability is defined as liability that does not depend on actual negligence or intent to harm, but is based in the breach of an absolute duty to make something safe. BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

30. The Illinois Appellate Court has cited the comments to section 424 of the Restatement as accurate statements of the law in Illinois. *See, e.g.*, Lombardo v. Reliance Elevator Co., 733 N.E.2d 874, 881 (Ill. App. Ct. 2000) (discussing a section of the Illinois Pattern Jury Instructions that imposes certain duties upon the owner of land to remedy known defects and/or reasonably foreseeable causes of injury).

31. Swanigan v. Smith, 689 N.E.2d 637, 642 (Ill. App. Ct. 1998); *see also infra* Part II.A.2 (discussing the facts of the *Swanigan* case and the court's reasoning in that case).

32. Wallace v. Smyth, 703 N.E.2d 416, 420 (Ill. App. Ct. 1998). The court stated that "DCFS has legal and financial responsibility for children of whom it is guardian, regardless of their momentary location." *Id.; see also infra* Part II.B.2 (discussing the facts and reasoning of the court in the *Wallace* case).

33. *See* RESTATEMENT (SECOND) OF TORTS § 424, cmt. a. The comment to section 424 states that "this section applies whenever a statute or administrative regulation imposes a duty upon one doing particular work to provide safeguards or precautions for the safety of others. In such a case the employer cannot delegate his duty to provide such safeguards or precautions to an independent contractor." *Id.*

34. 20 ILL. COMP. STAT. 520/1-15 (1998); *see also* ILL. ADMIN. CODE tit. 89, § 402 (2000). For the specific Illinois statutes, see *infra* note 54 and accompanying text (discussing the statutory sections relevant to determining the whether foster parents are entitled to sovereign immunity).

parents with a distinct set of rights and rules, such as the right to be treated as professionals and the right to reimbursement, thereby ensuring that foster parents in Illinois are given uniform treatment.[35]

Further, Illinois creates licensing standards.[36] The *Illinois Administrative Code* details the licensing standards for foster family homes including foster parents' duties and responsibilities.[37] The *Administrative Code* also requires DCFS to provide training for all foster parents, either by DCFS directly or through a private child welfare agency that has received accreditation for training.[38] Many of the *Administrative Code* regulations do not allow foster parents to use

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See also 42 U.S.C.A. § 671 (West 1998 & Supp. 2000). For example, federal law mandates that foster parents receive maintenance payments in return for their services and care of foster children. 42 U.S.C.A. § 671(a). The *United States Code* states that "[i]n order for a state to be eligible for payments . . . it shall have a plan approved by the Secretary which–(1) provides for foster care maintenance payments." *Id.*

35. 5 ILL. COMP. STAT. 350/1(b) (1998). "Employees" for the purpose of this act include "individuals who serve as foster parents for the Department of Children and Family Services when caring for a Department ward." *Id.*; *see also* 20 ILL. COMP. STAT. 520/1-10 (1998) (defining "child welfare team" as those people who provide care under the Children and Family Services Act; "department" as the Department of Children and Family Services; and "foster parent" as a person licensed under the laws of the State of Illinois to care for children who removed from the care of their natural parents and placed in the protective custody of the State of Illinois); 20 ILL. COMP. STAT. 520/1-15.

While section 520/1-15 provides a list of fourteen distinct rights and responsibilities, the first sentence of the statute also states that foster parents' rights are not limited to the fourteen enumerated rights. 20 ILL. COMP. STAT. 520/1-15. The relevant enumerated rights include: (1) Foster parents should be treated as a professional members of the child welfare team, *id.* § 520/1-15(1), and (2) Foster parents can receive reimbursement for all expenses related to the treatment and care of the foster child placed in their home, *id.* § 520/1-15(4).

The failure to include any right of foster parents to receive immunity, indemnification or representation by the state for an action arising out of the role as a foster parent, the relatively high frequency of suits against foster parents and the media attention they typically receive might lead to a logical inference that the lawmakers did not want or intend to provide foster parents with an unqualified right to claim immunity for torts against foster children.

36. *See generally* ILL. ADMIN. CODE tit. 89, § 402 (2000) (providing the specific acts required by the state if an individual chooses to participate in the Illinois foster care system as a foster parent).

37. *Id.*

38. *Id.* The Code states:

> Complete application for foster family home license means a completed written application form; written authorization by the applicant and all adult members of the household to conduct a criminal background investigation; medical evidence in the form of a medical report, on forms prescribed by the Department, that the applicant and all members of the household are free from communicable diseases or physical and mental conditions that affect their ability to provide care for the child or children; the names and addresses of at least 3 persons not related to the applicant who can attest to the applicant's moral character; and fingerprints submitted by the applicant and all adult members of the applicant's household.

Id. The Code leaves little room for interpretation or flexibility in the application of its provisions.

discretion in determining how to care for a foster child.[39] Examples include the requirements of specific closet and dresser space as well as ensuring that there are fire and emergency exits in the home.[40] Moreover, if foster parents obtain day care or babysitters for their foster child, they must receive prior approval of DCFS or another supervising agency.[41] While foster parents are responsible for the discipline of their foster child, foster parents are limited in the manner and type of punishment they can impose upon the foster child in their care.[42] The provisions set forth in the *Administrative Code* exemplify how the state maintains control over foster parents when foster children are placed in their homes.[43]

In addition to statutory regulation, the common law imposes a duty on foster parents to maintain their property in a safe condition.[44] The foster parent, as the controller of the child's environment, must anticipate the child's actions, consider the fact that the child cannot appreciate the danger, and take precautions to prevent any reasonably

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39. *See generally id.* § 402 (removing all discretion from foster parents); *infra* Part II.B (discussing the role of discretion in determining whether a non-parent satisfies the principles of parental immunity and *in loco parentis*).

40. *Id.* § 402.8(h), (i).

41. *Id.* § 402.11(d).

42. *Id.* § 402.21. Section 402.21 deals specifically with the extent to which foster parents can discipline the children in their care. For example, it provides that:

> c) No child shall be subject to corporal punishment, verbal abuse, threats or derogatory remarks about him or his family.
>
> d) No child shall be deprived of a meal or part of a meal as punishment.
>
> e) No child shall be deprived of visits with family or other persons who have established a parenting bond with him.
>
> f) No child shall be deprived of clothing or sleep as a punishment.
>
> g) A child may be restricted to an unlocked bedroom for a reasonable period of time. While restricted, the child shall have full access to sanitary facilities.
>
> h) A child may be temporarily restrained by a person physically holding the child if the child poses a danger to himself or to others.
>
> i) The personal spending money of a child may be used as a constructive disciplinary measure to teach the child about responsibility and the consequences of his behavior.

Id. § 402.21(c)–(i).

43. *See generally id.* § 402.

44. RESTATEMENT (SECOND) OF TORTS §§ 343, 343B (1965). Section 343 states that:

> [A] possessor of land is subject to liability for physical harm caused to his invitees . . . if, but only if he knows or by the exercise of reasonable care would discover the condition, and should expect that they [the invitee] will not discover or realize the danger . . . and fails to exercise reasonable care to protect against the danger.

Id. § 343. Section 343B states that "[i]n any case where a possessor of land would be subject to liability to a child for physical harm caused by a condition on the land if the child were a trespasser, the possessor is subject to liability if the child is a licensee or an invitee." *Id.* § 343B.

foreseeable injury.[45] The obligations imposed upon foster parents as homeowners stand independent from any statutory duties.[46]

2. Judicial Interpretation of Sovereign Immunity for Foster Parents in Illinois

Granting foster parents sovereign immunity depends upon two factors.[47] First, it must be established that the foster parents are state agents.[48] Second, there must be a determination that the foster parents are entitled to the protections of sovereign immunity.[49] Even if the foster parents satisfy both factors, courts do not grant sovereign immunity if the actions of the foster parents violate a statutory duty or are beyond the foster parents' grant of authority.[50] Further, foster parents who satisfy both factors do not receive representation from the Attorney General if the lawsuit arises from an act or omission outside the scope of the foster parents' employment.[51]

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45. *Id.* § 343B, cmt. b. Comment b to section 343B states that:

> Where the child is not upon the land as a trespasser, but is a licensee or an invitee, the possessor of the land is no less obligated to anticipate and take into account his propensities to inquire into or to meddle with conditions which he finds on the land . . . and his inability to understand or appreciate the danger, or to protect himself against it.

Id.; *see also* Sampson v. Zimmerman, 502 N.E.2d 846, 848-49 (Ill. App. Ct. 1986). In *Sampson*, the Illinois Appellate Court essentially adopted the entire Restatement. *Sampson*, 502 N.E.2d at 848-49. The only condition is that those dangers considered extremely obvious will not trigger liability upon the possessor of the land. *Id.*

46. *See* Swanigan v. Smith, 689 N.E.2d 637, 642 (Ill. App. Ct. 1998). According to the *Swanigan* court the obligation to protect a foster child from harm is a separate issue from whether the foster parent's employment required the care of the foster child. *Id.* The *Swanigan* court stated that "[h]er [the foster parent's] duty of care extended to any child in her home without regard to whether she was employed to provide care for that child." *Id.*

47. The grant of parental immunity is a separate issue from whether the individual claiming immunity is a state employee or a foster parent. *See generally* Healy v. Vaupel, 549 N.E.2d 1240 (Ill. 1990); Osborn v. Augsburger, 680 N.E.2d 822 (Ill. App. Ct. 1997); Griffen v. Fluellen, 670 N.E.2d 845 (Ill. App. Ct. 1996).

48. *See generally* 5 ILL. COMP. STAT. 350/1 (1998).

49. *Infra* Part II.B.2 (discussing the decisions of various Illinois courts on the question of whether foster parents are entitled to protection from liability through the application of sovereign immunity).

50. *Healy*, 549 N.E.2d at 1247. The court reasoned that "[s]overeign immunity affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority." *Id.*

51. *Id.* at 1250; *see also* 5 ILL. COMP. STAT. 350/2(a). A reasonable assumption from this principle is that once the Attorney General enters the case to provide representation, the state has investigated the situation and determined that the act in question was within the scope of employment for the purposes of indemnification and representation. *See infra* note 54 (discussing how the State Employee Indemnification Act defines foster parents for the purpose of indemnification and representation).

One of the first cases to address the application of these principles to foster parents was *Griffen v. Fluellen*.[52] In *Griffen*, a space heater used in a DCFS licensed foster home caused a fire and burned a child DCFS had placed in the home. The child's mother filed suit on the child's behalf, charging that the foster parent negligently performed the duties assigned to her in the capacity of a foster parent.[53] The Illinois Appellate Court held that when it is clear that DCFS appointed the foster parent and DCFS issued vouchers for expenses to the foster parent, the foster parent should be considered an agent of the state.[54]

The appellate court again took issue with foster parents as agents of the state in *Swanigan v. Smith*.[55] In *Swanigan*, eighteen-month-old Cortez Swanigan sustained burns from hot grease that his foster mother left within his reach.[56] At the time of the incident, the foster mother was licensed by DCFS and had three foster children in her care.[57] The court's analysis assumed that the foster parent in this case was a state employee; therefore, the state could be liable.[58] While the *Swanigan* court arrived at the same holding as the *Griffen* court, the *Swanigan* court's rationale was markedly different.[59] The court in *Swanigan* reasoned that the foster parent had a duty to the child not only because

52. Griffen v. Fluellen, 670 N.E.2d 845 (Ill. App. Ct. 1996).

53. *Id.* at 847. Absent from the suit were any claims that the foster parent violated the law or acted outside the scope of her employment as foster parent, or any documents to prove that the foster parent was an employee of the state. The defendant foster parent averred with both parental and sovereign immunity. *Id.*

54. *Id.* at 851. In this case, both the Attorney General and a private attorney represented the defendant. It was not clear whether the defendant foster parent was entitled to representation and indemnification under the State Employee Indemnification Act. The relevant portions include: 1) the definition of "State" for the purpose of indemnification includes any department, agency or other instrumentality created by the state; and 2) the definition of "employee" specifically includes "individuals who serve as foster parents for the Department of Children and Family Services when caring for a department ward." 5 ILL. COMP. STAT. 350/1(a), (b). The court also held that where there is a duty independent of state employment, the breach of that duty is not protected by sovereign immunity. *Griffen*, 670 N.E.2d at 852. The court made this point in the alternative and held that the defendant had not "breached a duty to [the foster child] that is independent of her employment with the State thus preventing the attachment of sovereign immunity and enabling the claim to be maintained in the circuit court." *Id.*

55. Swanigan v. Smith, 689 N.E.2d 637 (Ill. App. Ct. 1998).

56. *Id.* at 640. The relevant facts cited by the court included that "[w]hile talking with [another] child, defendant observed Cortez standing next to the sink. He reached for the bowl and before defendant could stop him, he spilled the grease onto himself." *Id.* at 639.

57. *Id.*

58. *Id.* at 641.

