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# Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care†

*Andre P. Derdeyn,* Andrew R. Rogoff,** and Scott W. Williams****

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† A portion of this Article is based upon the experience of the authors with an actual parental rights termination case. The names of all parties involved in that case have been changed to protect the anonymity of those parties.

## I. INTRODUCTION

The growing concern over the fate of children in foster care is one recent manifestation of this country's continuing interest in the welfare of its children. The rise in the number of children in "temporary" foster placements from 287,000 in 1965[1] to an estimated 364,000 in 1975[2] reflects increased protective service activity resulting in the removal of children from the parental home. Yet the continuing concept of foster care as a temporary placement prior to the child's returning home or being adopted is an idealized and outdated view of the system, for foster care is often many years in duration.

The present alternatives for placements after years of foster care are limited—foster children may be returned to parental custody, they may be adopted, or they may continue under foster care. Except in the unusual situation in which parents maintain contact with a child over many years and then resume custody, a child gains permanent and secure placement only through adoption. There is reason to question, however, whether absolute termination of the natural parents' rights and subsequent adoption constitute the optimal alternative for all children after long-term foster care.

This Article will explore in detail the variety of child placement arrangements, both within and outside the system, which can be tailored to meet the needs of children and their biological or foster parents. This examination will reveal numerous statutory reforms and recent judicial decisions that promise increasingly flexible approaches to the traditional custodial alternatives following long-term foster care. Particular emphasis will be devoted to the termination of parental rights case that first united the authors and confronted them with the fact that none of the traditional legal alternatives available to those children could adequately meet their emotional needs.

1. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283 (1971).
2. Geiser, *The Shuffled Child and Foster Care*, 10 TRIAL 27 (May/June 1974).

## II. Foster Care and Continuity of Relationships

### A. *The Traditional Status of Foster Parents*

Foster parents traditionally are considered employees of the agency with which they contract, with numerous duties and few rights.[3] When a foster parent attempts to contest removal of a child by the responsible welfare agency, or attempts to adopt a child against agency wishes, courts typically uphold the broad rights of biological parents and emphasize the limited nature of the placement contract between the foster parents and the agency.[4] Formulation of placement plans for the child, including plans for adoption, is left to the agency.[5]

The rationale for the traditional concept of the rights of foster parents vis-à-vis natural parents was articulated in In re *Jewish Child Care Association.*[6] Foster parents in that case appealed the lower court decision permitting a child care agency to remove from their custody a five and one-half year-old child who had spent four and one-half years in their care. The foster parents had accepted the girl under a standard agency agreement that the placement would be temporary and tbat the foster parents would prepare her for return to her biological mother. Before the first year ended, however, the foster parents decided to adopt the girl and actively pursued that course in direct conflict with agency rules and policies. The foster parents lost their battle to keep the child. In what Katz[7] sees as a subversion of the child's best interests, the court of appeals decided in favor of the agency, faulting the "extreme of love, affection, and possessiveness manifested by the [foster parents], togther [*sic*] with the conduct which their emotional involvement impelled."[8]

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3. Katz, *supra* note 1, at 283-302.

4. Note, *The Rights of Foster Parents to the Children in Their Care,* 50 Chi.-Kent L. Rev. 86-102 (1973). In one representative situation the biological mother sought custody of her child, who had been with his foster parents from the age of three months to five years. The foster parents in turn attempted to terminate the mother's rights and to adopt the child. The court found that the foster parents "were bound by their agreement with the Department of Public Welfare" and that the "Department . . . was entitled to the possession of the child." Huey v. Lente, 85 N.M. 585, 591-92, 514 P.2d 1081, 1087-88 (1973). Thus the foster parents were accorded no legal standing, and custody was granted to the biological mother.

5. For instance, in *In re* Adoption of Runyon, 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (1969), a boy who had been with foster parents since the age of three days was removed from their home at the age of eight and placed with prospective adoptive parents. Although the foster parents also filed a petition for adoption, they were unable even to obtain a hearing on their petition. The court upheld the absolute statutory right of the agency to choose adoptive parents, and removal of the child was final.

6. 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

7. Katz, *supra* note 1, at 296.

8. *Id.* at 294.