59. *Compare Swanigan*, 689 N.E.2d at 641, 642 (where the Fourth District Appellate Court granted sovereign immunity and also held that the foster parent had an independent duty to care for the child), *with Griffen*, 670 N.E.2d at 852 (where the first district appellate court held that DCFS licensing and issuing of vouchers was a sufficient basis for a grant of sovereign immunity).

the foster parent was an employee of the state but also because she owed the foster child a general duty of reasonable care in maintaining a safe premises.[60]

In a situation similar to *Griffen*, the appellate court in *Commerce Bank v. Augsburger*[61] again addressed the issue of whether foster parents are entitled to sovereign immunity. In *Commerce Bank*, three-year-old Louise Osborn died from asphyxiation and hyperthermia after being locked inside a closet by her foster parents.[62] The *Commerce Bank* court held, contrary to the holding of *Griffen*, that there was no basis for sovereign immunity.[63] The court distinguished its holding from *Griffen* because the contract in *Commerce Bank* did not stem directly from DCFS to the foster parents.[64] The court reasoned that the relationship between the foster parents and the state was remote because the state had very little control over the foster parents. Therefore, the court held that the application of sovereign immunity was not justified.[65] When foster parents are licensed by a private agency, however, the question of sovereign immunity is still unclear.[66]

B. Parental Immunity Applied to Foster Parents

The concept of parental immunity is similar to that of sovereign immunity. It provides protection from liability, contingent upon an individual's status as a child's caregiver.[67] Parental immunity is a

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60. *Swanigan*, 689 N.E.2d at 642. The court held that the foster parent's "duty of care was without regard to whether she was employed to provide care for that child." *Id.* The court stated that there was enough evidence to sustain the trial court's verdict; the implication being that the duty the foster mother owed as a homeowner was not breached through the act of the leaving the hot grease in a place accessible to a young child. *Id.*

61. Commerce Bank v. Augsburger, 680 N.E.2d 822 (Ill. App. Ct. 1997). Youth Services of Mid-Illinois placed three-year-old Louise Osborn into the foster care of the Augsburgers. *Id.* at 823. There are two distinct cases based on the actions of the Augsburgers, both questioning the foster parents liability for the events surrounding Louise Osborn's death. *See also infra* notes 97-101 and accompanying text (discussing the details of the other *Augsburger* case).

62. *Augsburger*, 680 N.E.2d at 823-24. The court considered the fact that "the child died in the Augsburgers' home from asphyxiation and hypothermia when the Augsburgers confined her in an enclosed space described as 'the upper half of a divided shelf with the door closed.'" *Id.*

63. *Id.* at 824.

64. *Id.* The court differentiated *Augsburger* from *Griffen*, where the foster mother had been directly hired by DCFS, in stating that "[n]o case has been called to our attention in which a party so attenuated from the state, as the Augsburgers were here has been held to have governmental immunity." *Id.*

65. *Id.*

66. *See infra* notes 102-07 and accompanying text (discussing specifically the *Commerce Bank* case, in which the foster parents were licensed by a private agency).

67. *Infra* Parts II.B.1-2 (discussing the origins and current meanings of the concept of parental immunity).

slightly broader concept than sovereign immunity.[68] Parental immunity allows a non-parent to receive the protection of parental immunity through the application of the concept of *in loco parentis*,[69] while an individual can only receive sovereign immunity through an established relationship with the state.[70] The result is that foster parents, like those in *Nichol v. Stass*, may seek the protection of parental immunity where the protection of sovereign immunity is unavailable.

1. The General Principle of Parental Immunity and "*In Loco Parentis*" Status

The grant of parental immunity for torts committed upon one's child is a common law doctrine adopted through case law.[71] While the common law recognized the public policy of maintaining family harmony, the actual doctrine of parental immunity arose out of American case law beginning early in the twentieth century.[72] The

68. *Compare supra* Part II.A (discussing the basis for a grant of sovereign immunity), *with infra* Parts II.B.1-2 (discussing the situations in which non-parents are granted parental immunity for injuries for children in their care).

69. *In loco parentis* is "to act as a temporary guardian of a child or the supervision of a young adult by an administrative body such as a university." BLACK'S LAW DICTIONARY 790 (7th ed. 1999); *see infra* Part II.B.1 (discussing that courts use the term *in loco parentis* to mean a person who temporarily stands in the place of a parent who is charged with a parent's rights, duties and responsibilities).

70. *See infra* Part II.B.1.

71. *See generally* 4 FAMILY LAW & PRACTICE § 67.09 (Arnold H. Rutkin et al. eds., 2000) (discussing the doctrine of parent-child tort immunity, the reasons why states throughout the nation have adopted the doctrine and an explanation of how the doctrine has changed over time).

72. *See* Cates v. Cates, 619 N.E.2d 715, 721 (Ill. 1993). In *Cates*, four-year-old Heather Cates was visiting with her father when she was severely injured in a car accident. *Id.* at 716. Heather's mother filed a negligence suit against her father. *Id.* The Illinois Supreme Court concluded that the doctrine of parental immunity applied in situations where the parent was acting within his authority and discretion. *Id.* at 729. In its discussion of parental immunity, the *Cates* court refers to the three cases that established the doctrine of parental immunity as the "great trilogy." *Id.* at 721. The "great trilogy" includes *Hewellette v. George*, *McKelvey v. McKelvey* and *Roller v. Roller*. Hewellette v. George, 9 So. 885 (Miss. 1891), *overruled by* Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992); McKelvey v. McKelvey 77 S.W. 664 (Tenn. 1903), *overruled by* Broadwell by Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994); Roller v. Roller, 79 P. 788 (Wash. 1905). In *Hewellette*, the court held a married daughter living apart from her husband was not entitled to damages for injuries inflicted by her mother unless the rights and duties inherent in the parent-child relationship did not exist and the daughter had not returned to her mothers home. *Hewellette*, 9 So. at 887. In *McKelvey*, the court held that cruel behavior inflicted upon a child did not provide a basis for suit and the parents, including the stepmother, were immune from liability because the right of the parent to control the child comes from the corresponding duty to maintain, protect and educate the child and includes the right to inflict moderate chastisement. *McKelvey*, 77 S.W. at 664. The court further stated that only gross misconduct could subject the parent to liability. *Id.* Also, in *Roller*, a father raped his fifteen-year-old daughter and the court held that the daughter could not sue her father for damages because such a suit was against public policy, as it did not encourage the preservation of harmony

question of whether parental immunity is proper for non-parents depends upon whether foster parents are granted *in loco parentis* status.[73] Throughout the development of the doctrine of parental tort immunity, courts consistently have applied the principle not only to natural parents of a child, but also to individuals granted *in loco parentis* status.[74] Although not mentioned in early cases, a fundamental principle to recent cases questioning the appropriateness of parental immunity for non-parents focuses on the concept of *in loco parentis*.[75]

Since its adoption in the early twentieth century, parental immunity has evolved into two general approaches.[76] In the majority of jurisdictions, the doctrine of parental immunity protects parents from liability arising from actions that are either an exercise of parental

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in domestic situations. *Roller*, 79 P. at 789. While these cases have since been overruled, they provided the basis for the doctrine of parental immunity.

73. *See supra* note 69 (defining *in loco parentis*). Most states, including Illinois, have adopted the same or similar definitions. *See, e.g.*, Busillo v. Hetzel, 374 N.E.2d 1090, 1091 (Ill. App. Ct. 1978); Gulledge v. Gulledge, 367 N.E.2d 429, 431 (Ill. App. Ct. 1977); Weinand v. Weinand, 616 N.W.2d 1, 6 (Neb. 2000); Miller v. Davis, 268 N.Y.S.2d 490, 493 (N.Y. Sup. Ct. 1966); Fox v. Mission of Immaculate Virgin, 119 N.Y.S.2d 14, 15 (N.Y. Sup. Ct. 1952). In *Gulledge*, the trial court held that grandparents were not entitled to parental immunity for the injury to their grandchild while he was in their care. *Gulledge*, 367 N.E.2d at 431. The court rationalized that the grandparents did not stand *in loco parentis*, as their control over the child was temporary and Illinois courts had failed to extend this rule beyond its limited boundaries. *Id.*; *see also* 4 FAMILY LAW & PRACTICE, *supra* note 71, § 67.09 (explaining that parental immunity is typically not extended to parties who are not *in loco parentis* and, further, that foster parents are not usually considered to stand *in loco parentis* because of the different nature of the relationship and the ability to terminate the foster parent-child relationship); E. Russell March III, Note, *Torts–Personal Injury–Doctrine of Parental Immunity Extended to Foster Parents Standing In Loco Parentis for Claims of Simple Negligence:* Mitchell v. Davis, *598 So. 2d 801 (Ala. 1992)*, 23 CUMB. L. REV. 483 (1992/1993) (providing a history of the doctrine of parental immunity and *in loco parentis* and applying the concepts to a 1992 case in Alabama that considered whether foster parents were entitled to parental immunity).

74. Lawber v. Doil, 547 N.E.2d 752, 753-54 (Ill. App. Ct. 1989). The court stated that "immunity applies not only to the natural parents of the child, but also to those who stand *in loco parentis*." *Id.* at 753 (citing *Busillo*, 374 N.E.2d at 1090); *infra* notes 92-93 (discussing the *Busillo* case and the court's reasoning in that case).

75. *Busillo*, 374 N.E.2d at 1090; *Gulledge*, 367 N.E.2d at 429; *see also infra* notes 92-93 (discussing the facts and holding of the *Busillo* case, particularly the court's reasoning to deny grandparents parental immunity and the attached *in loco parentis* status).

76. *Cates*, 619 N.E.2d at 722. The *Cates* court stated that jurisdictions have either "(1) fully abrogated the doctrine concerning all types of parent-child negligence and applied a standard which limits actionable liability between parent-child; or (2) partially abrogated the doctrine with respect to all types of parent-child negligence by carving out exceptions to its reach." *Id.*; *see also* Samuel Mark Pipino, Comment, *In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine*, 53 OHIO ST. L.J. 1111 (1992) (discussing the history of parental immunity, the expansion the doctrine has undergone and the present status of parental immunity); *supra* note 72 and accompanying text (discussing the facts and holding of *Cates*).

authority or parental discretion.[77] Parental discretion generally includes providing food, clothing, housing, and medical and dental care.[78] The minority of jurisdictions, including Illinois, take a piecemeal approach in determining whether parental immunity is appropriate.[79] These jurisdictions apply the above stated general majority rule, but permit exceptions to the general rule on a case-by-case basis.[80]

2. Parental Immunity and *In Loco Parentis* in Illinois

Illinois courts first recognized and adopted the doctrine of parent-child tort immunity in 1895 in *Foley v. Foley*.[81] The *Foley* court adopted the doctrine of parental immunity, reasoning that internal family disputes and issues should not be resolved by the judicial system.[82] *Foley* also addressed the question of whether the doctrine of parental immunity should apply equally to natural parents and adoptive parents.[83] The court determined that because all the benefits given to natural parents are also given to adoptive parents when a child permanently enters the home, the adoptive parent must be granted the

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77. *Cates*, 619 N.E.2d at 722 (citing Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963)). The court summarized *Goller* as allowing "a child [to] sue his parent for negligent conduct except where the conduct involves 'an exercise of parental authority . . . or an exercise of ordinary parental discretion.'" *Id.* The *Goller* case involves a foster father's claim for immunity for the injuries sustained by the foster son while riding on the foster father's tractor. *Goller*, 122 N.W.2d at 198. The court held that the foster father was not relieved from liability under the parental-immunity rule because the negligent act did not occur in either an exercise of parental authority over the child or during an act involving an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. *Id.* at 198.

78. *Goller*, 122 N.W.2d at 198.

79. *See Cates*, 619 N.E.2d at 723. In *Cates*, the court cited to a dissenting opinion of a prior case, which stated that "the piecemeal approach, taken in this case . . . can lead to nothing but confusion." *Id.* (citing Cummings v. Jackson, 372 N.E.2d 1127 (Ill. App. Ct. 1978)).

80. *See id.* An example of an exception to the general rule, as stated in *Cates*, is that parent-child tort immunity does not apply when the parent is deceased because the policy reason prohibiting parent-child suits no longer exists. *Id.* (citing Johnson v. Myers, 277 N.E.2d 778 (Ill. App. Ct. 1972)). A second exception is that grandparents do not qualify for parental immunity because the family relations are too distant. *Id.* (citing Gulledge v. Gulledge, 367 N.E.2d 429 (Ill. App. Ct. 1977)).

81. Foley v. Foley, 61 Ill. App. 577 (1895). The relevant facts before the court were that the child was in the care of his uncle, where he was beaten and sustained an injury to his arm that left that arm crippled. *Id.* at 578.

82. *Id.* at 579. The court's reasoning included that:

> [T]he child cannot maintain a civil action for damages against its parents for such injury. This rule of law, as the court conceives, is founded upon consideration of public policy, affecting family government; that is, that the child shall not contest with the parent the parent's right to govern the child.

Id.

83. *Id.* at 580.

same rights as a natural parent.[84] Despite the grant of parental immunity to adoptive parents, the court concluded that if the injuries sustained by the child were outside the duties of care and control, civil liability for the child's injury will not be absolved by the doctrine of parental immunity.[85]

Since *Foley*, Illinois courts have continued to grant parents immunity for negligence within the scope of the parental relationship.[86] Most cases granting parental immunity apply the "family purpose exception,"[87] which justifies parental immunity by promoting the public policy of family harmony.[88] Courts limit this exception by establishing that parental immunity will not be granted for a parent's willful or wanton acts.[89] While the Illinois courts have followed *Foley's* rationale justifying parental immunity, the courts consistently carve out exceptions to take into account the specific facts of each case.[90] Examples of the exceptions noted by the courts include the parent's operation of a car and the maintenance of stairway banisters in the home.[91] The Illinois courts justify such exceptions by stating that, in many cases involving either the natural parent or the non-parent, there is a limited social utility in extending the grant of parental immunity.[92]

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84. *Id.*

85. *Id.* at 582. The court reasoned that "there could be no recovery for injuries inflicted in the exercise of such [parental] rights, but we are not prepared to say that if the contract was made, the defendant could violate that contract and repudiate its obligations without civil responsibility to any one." *Id.*

86. *See, e.g.*, Nudd v. Matsoukas, 131 N.E.2d 525, 531 (Ill. 1956). The current public policies that the court cites as a rationale to maintaining parent-child tort immunity include preserving family harmony, discouraging fraudulent suits and preserving parental authority and discretion. Cates v. Cates, 619 N.E.2d 715, 723 (Ill. 1993). Throughout the evolution of the parental immunity doctrine in Illinois, the original public policy justifications enumerated in *Foley*, and restated in *Cates* with modernized language, have remained consistent.

87. Bennett v. Lahr, 612 N.E.2d 1381, 1383 (Ill. App. Ct. 1993). The *Bennett* court inferred that the family purpose exception was explained as "the interest of the State in maintaining . . . the peace, harmony, tranquility, discipline, cooperation, love and respect essential to good family relationship [considered] when the family immunity rule was promulgated many, many years ago." *Id.* (citing Schenk v. Schenk, 241 N.E.2d 12, 13 (Ill. App. Ct. 1968)).

88. *Id.*

89. *Nudd*, 131 N.E.2d at 531. The plaintiff was the administrator for the estate of the defendant's children, who were killed while passengers in the defendant's car. *Id.* at 526. The court stated that the conduct of the parent in this case was willful and wanton. *Id.* at 531. As such, no Illinois policy requires that children be precluded from recovering from their parents when the policy goals are not satisfied. *Id.*

90. *Cates*, 619 N.E.2d at 723. The *Cates* court provided a detailed list of cases and circumstances in which the court permitted a suit between parent and child despite the general rule that children cannot sue their parents for negligence. *Id.* at 725-26.

91. *Id.*

92. Busillo v. Hetzel, 374 N.E.2d 1090, 1091 (Ill. App. Ct. 1978). The court also explains that

As the principle presently exists in Illinois, a parent who satisfies the requirements of *in loco parentis* receives the protection of parental immunity as long as the conduct in question is part of the parent-child relationship, an exercise of parental authority, an act of supervision or discretion over the child, and the parent maintains financial responsibility for the child's care.[93] These parents' ability to claim parental immunity, however, is both expressly and impliedly limited.[94] For example, expressly excluded are those acts that are outside the boundaries of socially acceptable treatment of children.[95]

Illinois appellate courts have considered whether foster parents are entitled to parental immunity.[96] One of the first cases to address the issue was *Country Mutual Insurance Co. v. Peoples Bank.*[97] Here, the court questioned whether, for the purposes of insurance law, a foster child is considered a "resident" of the foster family's household.[98] While the court held that the foster child was a "resident" of the foster

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unless immunity is based on a grant of statutory *in loco parentis* status, then all the requirements of the traditional *in loco parentis* standard should be satisfied before any immunity is granted. *Id.*

93. *Id.* The standard stated in *Busillo v. Hetzel*, which provides guidance for questions of parental immunity involving foster parents, was applied in that case to deny grandparents parental immunity. *Id.* The *Busillo* court made clear that *in loco parentis* status requires an assumption of the obligations of a parent, including the financial burdens arising out of the relationship of a parent and child. *Id.* Affection, generosity and exercise of care without the financial burdens of parenthood are insufficient to place one *in loco parentis* to a child. *Id.* Further, grandparents with temporary custody and control do not fall within the purview of the Illinois parental immunity doctrine as the rationale behind the rule loses its persuasive force as situations involving others than the actual parent are considered. *Id.*

94. *Cates*, 619 N.E.2d at 729; *see also supra* note 72 and accompanying text (discussing the *Cates* court's conclusion that the limits to the principle of parental immunity are not enumerated within any one decision of the court).

95. *Cates*, 619 N.E.2d at 729. The court stated "that parents in Illinois must conform their treatment of their children within certain socially acceptable limits or face criminal and civil actions by the state. Such actions are instituted regardless of the fact that parental authority is thereby circumscribed . . . [t]here yet exist limits to parental immunity beyond those recognized here." *Id.*

96. The grant of parental immunity and *in loco parentis* status to foster parents, irrespective of the individual's designation as a state employee, remains undetermined. This is true even though the grant of parental immunity and *in loco parentis* status rests upon the fundamental principles and tests stated in the above section. Despite these principles, the court's willingness to permit exceptions to standard tests for parental immunity leaves non-parental caretakers without guidance regarding questions of parental immunity.

97. Country Mut. Ins. Co. v. Peoples Bank, 675 N.E.2d 1031 (Ill. App. Ct. 1997); *see supra* notes 61-62 and accompanying text (discussing the events leading up to Louise Osborn's death and explaining that there are two separate cases against the Augsburgers, who were acting as Louise Osborn's foster parents, based on the same set of facts).

98. *Country Mut.*, 675 N.E.2d at 1035. This case centered on the question of whether the foster parents' homeowner's policy was required to insure a foster child temporarily living in the home. *Id.* at 1032.

parents' household for insurance purposes, it also stated that there is no automatic assumption that the foster parents receive parental immunity.[99] The court stated that foster parents, in providing supervision to foster children, have a high exposure to lawsuits if foster children are injured or killed while in their care.[100] The court further explained that if foster parents were uniformly protected by the doctrine of parental immunity, the *Country Mutual* case would never have been brought because the foster parents would clearly have been protected by the doctrine.[101]

In a case based on the same facts as *Country Mutual*, the appellate court in *Commerce Bank v. Augsburger*[102] again questioned whether foster parents would be liable for their foster child's death. The court established that parental immunity is only appropriate in cases where its application is necessary to preserve authority and discipline between the parent and child.[103] The court held that the principles of parental immunity also applied to the foster parent-child relationship.[104] The court stated that such a relationship involves responsibilities including supervision and discipline of the child, and that the discretion given to natural parents should also be given to foster parents.[105] The court

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99. *Id.* at 1034. The court stated that "if foster parents have [parental] immunity, the Bank has no case here." *Id.*

100. *Id.* at 1034. The court reasoned that,

> [T]he exposure of foster parents to suits by foster children in regard to the supervision and care given to the foster children would appear to be greater than the exposure to suits brought by natural or adopted children, because in the latter case natural and adoptive parents are still protected by parent-child immunity.

Id.

101. *Id.* This statement seems to imply that foster parents do not have parental immunity.

102. Commerce Bank v. Augsburger, 680 N.E.2d 822 (Ill. App. Ct. 1997); *see also supra* notes 61-62 and accompanying text (discussing the facts of both cases involving the Augsburgers and the events that resulted in the foster child's death from discipline imposed by the foster parents).

103. Cates v. Cates, 619 N.E.2d 715, 723 (Ill. 1993); *see also Commerce Bank*, 680 N.E.2d at 826; *supra* note 72 and accompanying text (discussing the facts of the *Cates* case). The *Commerce Bank* court summarized *Cates* by stating:

> [T]he Cates majority opinion considered other inroads upon the parental immunity doctrine and concluded that the "preservation of family harmony" and the discouragement of fraud and collusion considerations for the doctrine were not longer viable, but the preservation of authority and discipline aspects of the doctrine made sense and should be preserved.

Commerce Bank, 680 N.E.2d at 826. The historical background of parental immunity is presented in a recent law review article. Pipino, *supra* note 76, at 1111–21.

104. *Commerce Bank*, 680 N.E.2d at 827; *see also infra* note 107 (discussing the *Commerce Bank* court's rationale in granting foster parents parental immunity and its opinion that foster parents require the same discretion granted to natural parents).

105. *Commerce Bank*, 680 N.E.2d at 827.

made clear that parental immunity would apply only to foster parents where there was no willful or wanton conduct.[106] As a policy rationale, the court stated that the frequent animosity between natural parents and foster parents, which often leads to frivolous claims by natural parents, was a sound basis upon which to grant foster parents immunity for torts committed upon foster children.[107]

In *Wallace v. Smyth,*[108] the appellate court specifically questioned the relationship between *in loco parentis* status and the grant of parental immunity. In *Wallace*, DCFS placed twelve-year-old Waketta Wallace at Maryville Academy for a ninety-day assessment, during which time he died as a result of physical restraint by Maryville administrators.[109] Waketta's mother filed suit on behalf of the child's estate.[110] The court began its analysis with an affirmation that *in loco parentis* status implies that a non-parent is standing in the place of a parent and is assuming all parental rights and obligations.[111] The court specifically mentioned that the assumption of the usual financial burden of parenting is a required

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106. *Id.* (stating that parental immunity would not apply to willful or wanton acts).

107. *Id.* As a policy justification for granting foster parents immunity, the court reasoned that:

> Often animosity can exits between natural parents and foster parent. Exposure to suit for negligence in supervising and disciplining the children in their custody would be a deterrent to the best performance by the foster parent in this regard. We find no precedent for denying parental immunity here and deem the granting of it consistent with the theory of *Cates*.

Id. Noticeably absent from both Augsburger decisions is any discussion regarding whether the foster parents stood *in loco parentis* and how this relates to the decision to grant parental immunity upon the foster parents. *See generally* Commerce Bank v. Augsburger, 680 N.E.2d 822 (Ill. App. Ct. 1997); Country Mut. Ins. Co. v. Peoples Bank, 675 N.E.2d 1031 (Ill. App. Ct. 1997); *supra* notes 61-62 (noting that there are two separate cases involving the Augsburger based on the same events).

108. Wallace v. Smyth, 703 N.E.2d 416 (Ill. App. Ct. 1998).

109. *Id.* at 418. The court concluded their factual examination by stating that:

> [The physical restraint] continued for approximately four hours in the middle of the hallway floor while other children walked past. . . . In the course of his restraint, Waketta warned the counselors he had to urinate and that he might urinate upon himself. They continued to restrain him. Even after Waketta urinated upon himself, the counselors continued to restrain him . . . [a]t approximately 6:00 p.m. [the restraint ended and] . . . [t]he counselors flipped Waketta onto his back and Voltz unsuccessfully attempted to resuscitate Waketta.

Id. Medical testimony stated that the cause of death was asphyxia. *Id.*

110. *Id.* at 417.

111. *Id.* at 419. The court cited to a variety of different cases decided in Illinois, all of which affirmed that *in loco parentis* is to be used sparingly and only in situations where the rights and responsibilities of parenting are assumed. *See, e.g.*, Lawber v. Doil, 547 N.E.2d 752 (Ill. 1989); Bland v. Dep't of Children & Family Servs., 490 N.E.2d 1327 (Ill. App. Ct. 1986); Busillo v. Hetzel, 374 N.E.2d 1090 (Ill. App. Ct. 1978); *see also supra* notes 74-75 and accompanying text (discussing the respective holdings and reasoning of the *Lawber* decision and the *Busillo* decision).

element of *in loco parentis* status.[112] According to the court, the mere act of housing, caring, and educating another's child does not alone confer *in loco parentis* status.[113] The court held that because DCFS maintained enough control over the child's daily activities, through the *Illinois Administrative Code*, Maryville Academy did not satisfy the requirements of *in loco parentis*.[114] Without satisfaction of the *in loco parentis* test, Waketta's caretakers could not qualify for immunity under the doctrine of parental immunity.[115]

Illinois courts have had numerous opportunities to question whether foster parents are entitled to parental immunity.[116] The courts have arrived at inconsistent holdings, leaving foster parents, state administrators and courts throughout the state without clear guidance as to whether foster parents are entitled to parental immunity.[117] It is

112. *Wallace*, 703 N.E.2d at 419 (citing *Busillo*, 374 N.E.2d at 1091).

113. *Id.* at 420. The court noted that to extend *in loco parentis* status to those who provided only housing, care and education would create a situation where far too many parties would stand *in loco parentis*. *See id.* The parties who would be granted *in loco parentis* include "summer camps, day-care centers, medical and physiological treatment facilities, and grandparents." *Id.* The court concluded by stating that, if this is the desired result, it should be accomplished by "legislative enactment, not judicial fiat." *Id.*

114. *Id.* The court stated that "the relevant legislation here is Illinois' Administrative Code which states DCFS has legal and financial responsibility for children of whom it is guardian, regardless of their momentary location." *Id.* (citing ILL. ADMIN. CODE tit. 89, § 359.7-359.9 (2000)).

115. *Id.*

116. Wallace v. Smyth, 703 N.E.2d 416 (Ill. App. Ct. 1998); Commerce Bank v. Augsburger, 680 N.E.2d 822 (Ill. App. Ct. 1997); Country Mut. Ins. Co. v. Peoples Bank, 675 N.E.2d 1031 (Ill. App. Ct. 1997); *see also supra* notes 61-62 and accompanying text (discussing that there are two separate cases involving the Augsburgers, both arising from the death of three-year-old Louise Osborn).