This decision reflects a common judicial impression of foster care, in which the contractual view of foster care persists. A New York court recently disparaged the idea of a foster parent's right to custody as a notion by which "third-party custodians . . . acquire some sort of squatter's rights in another's child."[9] In an earlier decision, the same court admonished that "the temporary parent substitute must keep his proper distance at all costs to himself."[10] By tradition, then, foster care is defined as providing merely "substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible."[11] Nevertheless, the assumption that foster care involves only temporary placement is not always correct.

### *B. Duration of Foster Care Placements*

The results of studies conducted in the last twenty years rebut the presumption that foster placements are uniformly short in duration.[12] In Maas and Engler's classic 1959 study[13] involving over 4000 children the authors demonstrated that more than half would remain in foster care for most of their childhoods. A 1973 Massachu-

9. Bennett v. Jeffreys, 40 N.Y.2d 543, 552 n.2, 356 N.E.2d 277, 285 n.2, 387 N.Y.S.2d 821, 829 n.2 (1976). *See also* Organization of Foster Families v. Dumpson, 418 F. Supp. 277, 281 (S.D.N.Y. 1976) (three-judge court), *rev'd on other grounds sub nom.* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (Foster parents do not have a constitutional expectation that their roles "will not be abruptly and summarily terminated."); Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 205, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 945 (1971) ("To the ordinary fears in placing a child in foster care should not be added the concern that the better the foster care custodians the greater the risk that they will assert, out of love and affection grown too deep, an inchoate right to adopt."). *But see* Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 853, 855 (5th Cir.), *rev'd on rehearing en banc*, 563 F.2d 1200 (5th Cir. 1977); *In re* B.G., 11 Cal. 3d 679, 692-93, 523 P.2d 244, 253-54, 114 Cal. Rptr. 444, 453-54 (1974) (Foster parents, as de facto parents, are proper parties in a juvenile court review of foster placement and may "assert and protect their own interest in the companionship, care, custody and management of the child.").

10. Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 205, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 945 (1971).

11. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959). One must suspend disbelief while reading these standards because of the superhuman qualities they require of the model foster parent. Not only should such a person (1) love his or her foster child, (2) enjoy being a foster parent and (3) be able to maintain friction-free relationships with all people, but he or she should also "have the ability to accept the child's relationship with his parents and with the agency, without marked tendency to be overpossessive." *Id.*, standard 4.4 at 35.

12. This fact is well-recognized in the literature. *See, e.g.*, Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 626 & n.7, 627 n.8 (1976).

13. H. MAAS & R. ENGLER, CHILDREN IN NEED OF PARENTS (1959).

setts study revealed that the sixty percent of the children in care at the time of the study had been in care between four and eight years; the average stay was over five years.[14] In the Columbia University longitudinal study of children in foster care in New York City,[15] thirty-six percent remained in foster care at the end of five years.[16] About two-thirds of the children who had remained in care for five years had lost contact with their parents, and forty-six percent of the children remaining in care five years had experienced three or more placements.[17] Thus a great gulf exists between the myth that foster care readily terminates in return home or in adoption, and the reality that for many children foster care is interminable and may involve a siguificant number of placements.

### C. *Judicial Recognition of the Foster Child-Foster Parent Relationship*

The emotional bonds that develop between foster parents and foster children often are indistinguishable from those existing between natural parents and their children. Because neither children nor foster parents have been parties to termination disputes, however, traditionally the courts have rarely recognized the emotional needs of foster children. Several recent cases, on the other hand, evidence a new trend in the legal status of foster parents. In *James v. McLinden,*[18] for example, a three month-old daughter of a heroin addict was placed with a forty-seven year-old woman who desired to raise the child. When the child was two years old, the welfare department filed a petition of neglect stating that the child had been abandoned by her parents and "is presently being cared for through an informal arrangement which is neither legal nor healthy."[19] The juvenile judge did not deem the mothering person a legal party to the proceeding and denied her entrance to the hearing. On application for injunction and declarative relief, however, the district court held that the woman's due process and equal protection rights had been violated, reasoning that:

14. A. GRUBER, FOSTER HOME CARE IN MASSACHUSETTS 72 (1973) (copy on file with the *Vanderbilt Law Review*).

15. S. JENKINS & M. NORMAN, BEYOND PLACEMENT: MOTHERS VIEW FOSTER CARE (1975). This study provided information concerning 624 children from 467 families with children in foster care. The children were under twelve years of age at first entry into foster care.

16. Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study,* 55 CHILD WELFARE 143, 145 (1976).

17. Fanshel, *Parental Visiting of Children in Foster Care: Key to Discharge?,* 49 Soc. SERVICE REV. 493, 496 (1975).

18. 341 F. Supp. 1233 (D. Conn. 1969).

19. *Id.* at 1234.

> There is no sound reason to deny a person who has voluntarily assumed the obligations of parenthood over a child the same basic rights to due process a natural or legal parent possesses when the state intervenes to disrupt or destroy the family unit. "The policy of our law has always been to encourage family relationships, even those foster in character."[20]

Thus the court clearly recognized the bond that had developed between a non-biological parent and a child in her care.

In a second case[21] a relatively inexperienced agency worker determined that the atmosphere in a certain foster home was detrimental to a child who had lived there from the age of three weeks to nine years. At the request of the worker, the agency removed the child from the home. The lower court denied the foster parents' request for continued custody, but the appellate court upheld the rights of the foster parents and reversed the decision. The court noted that custody determinations should focus on the child's best interests rather than the rights of the placement organization. In this case the court deemed the effect of separating the child and his foster parents to be devastating.

A similar case[22] involved a five year-old boy who spent four years with a foster family. The child care agency ordered return of the child to the biological parents, and the lower court upheld this decision. On appeal, the reviewing court determined that despite the limited rights granted by the contract under which they cared for the child, the foster parents, as the de facto parents for four years, had the legal standing to file a petition raising the custody issue. The contract they had signed with the child care service was, therefore, held unenforceable. Despite the evidence that a greater concern regarding the needs and rights of children and their foster parents exists in today's courts, the current legal status of foster parents remains ambiguous.

### *D. The Current Ambiguous Status of Foster Parents*

For some time foster parents and foster parent organizations have been seeking a greater part in decisionmaking regarding children in their care.[23] Even when foster placement is of long duration and the level of the child's contact with biological parents is low,

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20. *Id.* at 1235.

21. Commonwealth v. Children's Servs., 224 Pa. Super. Ct. 556, 307 A.2d 411 (1973).

22. Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). For a discussion of this case, see Note, *Increasing the Rights of Foster Parents*, 36 U. PITT. L. REV. 715, 718-24 (1975).

23. *See also* Reistroffer, *Participation of Foster Parents in Decision Making: The Concept of Collegiality*, 51 CHILD WELFARE 25 (1972); Kurtis v. Ballou, 33 A.D.2d 1034, 308 N.Y.S.2d 770 (1970).

the status of the foster parent remains unclear. In 1977 the United States Supreme Court struck a blow to the rights of foster parents by upholding a New York statute authorizing removal of the child from the foster home without a prior full adversary administrative hearing.[24] The district court[25] had invalidated that provision of the statute on due process grounds, but the Supreme Court found only a limited liberty interest at stake and held that the established procedures were sufficient to protect those limited interests. Emphasizing that the relief sought in this case was purely procedural, the Court distinguished this case from those recognizing a right to family privacy in that "the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in State law and contractual arrangements."[26] A concurring opinion dismissed the foster family's interest with even greater ease, stating that "[t]he family life upon which the State 'intrudes' is simply a temporary status which the State itself has created."[27] Clearly, then, conflict still exists between the emotional ties developed in a foster care situation and the long-established theories of the rights of natural parents.

### *E. The Child's Needs and the Law of Child Custody After Long-Term Foster Care*

The superior custody claim of a natural parent over a third party is ingrained in our cultural and legal tradition. The claim of the natural parent is supported by two doctrines which frequently are mutually reinforcing. The "parental right" doctrine holds that the natural parent has the right to custody in the absence of demonstrable detriment to the child.[28] The "best interests of the child" doctrine purports to give courts great latitude in determining placements. In reality, however, it often complements the "parental right" doctrine because judges assume that the best interests of the child are met when he or she is in the custody of the natural parent.[29]

24. Smith v. Organization of Foster Families, 431 U.S. 816 (1977). The Court considered emotional issues in its determination that there was no liberty interest at stake.

25. Organization of Foster Families v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976) (three-judge court).

26. 431 U.S. at 845.

27. *Id.* at 863 (Stewart, J., concurring).