117. *Compare Wallace*, 703 N.E.2d at 420, *with Commerce Bank*, 680 N.E.2d at 827-28, *and Country Mut.*, 675 N.E.2d at 1034-35 (the court in *Wallace* held that the group institution where the child was placed by DCFS was not standing *in loco parentis*, whereas the court in *Commerce Bank* and *Country Mutual* held that the foster parents licensed by a private agency were entitled to the leeway given to natural parents under the doctrine of parental immunity).

Other jurisdictions have also questioned whether foster parents qualify for parental immunity. These jurisdictions have also arrived at ambiguous and inconsistent holdings on the issue. In *Mayberry v. Pryor*, the Michigan Supreme Court held that a foster parent-child relationship could never rise to the level of *in loco parentis*, the result being that foster parents are never entitled to parental immunity. Mayberry v. Pryor, 374 N.W.2d 683, 689 (Mich. 1985). In this case, the foster child, who was deaf, was placed with the defendant foster parents when he was approximately two years old. *Id.* at 684. When the child was about four years old, he was attacked by a dog while sitting alone on the defendant foster parents front porch. *Id.* The trial court dismissed the complaint against the foster parents on the basis of parental immunity. *Id.* The Supreme Court of Michigan reasoned that the foster parent-child relationship centered on a contract and that the foster parent and their home had to conform to strict statutory guidelines. *Id.* at 686. The court further stated that family preservation and protection of family resources was the policy impetus for parental immunity and that the nature of the foster parent-child relationship

within the context of this ambiguity, as well as the ambiguity surrounding questions of foster parents rights to sovereign immunity, that the Illinois Supreme Court undertook the opportunity to provide clarification and consistency in *Nichol v. Stass.*

III. DISCUSSION

In *Nichol v. Stass*, the Illinois Supreme Court decided whether foster parents licensed by a private agency are entitled to sovereign immunity and parental immunity when the foster child in their care dies as a result of their negligence.[118] The Illinois Supreme Court held that the foster parents did not qualify as state employees entitled to immunity, but that they may be entitled to a limited grant of parental immunity.[119]

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fell outside these goals. *Id.* The court also noted that foster parents "are compensated for expenses incurred in caring for the child." *Id.* The *Mayberry* court made clear that foster children must be permitted a remedy for torts committed by their foster parents. *Id.* at 689. The court stated the "the interests of the child outweigh those of the foster parents and that the parental immunity doctrine should not be further extended." *Id.* The court concluded by stating that if this extension of the doctrine was desired, it is in the legislature's power to do so. *Id.; see also* Mitchell v. Davis, 598 So.2d 801, 805 (Ala. 1992) (agreeing with the policy reasons stated in *Mayberry* but concluding that in cases of ordinary negligence, as compared to willful and wanton negligence, foster parents were eligible to receive parental immunity); Newsome v. Dep't of Human Servs., 405 S.E.2d 61, 63 (Ga. Ct. App., 1991) (holding that the facts of the case did not permit a granting of *in loco parentis* status and accompanying parental immunity, but that if the child had been in the care of the defendant foster parents at the time of the tort, parental immunity would have been appropriate).

In *In re Diana P.*, the New Hampshire court arrived a decision contrary to the holding in *Mayberry*. *Compare In re Diana P.*, 424 A.2d 178, 181 (N.H. 1980), *with Mayberry*, 374 N.W.2d 683. The New Hampshire Supreme Court analyzed the definition of *in loco parentis* to determine the rights and standing of foster parents. *Diana P.*, 424 A.2d at 180. In this case, the foster child, Diana P., was neglected by her natural mother and placed into foster care at eleven months old. *Id.* at 179. Diana's natural mother visited infrequently, and the foster parents subsequently requested that the court terminate the natural parents' parental rights so that they could adopt Diana. *Id.* at 180. The court held that the foster parents' rights depended upon establishing an intentional acceptance of the duties of parenthood, financial support of the child and the amount of time the child had been in the foster home. *Id.* The court further required the formation of a "psychological family," which they determined occurred after a few weeks and before two or three years. *Id.* at 181. Only when the foster parent proved all these elements, as occurred in this case, would the court grant the foster parents rights. *Id.* The court reasoned that "a status of *in loco parentis* has arisen out of the foster parents' relationship." *Id.*

118. Nichol v. Stass, 735 N.E.2d 582, 585 (Ill. 2000).

119. *Id.* at 589.

A. The Facts

Jonathan Nichol died on June 16, 1995.[120] He was two years old when he drowned in a toilet in the home of John and Bonnie Stass.[121] The Stasses were Jonathan's foster parents, and through an independent child welfare agency that worked with DCFS, they were vested with the responsibility of caring for Jonathan.[122]

Following his death, Jonathan's natural parents filed an action in the Circuit Court of Cook County alleging that the Stasses failed to supervise Jonathan, failed to protect him from any potential hazards within the home and failed to seek proper medical assistance for Jonathan.[123] In response, the Stasses filed a motion to dismiss averring that, as foster parents, they were entitled to sovereign immunity.[124] The court held that because the foster parents were entitled to sovereign immunity, the court lacked subject matter jurisdiction.[125] The Nichols immediately appealed to the Appellate Court for the First District of Illinois.[126]

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120. *Id.* at 584. All recounting of the facts are taken from Illinois Supreme Court's decision in *Nichol v. Stass*, unless otherwise cited. It is worth noting the absence of any statement of the non-procedural facts from the appellate decision of this case. *See* Nichol v. Stass, 697 N.E.2d 758 (Ill. App. Ct. 1998), *rev'd*, 735 N.E.2d 582 (Ill. 2000).

121. *Nichol*, 735 N.E.2d at 584.

122. *Id.* It is unknown why Jonathan was placed in foster care. *Cf. Child Protection, supra* note 5 (discussing DCFS's mission statement of ensuring safety for every child).

123. *Nichol*, 735 N.E.2d at 584. The plaintiffs sought recovery from each of the defendants under the Wrongful Death Act, the Rights of Married Persons Act and the Survival Act, alleging that "the defendants negligently violated various duties imposed by the common law and by administrative regulations, and further, that liability was established under the doctrine of *res ipsa loquitur*." *Id.* (citing The Wrongful Death Act, 740 ILL. COMP. STAT. 180/1 (1998); The Rights of Married Persons Act, 750 ILL. COMP. STAT. 65/15 (1996); The Survival Act, 755 ILL. COMP. STAT. 5/27-6 (1998)). Res ipsa loquitur, translated as "the thing speaks for itself," is an accepted doctrine in tort law. JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 237 (5th ed. 1999).

124. *Nichol*, 735 N.E.2d at 585. In support of their motion to dismiss, the Stasses cited to 705 ILL. COMP. STAT. 505/8(d) (1998 & West Supp. 2000), which states that all actions against the state and its agents must be heard in the court of claims, and 735 ILL. COMP. STAT. 5/2-619 (a)(1) and (a)(9) (1998), which states that a motion to dismiss may be granted if (1) the court does not have subject matter jurisdiction and the defect of subject matter cannot be resolved through a transfer of the case and . . . (9) the claim is barred by another matter, the legal effect of which is defeating to the claim at issue. *Id.*

125. Nichol v. Stass, 697 N.E.2d 758, 759 (Ill. App. Ct. 1998), *rev'd*, 735 N.E.2d 582 (Ill. 2000). The trial court reasoned that it had to reserve its judgment because the defendants' attorney informed the court that the appellate court was deciding the *Griffen v. Fluellen* case, in which there were similar issues. *Nichol*, 735 N.E.2d at 585. After *Griffen* was decided, the trial judge concluded that he was required to follow *Griffen* and granted the Stasses' motion to dismiss. *Id.*

126. *Nichol*, 735 NE.2d at 585. The appellate judge granted the Nichols' the right to immediate appeal under Illinois Supreme Court Rule 304(a), stating that if there are multiple claims for relief, an appeal may be taken from a final judgment without delay only if the trial

B. The Appellate Court Decision

The First District of the Illinois Appellate Court affirmed that the Stasses were entitled to sovereign immunity.[127] The court concluded that while foster parents act in a capacity to carry out the non-delegable duty the state owes to foster children, they are entitled to sovereign immunity.[128] There was no discussion of whether the Stasses were entitled to parental immunity, as this defense was not raised until the case reached the Illinois Supreme Court.[129]

To support these conclusions, the court applied the two-part test adopted by the Illinois Supreme Court in *Healy v. Vaupel*.[130] The appellate court used the *Healy* test to address the question of whether the Nichols' suit was actually against the state and not the Stasses, thereby granting the Stasses sovereign immunity.[131] First, the court considered whether the foster parents are agents or employees of the state.[132] The court stated unequivocally that foster parents act for the government and are agents of the state.[133] The court also stated that an independent contractor relationship is created when foster parents receive their license from a private child welfare agency. Therefore, liability continues to rest with the state because the care of foster

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judge enters an express written order stating that there is no reason to delay. *Nichol*, 697 N.E.2d at 759.

127. *Nichol*, 697 N.E.2d at 765. The appellate court reasoned that "foster parents also are agents of the State because they are performing duties which are statutorily mandated as government duties." *Id.* at 761.

128. *Id.* at 761-63. To establish the state's non-delegable duty, the appellate court reasoned that "the State's duty to provide for the care of its foster children is non-delegable such that the State was not relieved of duty to provide care for the foster child/ward in the instant case when the defendant foster parents contracted with the State to assume that duty." *Id.* at 762.

129. *Nichol*, 735 N.E.2d at 585.

130. *Nichol*, 697 N.E.2d at 765 (citing Healy v. Vaupel, 549 N.E.2d 1240, 1247 (Ill. 1990)). The *Healy* test states:

> [T]hat when there are "(1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State, then the cause of action is only nominally against the employee." In those circumstances, the action is one against the State and must, therefore, be brought in the Court of Claims.

Healy, 549 N.E.2d at 1247 (quoting Robb v. Sutton, 498 N.E.2d 267 (Ill. Ct. App. 1986)).

131. *Nichol*, 697 N.E.2d at 760.

132. *Id.* at 760-61. The court stated that "the inclusion of foster parents in the definition of employee in that Act [5 ILL. COMP. STAT. ANN. 350/1 (1998 & West Supp. 2000)] does not conclusively establish employment status for sovereign immunity purposes." *Id.* at 760-61.

133. *Id.* at 761.

children is a non-delegable duty.[134] The court concluded by stating that it could find no reason not to grant foster parents sovereign immunity.[135]

Second, the court addressed the question of whether foster parents are held to any duties independent of their position as foster parents.[136] The court noted the differing appellate court decisions in *Griffen* and *Swanigan* on the issue, but analyzed the case based solely on whether the duty existed because of their status as foster parents.[137] The court concluded that any duties between Jonathan Nichol and the Stasses existed only because of the foster care relationship.[138] Since the court reasoned that the Stasses' independent duty was only a duty of "reasonable care," and there was no allegation that the Stasses violated this duty, the court concluded that there was no breach of an independent duty of care.[139] Based on this two-part analysis, the appellate court affirmed the trial court's dismissal of the claim.[140]

C. The Illinois Supreme Court Opinion

In a five-to-two decision,[141] the majority opinion reversed the appellate court's holding that the Stasses were state employees entitled to sovereign immunity.[142] The majority also considered whether foster

134. *Id.* at 762. The court stated that while there is no one test to determine whether a duty is non-delegable, it looked to the Second Restatement of Agency, section 214, and determined that the state's statutory duty to "provide direct child welfare services for foster children who are its wards" was sufficient to establish a non-delegable duty. *Id.* at 762.

135. *Id.* at 763.

136. *Id.* at 763-64.

137. *Id.* at 764. The appellate court stated that "the analysis must look to the source of the duty breached and whether that duty existed solely because of the plaintiff's status." *Id.* at 765; *see also supra* notes 46, 54 and accompanying text (discussing the respective reasoning of the court in the *Swanigan* and *Griffen* decisions and the effect of each court's holding).

138. *Nichol,* 697 N.E.2d at 765. The court reasoned that the "breach . . . is dependent on that relationship because without that relationship the foster parent would have no duty to exercise ordinary care in the supervision and monitoring of the foster child." *Id.*

139. *Id.* The court stated that "there is no allegation that the foster parents were negligent in failing to exercise reasonable care with respect to a condition on the premises." *Id.*

140. *Id.* at 765-66. Near the end of the opinion, the court did state that if the plaintiffs had alleged that the Stasses' failed to exercise reasonable care, this would have defeated any possible claim of sovereign immunity. *Id.* at 765.

141. Justice Miller wrote for the majority of the court, including Chief Justice Harrison and Justices Bilandic, McMorrow, and Rathje. Nichol v. Stass, 735 N.E.2d 582, 584 (Ill. 2000). Justices Heiple and Freeman filed separate dissenting opinions. *Id.* at 592 (Heiple, J., dissenting), 594 (Freeman, J., dissenting).

142. *Id.* at 591. Upon presentation to the Illinois Supreme Court, the plaintiffs' presented two issues for review. The first issue was whether the lower courts had correctly decided that the foster parents were either state employees or agents and could therefore assert the protection of the sovereign immunity doctrine. *Id.* at 586. The court considered a variety of statutes and

parents could receive the protection of parental immunity, an issue not addressed in either the trial or appellate courts.[143] The majority held that foster parents may be entitled to a limited grant of parental immunity for any injuries to the foster children in their care, but required more specific facts and, therefore, remanded the issue.[144] The court stated that foster parents, like natural parents, are in a position of parental authority and should receive the same immunity granted to natural parents.[145]

1. Sovereign Immunity is Inappropriate for Foster Parents

The majority held that the foster parents were not state employees.[146] The court expressly rejected the argument that the existence of regulations for foster parents contained in the *Illinois Administrative Code* transformed foster parents into state employees.[147] The court determined that neither the *Illinois Administrative Code* nor the *Illinois*

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reasoned that:

> The record in the present case is not entirely clear concerning the relationship among the Stasses, [Human Enrichment and Development Association], and the Department of Children and Family Services . . . it was the defendants' motion to dismiss, and therefore it was their duty to supply a record in support of their motion. In the absence of these documents, and in light of the relevant statutes . . . we must conclude that the Stasses were independent contractors rather than employees or agents of the state.

Id. at 586-87.

The second issue, raised by the defendants, was whether parental immunity was applicable if the court determined sovereign immunity to be inappropriate. *Id.* at 589. Justice Miller wrote the majority opinion. *Id.* at 584. Justice Heiple did not agree with the majority decision on the question of parental immunity and wrote a separate dissenting opinion on this issue. *Id.* at 592 (Heiple, J., dissenting). Justice Freeman dissented from the majority decision on both issues and wrote his own dissenting opinion. *Id.* at 594 (Freeman, J., dissenting).

143. *Id.* at 589.

144. *Id.* at 591.

145. *Id.* at 589-90. The court considered the reasoning it had employed in *Cates*. *Id.* at 589. It held that the rationale of preserving parental immunity was equally applicable to foster parents. *Id.*; *see also supra* note 72 and accompanying text (reasoning that certain policy goals still existed sufficient to justify the maintenance of parental immunity).

146. *Nichol*, 735 N.E.2d at 587. The court reasoned that the foster parents had "failed to establish they are state employees or agent." *Id.*; *see also infra* Part IV (discussing the ramifications of the court deciding that it is possible for foster parents to present facts that could entitle them to sovereign immunity).

147. *Nichol*, 735 N.E.2d at 587. The court considered various sections of title 89 of the *Illinois Administrative Code* as well as sections of the *Illinois Compiled Statutes* that consider sovereign immunity in general and specifically foster parents. *Id.* The court stated that they did "not believe that the preceding measures are anything more than licensing requirements or that they serve to establish the defendants' role as state employees or agents." *Id. See generally* 5 ILL. COMP. STAT. ANN. 350/1 (1998 & West Supp. 2000); ILL. ADMIN. CODE tit. 89, § 402 (2000); *supra* Part II.A (discussing the *Illinois Administrative Code* and its role in regulating the foster parents and the entire foster care system).

Compiled Statutes provisions addressing foster parents automatically transformed foster parents into state employees.[148] Further, the court considered that foster parents are entitled to indemnification and representation, but concluded that this benefit does not transform foster parents into state employees.[149] The court determined that because the defendants failed to present any conclusive evidence on the questions of sovereign immunity, there was no basis for a grant of sovereign immunity to the foster parents.[150]

The majority also disagreed with the appellate court's analysis of whether the duty owed to foster children was the state's non-delegable duty.[151] While the court made clear that it was not questioning any decision of the United States Supreme Court, it distinguished the case at bar from prior Supreme Court decisions.[152] The court rejected the appellate court's application of principles from the common law of Torts and Agency as imposing upon the state a non-delegable duty of care for foster children.[153] In addition, the court unequivocally stated

148. *Nichol,* 735 N.E.2d at 587. The court reasoned that "[t]he existence of those administrative requirements, however, does not mean that the persons subject to them are state employees or agents." *Id.*; *see also supra* Part II.A (discussing the sections of the *Illinois Administrative Code* and *Illinois Compiled Statutes* that discuss foster parents).

149. *Nichol,* 735 N.E.2d at 587. The court stated that "the preceding definition [including foster parents as employees] simply affirms the entitlement of foster parents to indemnification, without also establishing, for other purposes, their status as government employees or agents." *Id.*

150. *Id.*; *see also infra* Part IV (discussing the significant implications of the court's failure to make clear whether foster parents are unilaterally not entitled to sovereign immunity).

151. *Nichol,* 735 N.E.2d at 588. The Illinois Supreme Court summarized the reasoning of the appellate court as also believing that sovereign immunity could be invoked in the present case because, whether or not the defendants are deemed state agents or employees, the state owed Jonathan, a ward of the court, a continuing, non-delegable duty of care. The appellate court further believed that the state would be vicariously liable for conduct of the foster parents in violations of that duty. *Id.* at 587.

152. *Id.* at 588. The distinction drawn by the court was between the degree of misconduct and the resulting public liability. *Id.* at 588. According to the *Nichol* court, this was a distinction from *Youngberg v. Romeo,* in which the United States Supreme Court stated that the state owes certain duties to the children in places in state care. Youngberg v. Romeo, 457 U.S. 307 (1982). *Youngberg* involved a question of foster children's rights under 42 U.S.C. § 1983. *Id.*; *see also* 42 U.S.C § 1983 (West 1998) (which establishes a civil cause of action for a deprivation of rights under an equal protection theory). The *Nichol* court stated that this case involved the question of foster parents' negligent conduct. *Nichol,* 735 N.E.2d at 588. The court reasoned that for the rationale of *Youngberg* to apply, the plaintiffs would have to make an allegation against the state for placing Jonathan in the foster parents home, and no such allegation existed. *Id.*

153. *Id.* at 589. The court distinguished this case from what was envisioned by the Second Restatement of Torts section 424 because in this case it is the principal (the state) imposing the regulations. The court held that section 424 envisioned a situation where it was the principal who was held to a statutory standard. The court further stated that the Second Restatement of Agency sections 214 and 251 do not apply because they require that the principal be required to "impose

that the state's act of providing placement, exercising general authority, and establishing required procedures does not create a non-delegable duty.[154] The court made clear that any relationship between the foster child and the state is separate from the relationship between the foster child and the foster parent.[155] Based on the application of the *Illinois Administrative Code* and the *Illinois Compiled Statutes*, as well as a reversal of the appellate court's decision to impute a non-delegable duty on the state, the court held that there is no basis upon which to provide foster parents with sovereign immunity.[156]

2. Parental Immunity is Appropriate for Foster Parents

While not considered by either the trial court or the appellate court, the majority held that foster parents may be entitled to a limited grant of parental immunity for torts committed upon the foster children in their care.[157] To begin its analysis, the majority stated that parental immunity is only appropriate when the injury occurred during conduct inherent to the parent-child relationship.[158] Further, the majority stated that parental immunity is necessary to preserve parental authority and discipline.[159] After a cursory examination of decisions in jurisdictions where foster parents were given parental immunity, the majority held that the rationale for parental immunity, the necessity to preserve parental authority, is equally applicable to foster parents.[160]

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an independent duty to guarantee compliance . . . with those provisions." *Id.* at 588-89; *see also supra* Part II.A and notes 35-37, 39 and accompanying text (discussing the Restatement sections and their adoption in Illinois law).

154. *Nichol*, 735 N.E.2d at 589.

155. *Id.*

156. *Id.* at 587-89.

157. *Id.* at 590. The court addressed the question of parental immunity despite the fact that the defendants' did not raise the defense of parental immunity at trial because it qualified as an "affirmative matter." *Id.* at 591 (citing 735 ILL. COMP. STAT. 5/2-619(a)(1) (West 2000)) (stating that a defense of immunity is an "affirmative matter" that can be raised in a motion to dismiss and is not waived by a failure to state the defense at trial). The court held that the question of parental immunity had to be remanded to the lower court to determine facts that were not considered in prior proceedings. *Id.*

158. *Id.* at 589 (citing generally *Cates v. Cates*, 619 N.E.2d 715 (1993)); *see also supra* Part II.A (discussing whether courts in Illinois and throughout the country have granted foster parents parental immunity); *supra* note 72 and accompanying text (discussing the *Cates* decision and the court's reasoning in upholding the doctrine of parental immunity).

159. *Nichol*, 735 N.E.2d at 589. Before stating that foster parents in Illinois were entitled to a limited form of parental immunity, the majority noted that there is no consensus among other jurisdictions on the issue of whether foster parents should receive parental immunity. *Id.*

160. *Id.* at 590. The majority distinguished foster parents from the natural parent considered in *Cates* because of the reimbursement provided to foster parents. *Id.* Despite this distinction, the majority stated that "they exercise a substantial amount of discretion in discipline,

The majority provided additional support for the proposition that foster parents are entitled to parental immunity by analogizing foster parents to teachers.[161] The majority stated that teachers are granted *in loco parentis* status and immunity for the injuries of their students because failure to grant this status would jeopardize the productivity of the teacher-student relationship.[162] From this statement, the majority reasoned that the foster parent-child relationship is similar to that of a teacher and student in both purpose and duration.[163] Because of these similarities, the majority concluded that foster parents stand *in loco parentis* and, therefore, granting them parental immunity is consistent with prior decisions granting immunity to other individuals who stand *in loco parentis*.[164] The majority tempered its decision by requiring a case-by-case analysis of each situation in which foster parents make a claim of parental immunity for a tort committed upon the foster child in their care.[165] The court, however, failed to issue a specific holding regarding parental immunity in this case because the issue was not considered at either the trial court or appellate court level, and, consequently, there were not enough facts presented to determine whether the foster parents deserved parental immunity.[166]

D. Justice Heiple's Dissent

In his dissent, Justice Heiple agreed with the majority that foster parents are not entitled to sovereign immunity for the torts committed upon their foster children.[167] Despite his partial agreement with the majority holding, Justice Heiple argued that the majority incorrectly

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supervision, and care, areas in which *Cates* found immunity to be appropriate." *Id.* at 589-90.

161. *Id.*

162. *Id.*

163. *See id.* In its analogy, the court reasoned that, "[l]ike teachers, foster parents receive compensation for their work. Moreover, the relationship between a foster parent and a foster child, like the relationship between a teacher and a student, is not permanent and may even be relatively brief." *Id.*; *see also infra* note 243 and accompanying text (discussing a statute known as the "school code" that confers *in loco parentis* status on teachers and the reasoning of courts that have addressed this matter).

164. *Nichol*, 735 N.E.2d at 590.

165. *Id.* The court held that "the scope of parental immunity in this context must be tempered by the circumstances peculiar to the foster-child relationship." *Id.*

166. *Id.* at 591. The case had to be remanded on this point because there was a genuine issue of material fact regarding the issue of parental immunity for the Stasses. *Id.*

167. *Id.* at 592 (Heiple, J., dissenting). Justice Heiple stated that the majority correctly determined that the foster parents in this case could not use sovereign immunity as a defense to the Nichols' claim because they were neither employees nor agents of the state. *Id.* (Heiple, J., dissenting). It is unclear from this statement whether his agreement with the majority is that foster parents are never entitled to sovereign immunity or that the facts of this case prevent these foster parents from being granted sovereign immunity. *See id.* (Heiple J., dissenting).

decided the issue of parental immunity. Justice Heiple supported this argument by citing the "fundamental differences" in the relationship of a natural parent and child and a foster parent and child.[168] Further, Justice Heiple examined the accepted definition and requirements of *in loco parentis* status and concluded that both the responsibilities accorded to foster parents and the relationship between foster parents and children was not sufficient to satisfy the definitional standards of *in loco parentis* status.[169]

Justice Heiple cited six distinct differences between the natural parent-child relationship and the foster parent-child relationship to support his conclusion that foster parents are not entitled to parental immunity.[170] First, Justice Heiple pointed to the fact that many foster parents are in no way related to their foster children.[171] Next, Justice Heiple stated that the contractual nature of the foster parent-child relationship, particularly the fact that foster parents are entitled to reimbursement for the costs associated with acting as foster parents, should prevent foster parents from receiving parental immunity.[172] Moreover, Justice Heiple reasoned that foster parents are not entitled to parental immunity because the stated purpose of the foster care program is to provide children with a temporary home only until the child can be reunited with his or her natural parent.[173] Finally, Justice Heiple pointed out that the *Illinois Compiled Statutes* define foster parents as "professional member[s] of the child welfare team."[174] Foster parents voluntarily accept these terms, and as such, Justice Heiple argued that they should not receive immunity when they fail to use reasonable care in performing the duties they chose to undertake.[175]

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168. *See id.* (Heiple J., dissenting). According to Justice Heiple:

> A foster parent is not related to a foster child by blood or adoption. The relationship between a foster parent and a foster child is created exclusively by contract. Foster parents, unlike biological or adoptive parents, receive reimbursement for expenses related to the care of the foster child. Moreover a foster parent's relationship with a foster child is purposely designed to be temporary. When a child is placed in foster care, the state's paramount goal remains to reunite the child with his biological parents.

Id. (Heiple, J., dissenting) (citations omitted).

169. *See id.* at 604 (Heiple, J., dissenting).

170. *Id.* (Heiple, J., dissenting).

171. *Id.* at 592 (Heiple, J., dissenting).

172. *Id.* (Heiple, J., dissenting).

173. *Id.* (Heiple, J., dissenting).

174. *Id.* (Heiple, J., dissenting) (citing 20 ILL. COMP. STAT. ANN. 520/1-15(1) (1998)); *see also supra* note 35 and accompanying text (discussing the statute and its impact on foster parents rights and responsibilities).

175. *Nichol*, 735 N.E.2d at 592 (Heiple, J., dissenting).

In response to the majority's statement that granting foster parents parental immunity falls under the same rationale as granting immunity to natural parents, Justice Heiple argued that the relationship between the foster parent and child was so "strictly circumscribed" by the *Illinois Administrative Code* that the maintenance of family harmony rationale could not apply.[176] Justice Heiple reasoned that the parental discretion the court intended to protect by granting parental immunity rarely comes into existence for foster parents; as a result, there is no basis upon which to grant parental immunity.[177] In considering the policy ramifications of granting foster parents parental immunity, Justice Heiple took specific issue with the majority's assertion that failure to grant parental immunity would deter foster parents from their best performance.[178] Justice Heiple stated that while the majority's concern was for the rights of foster parents, it failed to consider the rights of children placed in foster care.[179] In conclusion, Justice Heiple stated that the majority's failure to decide the issue leaves both the parties in this case and future parties without the necessary guidance on the status of the law.[180]

E. Justice Freeman's Dissent

Justice Freeman began his dissent with a clear statement that he viewed foster parents as state agents.[181] In support of this contention, Justice Freeman explained that foster parents are members of the "child welfare team" and perform duties for DCFS, an agency created by the

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176. *Id.* at 593 (Heiple, J., dissenting). Specifically, Justice Heiple considered title 89, section 402.21 of the *Illinois Administrative Code*, which provides regulations as to how and to what extent a foster parent can punish a foster child. *Id.* at 592-93 (Heiple J., dissenting); *see also supra* note 42 and accompanying text (discussing section 402.21 of the *Illinois Administrative Code* and the limitations it places on foster parent discretion).

177. *Nichol*, 735 N.E. at 592-93 (Heiple, J., dissenting).

178. *Id.* at 593 (Heiple, J., dissenting). According to Justice Heiple:

> Immunizing foster parents from liability eliminates a powerful incentive for ensuring that foster parents adequately perform the duties for which they were hired. The majority's rationale, whatever it means, has little relevance to this case. The Stasses have no more duties to perform as foster parents; they no longer care for Jonathan Nichol. He is dead.

Id. (Heiple, J., dissenting).

179. *Id.* (Heiple, J., dissenting).

180. *Id.* at 593-94 (Heiple, J., dissenting); *see also infra* Parts IV.A, V.A, V.B (discussing the majority's failure to provide guidance for future courts considering similar issues and the impact of the decision).

181. *Nichol*, 735 N.E.2d at 596 (Freeman, J., dissenting). In his dissenting opinion, Justice Freeman states that the proper decision of the issues presented was not dependent on the specific facts, but the established statutory and regulatory framework. *Id.* at 595-96 (Freeman, J., dissenting).

state legislature to perform state duties.[182] Justice Freeman looked to the licensing procedures, training programs, and record keeping requirements of the foster care system, all of which are administered by DCFS, for further support of his position that foster parents are state agents.[183]

In addition to the "integral role" foster parents take in the child welfare team, Justice Freeman cited the foster parents' entitlement to reimbursement and the state's control of virtually all aspects of the foster care relationship as indicative of the fact that foster parents are agents of the state.[184] According to Justice Freeman, the DCFS's continued control of foster parents, the existence of the *Illinois Administrative Code*, and the statutory language indicating that foster parents "champion the efforts" of the entire child welfare team made clear that foster parents are undoubtedly state agents.[185] Justice Freeman concluded that, because the state retains control over so many aspects of the foster parent-child relationship, "foster parents must be considered agents of the state."[186]

Consistent with his finding that foster parents are state agents, Justice Freeman stated that the state maintains a non-delegable duty to protect

182. *Id.* at 596 (Freeman, J., dissenting) (citing 20 ILL. COMP. STAT. 520/1-5 (1998)). Justice Freeman dismissed any possible distinction between foster parents licensed by the state and those licensed by a private agency. *Id.* (Freeman, J., dissenting). He stated that "[a]ll foster parents, whether supervised directly by DCFS or supervised by a child welfare agency, are subject to DCFS licensing requirements, must participate in DCFS training programs . . . and must comply with DCFS standards relating to the appearance, cleanliness and safety of the facility . . . ." *Id.* at 596 (Freeman, J., dissenting).

183. *Id.* at 597 (Freeman, J., dissenting).

184. *Id.* at 596, 597 (Freeman, J., dissenting) (citing 20 ILL. COMP. STAT. § 520/1-5, 1-15(4) as support for his reasoning that foster parents are state agents because these statutes state that foster parents fulfill an integral role on the child welfare team and are entitled to reimbursement); *see also supra* note 35 and accompanying text (discussing title 20, section 520/1-15 and its impact on the question of whether foster parents are entitled to sovereign immunity).

185. *Id.* at 596, 604 (Freeman, J., dissenting). Justice Freeman provided an exhaustive list of administrative code sections to emphasize the pervasive involvement of the state in the foster parent-child relationship. *Id.* at 588-89 (Freeman, J., dissenting). Some of these sections define what is permissive discipline, the appropriateness of overnight stays at a friend's home, descriptions of how meals are served and general provisions of how foster parents must provide supervision for the children in their care. *Id.* (Freeman, J., dissenting); *see also* ILL. ADMIN. CODE tit. 89, § 402 *et seq.* (2000); *supra* notes 34-43 and accompanying text (discussing specific provisions of the *Illinois Administrative Code* and their application in determining the agency status of foster parents).

186. *Nichol*, 735 N.E.2d at 599-600 (Freeman, J., dissenting). Justice Freeman summarized his position by stating that "[i]n light of the fact that foster parents perform services for the state, receive reimbursement from the state, and are subject to the state's control in all aspects of the provision of care to children at the facility, foster parents must be considered agents of the state." *Id.* (Freeman, J., dissenting).

foster children once they are placed in a foster home.[187] Using the rationale established by the Second Restatement of Torts, Justice Freeman proffered that the duty to care for foster children arises from the *Illinois Compiled Statutes*.[188] When a child dies or is injured by a foster parent, it is because the state placed the child in the home in an attempt to fulfill its statutorily created duty.[189] To lend support to this proposition, Justice Freeman cited to *Lipscomb v. Simmons*, a Ninth Circuit case in which the court stated that when the state takes a child into its care, it takes on "very significant responsibilities."[190] Because foster parents are state agents charged by the state with a non-delegable duty of care, Justice Freeman concluded that the state must be held liable for permitting a person without the proper "temperament or qualities" to take in and then injure a child placed under the state's protection.[191]

Justice Freeman also dissented from the majority's decision on the question of parental immunity and, particularly, the majority's use of the concept of *in loco parentis*.[192] Justice Freeman began his analysis by restating the definition of *in loco parentis* adopted by the Illinois Supreme Court in *Busillo v. Hetzel*.[193] Central to the portion quoted by Justice Freeman is the requirement that a person who stands *in loco parentis* assume the financial burden associated with the parent-child relationship.[194] Justice Freeman further stated that at no point had the Illinois court abrogated its prior decisions holding that "mere affection, generosity, and exercise of care" were insufficient bases for the grant of *in loco parentis* status and the immunity attached.[195]

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187. *Id.* at 600 (Freeman, J., dissenting).

188. *Id.* (Freeman, J., dissenting) (citing 20 ILL. COMP. STAT. 505/5(a)(3), (g), (*l*-1) (1998)).

189. *Id.* (Freeman, J., dissenting). Justice Freeman also reasoned that "[i]n the case at bar, the state had a duty to provide care to Jonathan Nichol. The state attempted to fulfill this duty by placing Jonathan in the home of the Stasses, where he died." *Id.* (Freeman, J., dissenting).

190. *Id.* at 601 (Freeman, J., dissenting) (citing Lipscomb v. Simmons, 962 F.2d 1374, 1385-86 (9th Cir. 1992) (Kozinski, J., dissenting)).

191. *Id.* (Freeman, J., dissenting).

192. *Id.* at 602 (Freeman, J., dissenting). Justice Freeman stated in his dissent that the majority's act of providing *in loco parentis* status to foster parents redefined the term with possible unintended consequences. *Id.* at 604 (Freeman, J., dissenting).

193. *Id.* (Freeman, J., dissenting) ("*[I]n loco parentis* is one who 'take[s] upon himself the obligations of a parent.'" (quoting Busillo v. Hetzel, 374 N.E.2d 1090, 1091 (Ill. App. Ct. 1978) (alteration in original))); *see also supra* Part II.B.1 (discussing the accepted principles and definition of *in loco parentis* from both case law and legal dictionaries).

194. *Nichol*, 735 N.E.2d at 602-03 (Freeman, J., dissenting) (citing *Busillo*, 374 N.E.2d at 1091).

195. *Id.* at 602 (Freeman, J., dissenting).

In applying what Justice Freeman saw as the accepted definition of *in loco parentis* to the question before the court, he stated that prior courts correctly found the DCFS as a party standing *in loco parentis*. [196] Consequently, the foster parents were not *in loco parentis* because they never assumed all the burdens associated with parenthood.[197] To answer the majority's analogy between teachers and foster parents as equally entitled to *in loco parentis* status, Justice Freeman highlighted that granting teachers *in loco parentis* status originates from specific statutory language, not from the accepted definition of *in loco parentis*.[198] According to Justice Freeman, the majority's failure to note this difference effectively eliminated the requirement of assuming financial burden from the definition of *in loco parentis* status and over-extended its application removing any meaning from the concept.[199] Further, Justice Freeman questioned why an area that was the subject of so many statutes and administrative codes had failed to expressly include the grant of *in loco parentis* status upon foster parents if the legislature, in fact, intended foster parents to stand *in loco parentis*.[200]

IV. ANALYSIS

The majority correctly determined that foster parents licensed by private agencies are not agents of the state entitled to sovereign immunity in suits arising from torts committed upon children in their care.[201] The majority also correctly reasoned that although the *Illinois Administrative Code* subjects foster parents to numerous state imposed regulations, these regulations are exclusively for the purposes of providing indemnification and establishing licensing standards.[202] However, the majority erroneously granted foster parents limited parental immunity through an application of *in loco parentis* status and

196. *Id.* at 603 (Freeman, J., dissenting).

197. *Id.* (Freeman, J., dissenting). Justice Freeman's reasoning was based on the long-standing principle that without the assumption of a financial burden, *in loco parentis* status could not be conferred. *Id.* (Freeman, J., dissenting) (citing Lawber v. Doil, 547 N.E.2d 752, 753 (1989)).

198. *Id.* (Freeman, J., dissenting). Justice Freeman stated that "it is by legislative enactment that a teacher stands *in loco parentis* to a student. The legislature has not seen fit to include a similar provision in the statutes relating to foster parents." *Id.* (Freeman, J., dissenting).

199. *Id.* at 604 (Freeman, J., dissenting).

200. *Id.* (Freeman, J., dissenting).

201. *Supra* Part III.C (discussing the majority's holding and reasoning for denying that the detailed administrative codes created by the state to regulate foster parents confers sovereign immunity upon the foster parents).

202. *Nichol*, 735 N.E.2d at 587; *see also supra* Part II.A.2 (discussing the State Employee Indemnification Act and the *Illinois Administrative Code*).

failed to consider the traditional standards required before granting foster parents *in loco parentis* status and parental immunity.[203] Both dissenting opinions correctly analyzed the question of parental immunity by examining the accepted definitions of *in loco parentis* and determining that foster parents could not fulfill the requirements.[204]

Absent from both the majority and dissenting opinions was any consideration of the foster parents' independent duty to the foster child.[205] The failure of both the majority and the dissent to consider this issue implies that this decision was "result driven" and leaves foster parents, as well as other courts, without any clear guidance.[206]

A. The Comprehensive Statutory Regulation of Foster Parents: The Invisible Bright Line Rule

The majority correctly held that no provision of Illinois law conferred sovereign immunity upon foster parents licensed by a private agency.[207] Other jurisdictions that have determined whether foster parents are entitled to sovereign immunity have deemed full sovereign immunity appropriate only where the court can reasonably infer that the state legislature intended to grant immunity to foster parents acting within the scope of their employment.[208] The *Nichol* court cited the plain language used in each legislatively enacted provision involving foster parents which is extremely specific and leaves little space for interpretation or debate.[209] As neither the *Illinois Compiled Statutes* nor the *Illinois*

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203. *Supra* Parts III.C-E (discussing the opposing opinions of the majority and the dissenting justices on the application of the concept of parental immunity and *in loco parentis* status).

204. *Supra* Parts III.D-E (discussing the reasoning and application of the dissenting Justices).

205. *Supra* Parts III (discussing the majority reasoning for granting parental immunity and the dissenting justices opinions for denying parental immunity), II.B (discussing the established standards of parental immunity and *in loco parentis* through an examination of both Illinois case law and case law from outside Illinois).

206. Elizabeth M. Smith, Note, Hunte v. Blumenthal: *A Case of Mistaken Identity*, 30 CONN. L. REV. 347, 364 (1997) (discussing how the Connecticut Supreme Court's detailed analysis of the facts and the Court's reasoning must have been a "result-driven decision" to arrive at the conclusion that the foster parents in *Hunte* were entitled to sovereign immunity).

207. *Nichol*, 735 N.E.2d at 586; *supra* Part III.C (discussing the majority's reasoning for denying foster parents the protections of sovereign immunity).

208. *See e.g.*, Hunte v. Blumenthal, 680 A.2d 1231, 1237 n.14 (Conn. 1986)). The *Hunte* court examined statutory construction to determine whether the legislature intended to provide foster parents with sovereign immunity and the level of regulation exerted over foster parents to arrive at the conclusion that state licensed foster parents were entitled to immunity in the wrongful death actions filed against them. *Id.* at 1233-34.

209. *Supra* Part II.A.1 (discussing the legislative provisions related to foster care and their impact on a determination of sovereign immunity for foster parents); *supra* notes 34-43 and accompanying text (discussing the breadth of the statutes that regulate foster parents' behavior); *see also* Smith, *supra* note 206, at 372 (reasoning that the existence of regulations are not a

Administrative Code expressly or impliedly infer that foster parents licensed by private agencies are entitled to complete sovereign immunity, the *Nichol* court correctly determined that sovereign immunity was inappropriate for foster parents.[210]

While the court correctly stated that none of the legislatively generated regulations granted foster parents sovereign immunity, the majority's decision was not without ambiguity.[211] The majority stated that the defendant foster parents could have presented documents that would have helped establish sovereign immunity.[212] Both the *Illinois Compiled Statutes* and the *Illinois Administrative Code*, however, define and articulate nearly every detail of the foster parents' responsibilities.[213] Therefore, the majority's failure to arrive at a clear resolution as to whether foster parents licensed by private agencies are entitled to sovereign immunity is contrary to precedent or legislative support.[214]

Absent from both the *Illinois Compiled Statutes* and the *Illinois Administrative Code* is the inclusion of any specific language granting foster parents complete sovereign immunity.[215] The legislature expressly granted foster parents the right to representation and indemnification, but remained noticeably silent on the specific question of sovereign immunity.[216] This silence supports the majority's

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sufficient basis upon which to decide that foster parents are entitled to sovereign immunity because the result would be an irrational construction).

210. Smith, *supra* note 206, at 372 (arguing the existence of many regulations cannot make foster parents state employees subject to sovereign immunity because the result would be an irrational construction of state promulgated regulations).

211. *Supra* Part III.C (discussing the majority's failure to grant sovereign immunity while leaving open the possibility that foster parents could present evidence that would convince the court that sovereign immunity is appropriate).

212. *See Nichol*, 735 N.E.2d at 586-87 (suggesting that documents reflecting the contracts between the Department of Child and Family Services and Human Enrichment and Development Association ("HEDA") and between HEDA and the foster parents might have helped).

213. *Supra* Parts II.A.2 (discussing the State Employee Indemnification Act and the *Illinois Administrative Code*), III.E (explaining that Justice Freeman's dissent provided a detailed inspection of numerous regulations imposed upon foster parents); *see also Nichol*, 735 N.E.2d at 598-99 (Freeman, J., dissenting).

214. *See supra* Part II.A (discussing the legislation of many aspects of the relationship between the foster parents and the children in their care). *But see* Smith, *supra* note 206, at 367 (discussing that in *Hunte*, a case with facts similar to that of *Nichol*, the Connecticut Supreme Court considered the language and legislative history of the statutes to conclude that sovereign immunity was appropriate for the state licensed foster parents).

215. *See generally*, 5 ILL. COMP. STAT. 350/1(b) (1998 & West Supp. 2000); ILL. ADMIN. CODE tit. 89, § 402 (2000).

216. *Compare* P.A. 91-799 (codified at 20 ILL. COMP. STAT. 105/4.04(e) (2000 Ill. Leg. Serv.)) (expressing clearly that an "ombudsman" in the mental health care system receives full immunity from all suits), *with* 5 ILL. COMP. STAT. § 350/1(b) (1998 and West Supp. 2000), *and*

conclusion that foster parents should not receive full immunity for torts committed upon their foster children.[217] The implication is the creation of a clear rule: all elements central to the foster care relationship are pre-determined by the legislature. The majority's failure to utilize this silence while permitting foster parents to present evidence justifying the application of sovereign immunity prevents the creation of any workable bright line rule upon which future courts can base their decisions.[218]

While the majority arrived at the correct decision, its rationale implies that privately licensed foster parents can present evidence entitling them to sovereign immunity.[219] Implicit in this reasoning is the conclusion that statutes governing foster care do not contain every fundamental duty or obligation.[220] One such fundamental duty not stated in any relevant code arises from the established principle in tort law that children are owed a higher duty because of their inability to comprehend danger.[221] The majority's conclusion hinges upon the specific evidence presented, rather than existing statutory law, and, as such, it permits other courts to question whether foster parents owe their foster children an independent common law duty.[222] The result is the failure to structure a workable rule for future Illinois courts.

ILL. ADMIN. CODE tit. 89, § 402 (2000). These child welfare and foster parent codes are void of any similar express language granting full immunity.

217. *Supra* Parts II.A.2 (discussing the State Employee Indemnification Act and the *Illinois Administrative Code* which provides guidelines for foster care), III.C (discussing the majority's reasoning that the relationship between the state and the foster parent remained too distant, despite the existence of the detailed code, to imply an employment situation).

218. Mushlin, *supra* note 7, at 215-16. The author discusses the problems that plague the foster care system, emphasizing that there is not enough legislative action to reform the system to protect foster children from being victims of abuse in foster homes. Within this climate, the author calls for judicial intervention to protect foster children because "[t]he judicial obligation to enforce the rights of the politically powerless is at the heart of the American political system." *Id.* at 216 (quoting Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R-C.L.L REV. 367, 386 (1977)).

219. *See* Nichol v. Stass, 735 N.E.2d 582, 591 (Ill. 2000); *supra* note 166 and accompanying text (discussing the majority's reasoning that the defendant foster parents in this case did not present sufficient evidence to convince the court that the court should grant them sovereign immunity).

220. *Supra* Part III.C (discussing the majority's reasoning that the existing codes do not provide for foster parent sovereign immunity but that certain evidence could prove otherwise and create a situation where sovereign immunity would be appropriate).

221. RESTATEMENT (SECOND) OF TORTS §§ 339, 343B (1965); *supra* Part II.A (discussing the general bases and background of sovereign immunity); *supra* notes 58-60 and accompanying text (explaining how the *Swanigan* court applied this principle to impose a separate duty upon a DCFS licensed foster parent separate from her position as a foster parent).

222. *Supra* note 46 (explaining the reasoning of the *Swanigan* decision which stated that the foster parent owed the injured foster child a duty of care independent from her responsibilities as

B. Breaking the Parental Immunity Precedent: Erasing the Bright Line Rule

The majority erroneously held that foster parents may be entitled to a limited grant of parental immunity for torts committed upon children in their care.[223] Both Justice Heiple and Justice Freeman correctly pointed out that the majority disregarded accepted principles and policies inherent in granting parental immunity and, instead, applied the doctrine in a destructive manner.[224] The majority's decision to remand the issue to the trial court leaves future courts facing similar issues without the necessary guidance to apply the new rules formulated by the majority.[225]

1. The Majority Disregarded the Policies Behind Parental Immunity

The majority incorrectly interpreted the policy proffered by cases across the nation to apply the doctrine of parental immunity to foster parents.[226] Further, the majority failed to fully consider how these principles apply to foster parents and disregarded the distinction between natural parents and foster parents.[227] The majority pointed to *Goller v. White,* a Wisconsin decision in which the court granted a foster parent limited parental immunity for a tort committed upon the foster child in his care.[228] In citing *Goller*, the majority failed to note

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a foster parent).

223. *Supra* Part III.C.2 (discussing the majority's rationale for granting foster parents limited parental immunity and *in loco parentis* status).

224. *Supra* Parts III.D-E (discussing Justice Heiple's reasoning that there are "fundamental differences" between the natural parent-child relationship and the foster parent-child relationship and Justice Freeman's reasoning that the existence of the *Illinois Administrative Code* should preclude foster parents from receiving parental immunity for torts committed upon the children in their care).

225. *See* Mushlin, *supra* note 7, at 216-17 (discussing how legislatures across the nation have not been quick to reform the foster care system to protect foster children from foster parent abuse, thereby requiring judicial intervention).

226. Nichol v. Stass, 735 N.E.2d 582, 589-90 (Ill. 2000); *supra* Part II.A.1 (discussing the history and policy rationale of parental immunity); *see also* A. John Hoomani & Kimberly Sieredzki Woodell, Note, Liner v. Brown: *Where Should We Go From Here—Two Different Approaches for North Carolina*, 19 CAMPBELL L. REV. 447, 462 (1997). Hoomani and Woodell quoted the North Carolina Court of Appeals, which concluded that "[b]ecause extension of the parental immunity doctrine to one having temporary custody and control of a child would not further the policies underlying the doctrine, foster parents standing *in loco parentis* are precluded from enforcing the parent-child immunity doctrine." Hoomani & Woodell, *supra*, at 450 (quoting Liner v. Brown, 449 S.E.2d 905, 909 (N.C. Ct. App. 1994)).

227. *Supra* notes 170-75 and accompanying text (discussing the six reasons employed by Justice Heiple to draw the distinction between natural and foster parents).

228. *Nichol*, 735 N.E.2d at 589 (citing Goller v. White, 122 N.W.2d 193 (Wis. 1963)); *see also supra* note 77 and accompanying text (discussing the *Goller* court's reasoning that a foster

that the Wisconsin court based its decision solely on a policy seeking to uphold parental authority when the act was one of ordinary parental discretion.[229] While the facts in *Nichol* may be similar to those in *Goller*, the Illinois statutes and codes imposed on all foster parents remove parental discretion, a substantial distinction from Wisconsin law. Therefore, the *Goller* decision cannot reasonably be applied to foster parents in Illinois.[230]

The majority also failed to consider how the fundamental doctrine behind parental immunity applies to foster parents.[231] The majority decision ignores that a founding principle of parental immunity was the desire to maintain the authority necessary for healthy family relationships.[232] This principle cannot be applied to foster parents, because their role is statutorily mandated as temporary and exists only until the child can be returned to his natural parents.[233] In sum, parental immunity is intended to grant parents immunity for those discretionary acts inherent in the task of parenting.[234] As foster parents are not vested with the discretion that parental immunity intends to protect, there is no rational basis upon which to extend parental immunity.[235]

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father was not entitled to parental immunity because the injury did not occur during an exercise of parental discretion).

229. *Goller*, 122 N.W.2d at 198.

230. *Supra* notes 34-35 (discussing the relevant sections of the *Illinois Compiled Statutes* that deal with the regulation of foster parent rights and responsibilities), notes 36-42 (discussing the relevant sections of the *Illinois Administrative Code* detailing the requirements of licensing and maintaining a foster home).

231. *Supra* Part II.A (discussing the *Illinois Compiled Statutes* and the *Illinois Administrative Code*, which impose strict regulations on foster parent homes and behavior toward foster children).

232. Hoomani & Woodell, *supra* note 226, at 453; *March*, *supra* note 73, at 486.

233. *Supra* Part II.A.1 (discussing the terms of the foster parent-child relationship established within the statutes and codes); *supra* notes 34-35 and accompanying text (discussing the relevant code provisions and providing relevant definitions to help determine whether foster parents are entitled to parental immunity).

234. Hoomani & Woodell, *supra* note 226, at 472-73.

235. *See id.* at 464 n.126. States that have limited the *Goller* standard, allowing parental immunity for those acts that would be done by "the reasonably prudent parent" allow a parent to exercise authority (such as spanking a child) without any potential liability. *Id.* at 463-64. In Illinois, under either the *Goller* standard or the "reasonably prudent parent" standard, the *Illinois Administrative Code* prohibits foster parents from inflicting corporal punishment, as well as a variety of other forms of punishment. ILL. ADMIN. CODE tit. 89, § 402.21 (c)–(i) (2000). If foster parents are restricted from engaging in even what is considered the most basic form of parental discretion, it is inconsistent that they would be granted parental immunity based upon these same policies.

2. The Majority Disregarded the Accepted Requirements of *In Loco Parentis*

Fundamental to the majority's faulty decision to grant foster parents parental immunity was its statement that foster parents stand *in loco parentis*.[236] To arrive at this conclusion, the majority disregarded the accepted definition and standards of *in loco parentis*.[237] Central to *in loco parentis* status is financial responsibility for the children.[238] The majority did not assert that foster parents assume financial responsibility for the children in their care, but rather confirmed that foster parents receive compensation for their participation.[239] Prior to the majority's decision in *Nichol,* no Illinois court had granted *in loco parentis* status to an individual who had not assumed both the financial responsibility for the child and the care required of a permanent caregiver.[240] Further, both federal and state law mandate that foster parents may not assume financial responsibility and must receive reimbursement for any costs incurred.[241] In light of these established principles and federal and state mandates, there is no basis upon which the majority could find foster parents *in loco parentis.*

The majority incorrectly pointed to the grant of *in loco parentis* status on teachers to support its contention that foster parents are entitled to parental immunity.[242] While the majority cited the fact that teachers, whose positions are arguably similar to that of foster parents, are granted *in loco parentis* status, it ignored the critical fact that teachers are entitled to this status only because of an express grant through the "School Code."[243] Without a provision similar to that of the "School

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236. Nichol v. Stass, 735 N.E.2d 582, 590 (Ill. 2000); *supra* notes 161-64 and accompanying text (discussing the majority's reasoning that foster parents are like teachers, who are granted *in loco parentis* status, and that therefore, foster parents should also receive *in loco parentis* status).

237. *Supra* note 69 (defining *in loco parentis*), notes 161-64 and accompanying text (discussing the majority's reasoning that foster parents are *in loco parentis* and therefore entitled to parental immunity).

238. *Supra* notes 112-13 and accompanying text (discussing that a long-standing principle of *in loco parentis* is the assumption of financial responsibility for the child, and not just affection and care of the child).

239. *Nichol*, 735 N.E.2d at 589.

240. Busillo v. Hetzel, 374 N.E.2d 1090, 1091 (Ill. App. Ct. 1978); *supra* notes 92-93 (discussing the reasoning and holding *Busillo*).

241. *Supra* notes 34-35 (discussing 42 U.S.C. § 671 (1994) and 20 ILL. COMP. STAT. 520/1-15(4) (1998), both of which mandate reimbursement for expenses related to the care of a foster child); *see also Nichol*, 735 N.E.2d at 589 (stating foster parent compensation as a given fact).

242. *Supra* notes 161-64 and accompanying text (discussing the majority's analogy of foster parents to teachers for the purposes of concluding that foster parents stand *in loco parentis*).

243. Gerrity v. Beatty, 373 N.E.2d 1323, 1324 (Ill. 1978). Central to understanding the

Code," the majority's extension of *in loco parentis* status is without support.[244]

V. IMPACT

Although the Illinois Supreme Court's decision on the issue of sovereign immunity provides sound policy, its rationale lacks the clarity necessary to provide guidance for future courts facing similar issues. The majority's decision to grant foster parents limited parental immunity, while express in this particular case, leaves nothing but ambiguity as its legacy. This decision highlights the need for the clarification necessary to implement the majority's holding.[245] While the court deemed sovereign immunity inappropriate and parental immunity potentially appropriate, its decision neglects larger issues and requires further clarification.

A. Revising Sovereign Immunity

The consistent flaw throughout the majority's decision is the reliance on a case-by-case analysis.[246] The majority's decision fails to consider that there are fundamental similarities in the relationship between every foster parent and every foster child.[247] Within the context of this uniformity, the Illinois Supreme Court should have extended its holding to all cases involving foster parents.[248] Such an act would answer any future questions of whether foster parents are entitled to sovereign immunity without any analysis of the foster parents' licensing.

The majority's decision presumed that foster parents licensed by private agencies are entitled to the representation and indemnification

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distinction between the grant of *in loco parentis* status for teachers and foster parents is section 5/34-84a of the statute known as the "School Code," which provides parental status to teachers, other education related employees, and any other person involved with a student if the individual is acting to maintain discipline in the school, on the school property, or in connection with a school related activity. 105 ILL. COMP. STAT. 5/34-84a (1998).

244. *Infra* notes 263-65 and accompanying text (discussing the detrimental impact of the majority's decision to extend parental immunity to foster parents).

245. *See* Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 23-26 (1994-95) (discussing the history of the foster care system, the current need for reform, and the need for judicial and legislative action).

246. *Supra* Part III.C.2 (discussing the majority's use of a case-by-case method of analysis, rather than an examination of the general class of foster parents).

247. *See generally* 20 ILL. COMP. STAT. 520/1-10 (1998); 20 ILL. COMP. STAT. 520/1-15 (1998); ILL. ADMIN. CODE tit. 89, § 402 (2000). These codes define the relationship of every foster parent and child throughout the State of Illinois.

248. *See* Levesque, *supra* note 245, at 26-28 (discussing the need for courts to clarify the roles and rights of foster parents).

the *Illinois Compiled Statutes* confers on foster parents licensed by DCFS.[249] The majority did not stop to consider or explain why the provision of the *Illinois Compiled Statutes* providing DCFS licensed foster parents with indemnification and representation should apply to foster parents licensed by private agencies.[250] Assuming that the decision to extend this protection to foster parents licensed by private agencies complies with policies of the foster care system, the next logical issue is the implication of state representation and indemnification.[251] While no court has specifically considered this issue, providing foster parents with both representation and indemnification is inconsistent with the mission statement of DCFS.[252] The primary mission of DCFS is to protect children, but providing foster parents with both representation and indemnification in all cases protects foster parents from the significant financial ramifications of committing torts upon the foster children in their care. While providing indemnification and representation may provide an incentive for individuals to become foster parents,[253] there must be a middle ground between protecting the safety of foster children and the finances of foster parents.

A possible solution to the inequity in interests created by providing foster parents with representation and indemnification is to provide representation without indemnification. This solution prevents foster parents from having to incur legal costs upon the filing of a frivolous suit or when a jury of their peers determines that they are were not negligent in caring for their foster child.[254] This solution, however, requires that when a court or a jury decides that foster parents have not

249. *Supra* Part III.C and notes 147-49 (discussing the majority's application of the State Employee Indemnification Act to the defendant foster parents, even though they were not licensed by the state or DCFS as is required by the statutory provision).

250. *Supra* notes 147-49 and accompanying text (discussing the majority's conclusion that the State Employee Indemnification Act applies to all foster parents).

251. *See supra* Parts III.D-E (discussing the reasoning of the dissenting opinions, both of which were concerned with the implications of granting foster parents parental immunity for the torts committed upon the children in their care).

252. *Supra* Part I and note 5 and accompanying text (stating that the mission of DCFS is to prevent children from being subjected to any future harm at the hands of an abuser).

253. *See supra* Part II.B.2 (discussing the appellate court's reasoning in both *Augsburger* cases that that failure to provide foster parents with some protection from liability will prevent the foster parents best performance); *see also supra* notes 178-80 and accompanying text (discussing Justice Heiple's concerns that providing foster parents with parental immunity may prevent foster parents from feeling any obligation to complete their responsibilities).

254. *Supra* note 107 and accompanying text (discussing that one of the *Augsburger* court's reasoning for granting parental immunity was to protect foster parents against baseless suits by angered foster children or natural parents).

acted with the requisite care or in the best interests of the child placed in their care, foster parents must face the consequences.[255] This solution would also prevent those individuals who become foster parents without admirable intentions from becoming foster parents, as they would know that failure to exercise reasonable care would have a direct result on their financial situation.[256] Providing complete immunity to foster parents could encourage foster parents to be negligent in the completion of their responsibilities because they know that there will be no long-term consequences for their actions.[257]

B. Rethinking Parental Immunity

There was no sound basis for the majority's decision that foster parents can exercise parental discretion.[258] Parental immunity is intended to create a very narrow exception for parents to avoid liability from discretionary acts central to their role as parents.[259] Widening this doctrine to include foster parents, who are not generally intended to be permanent figures in a child's life, is a slippery slope. The role of foster parents is to facilitate an environment in which the child can eventually be reunited with his or her natural parent.[260] Granting parental immunity obscures this role because the doctrine of parental immunity implies permanency.[261] Foster parents must comply with their state established role; to adopt the attitude of a natural parent creates a situation in which foster parents may no longer be mindful of the

255. *Supra* note 175 and accompanying text (discussing Justice Heiple's reasoning that a foster parent's failure to use reasonable care should not result in immunity from liability).

256. *See Foster Homes . . . or Warehouses?*, *supra* note 2, at 22. The writer of this editorial points out that there are individuals who choose to enter "the business of foster care" because of the funds provided for each child in care. *Id.*

257. *Supra* note 178 and accompanying text (discussing Justice Heiple's concern that granting foster parents parental immunity may prevent foster parents from completing their responsibilities to the best of their abilities).

258. *Supra* notes 77-78 and accompanying text (discussing the requirement of discretion for parental immunity); *see also supra* Parts III.D-E (discussing the dissenting justices' opinions that the nature of the *Illinois Administrative Code* and *Illinois Compiled Statutes* precludes foster parents from being vested with the required discretion).

259. *See supra* note 95 and accompanying text (discussing the reasoning of the court in *Cates* to abrogate the doctrine of parental immunity for all intentional torts and for negligence, except for conduct inherent in parent-child relationships, such as education, discipline, care and household maintenance); *see also* 4 FAMILY LAW & PRACTICE, *supra* note 71, at app.67B (listing generally all the cases throughout the nation that have considered questions of parental immunity and clearly showing the gradual narrowing and frequent extinction of the doctrine of parental immunity).

260. *See generally* ILL. ADMIN. CODE tit. 89, § 315.2 (2000).

261. *Supra* Part II.B.1 (discussing the established principles of parental immunity and the situations in which historically parental immunity is accepted as appropriate for non-parents).

binding state imposed administrative regulations.[262] Further, a grant of parental immunity may eliminate the foster parents' notions that they are accountable for their actions.

The majority's willingness to extend parental immunity to foster parents and fundamentally change the required elements of *in loco parentis* is without precedent.[263] The result is a definition that requires a case-by-case analysis and is counter-intuitive to both the principles of judicial efficiency and stare decisis.[264] Further, the majority's failure to apply the law it created to the facts of the *Nichol* case creates a vast change in the law without providing the rationale other courts will require to properly apply the majority's decision.[265] The result of the majority's decision in *Nichol v. Stass* is the destruction of two "bright-line" rules without clearly establishing new frameworks of analysis. As a result, the need for further revision and clarification continues.

C. The Independent Duty of Foster Parents

Foster parents deal with children in extremely fragile conditions.[266] Foster children are forcibly removed from their natural parents by the state because they faced an "immediate risk of harm."[267] Not only are these children often physically injured but they also frequently face a variety of emotional challenges.[268] Foster parents know these facts and

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262. *Supra* note 178 and accompanying text (discussing Justice Heiple's concern in his dissent that foster parents will disregard their obligation if they assume that there are no ramifications for failure to comply with the stated regulations).

263. *Supra* Part II.B (discussing the established principles and applications of parental immunity and *in loco parentis*).

264. Nichol v. Stass, 735 N.E.2d 582, 590 (Ill. 2000) (holding that a case-by-case analysis is required in considering parental immunity). Perhaps the only time a case-by-case analysis is appropriate is when the foster child is permanently placed in the foster home or the foster parent is in the process of adopting the child. In these cases, the foster parent is assuming the responsibilities, including financial support, commensurate with the traditional definition of *in loco parentis* status. *Id.*

265. *Supra* Part III.C.2 (discussing the majority's reasoning for remanding the case after determining that parental immunity was an option available to foster parents in limited situations); *infra* Part VI (discussing how the majority's decision leaves foster children, or their estates, without recourse under the law).

266. *Child Protection, supra* note 5 (discussing that DCFS only removes a child from the natural parent's home to prevent any further harm from being perpetrated on the child).

267. *Id.*

268. Ill. Dept. of Children and Family Servs., *Foster Care, About Foster Care* (2000), *at* http://www.state.il.us/dcfs/aboutfc.pdf; *see also* ILL. ADMIN. CODE tit. 89, § 402.12 (2000) (discussing the factors considered during the licensing process, including whether the foster parents can adequately handle any aberrant behavior of the child placed in their care); *supra* notes 36-46 and accompanying text (discussing the rigorous standards imposed upon foster parents during the licensing process and while the child is in care).

should be required, at a minimum, to maintain the duties imposed by general tort principles.[269] Consistent with the applicable sections of the Second Restatement of Torts, foster parents should be required to anticipate reasonable dangers in their home that children may encounter.[270] Failure to prepare the home to prevent these reasonably foreseeable injuries should result in liability, regardless of sovereign immunity or parental immunity. Under this theory of "no excuses" for reasonably foreseeable injuries, foster parents will not be granted immunity for torts committed upon their foster children when the injury could have easily been prevented.[271] This is sound policy for both the health and safety of foster children and the desired predictability in the law surrounding foster parents.

VI. CONCLUSION

The majority correctly decided that foster parents are not entitled to sovereign immunity for the torts committed upon their foster children. While the majority's decision on the sovereign immunity issue in *Nichol v. Stass* created more questions than it answered, the majority correctly chose foster children's rights, health, and safety over the rights of foster parents. The majority incorrectly decided that foster parents may be entitled to parental immunity and that foster parents do stand *in loco parentis*. Although the statistics clearly reflect that children are exponentially more likely to be injured by a natural parent, once the state removes a child and places him with a foster parent, the law should first and foremost protect the interests of the child by holding those parties who enter the child's life to a standard in which there is no room for that child to be injured again. The court's decision in *Nichol v. Stass* failed to reflect this central policy rationale and, as a result, left foster children without the recourse to which they should be entitled.

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269. RESTATEMENT (SECOND) OF TORTS §§ 339, 343B (1965) (discussing the independent duty maintained by all possessors of land toward children, since children cannot appreciate the danger of the environment around them).

270. *Supra* Part II.A.1 and note 33 (providing the exact text of the Second Restatement of Torts relevant to determine whether foster parents should be held to a duty independent of that delegated to them as foster parents).

271. *Supra* note 44 and accompanying text (discussing the accepted principle that liability is imposed on land owners who could have prevented a child from being injured through the use of reasonable care); *see also Baby Protectors: Bathrooms*, *at* http://www.babypro.com/bathrooms.html#toilet (last modified May 24, 1999) (providing information and pricing for toilet locking devises).