28. For a general discussion of the evolution of the parental right doctrine, see Leavell, *Custody Disputes and the Proposed Model Act*, 2 GA. L. REV. 162, 165-78 (1968). American courts never accepted the harsh common law concept that gave a father almost unlimited right to custody. Nevertheless, until recently, courts have used property concepts in determining custody disputes. *Id.* at 166.

29. *Id.* at 166, 178-81. *See* note 28 *supra*. For a summary of the disposition standards

For many children the limited and rigid custodial alternatives available after long-term foster care constitute an important part of the problem afflicting the foster care system. When the child cannot return to the biological parents' home, the standard options are either continued foster care or adoption, the latter alternative requiring termination of biological parents' rights regarding their children. No custodial question is more difficult than termination of parental rights, since the law also must serve parental interests. Termination is fraught with judicial resistance because of its absoluteness: parental rights are either sustained or severed.[30] This decision vexes judges. Also, it is unclear whether the child's interests might not sometimes better be served by a custody arrangement short of absolute severance. Providing children a permanent placement with adults who have a long-term commitment to them, as well as making possible some continuity with biological parents, optimally might meet the needs of some children.

In termination actions courts too often find that the parents' behavior or disabilities do not warrant absolute termination, but that the child's welfare requires continued foster care.[31] Although in many such cases it is unlikely that the parents will resume adequate parenting roles, the tradition of parental custody rights is so strong that these rights tend to prevail in any doubtful situation. Thus, courts face a recurring impasse that results in the often unsatisfactory compromise solution of continued foster care.

Decisions to intervene in children's lives are difficult to make because they involve value judgments as well as complicated legal, emotional, and practical issues. The morass of conflicting and often indeterminate interests is reflected in the definition of the best interest standard as "an empty vessel into which adult perceptions and prejudices are poured."[32] A 1971 Oregon case seeking termina-

prescribed by various state laws, see Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226 (1976). This Article does not attempt to address the differences in standards for termination of parental rights or the issues addressed at a termination hearing. For such a discussion, see Wald, *supra* note 12.

30. *See generally* Derdeyn & Wadlington, *Adoption: The Rights of Parents Versus the Best Interests of Their Children*, 16 J. AM. ACAD. CHILD PSYCH. 238 (1977). For a concise bibliography on the termination question, see Levine, *Foundations for Drafting a Model Statute to Terminate Parental Rights: A Selected Bibliography*, 26 JUV. JUST. 42, 46-56 (Aug. 1975). For a summary of state termination laws, see Katz, Howe, & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 73-362 (1975). *See also* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887, 928-30 (1975).

31. *See generally* Derdeyn, *A Case for Permanent Foster Placement of Dependent, Neglected, and Abused Children*, 47 AM. J. ORTHOPSYCH. 604 (1977).

32. Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973).

tion of rights of neglectful parents provides a good example of the ethical and legal quagmire such cases may entail. In *State v. McMaster*[33] the child had been placed with foster parents at age two months. The foster parents later wished to adopt, and when the child turned four the lower court effected termination of parental rights preparatory to adoption. The biological parents appealed. The Oregon Supreme Court noted that "the parents frequently quarrelled, [the biological father] never held a job more than a month and seldom that long, they were usually on welfare, and [the father] frequently left home with the welfare check, leaving [the biological mother] destitute."[34] Testimony suggested that the biological parents "would not allow [the] child to maximize her potential."[35] Yet the court was unwilling to terminate parental rights because this family's situation was not unusual enough to warrant such a drastic step:

> [T]he state of the [biological] family is duplicated in hundreds of thousands of American families,—transiency and incapacity, poverty and instability . . . . However, we do not believe the legislature contemplated that parental rights could be terminated because the natural parents are unable to furnish surroundings which would enable the child to grow up as we would desire all children to do . . . . The best interests of the child are paramount; however, the courts cannot sever . . . parental rights when many thousands of children are being raised under basically the same circumstances as this child.[36]

The court invalidated the termination but did not require transfer of custody to the biological parent. Thus the parental disabilities appeared to have justified the child's placement in foster care, but were not sufficient to warrant termination of parental rights. This impasse—judicial affirmation of parental rights coupled with judicial admission that the welfare of children may warrant custody in a foster parent—is one which significantly impairs the lives of thousands of children in foster care.

The termination issue creates substantial obstacles to proper attention to the needs of some children.[37] The either-or approach to termination results in inconsistent judicial decisions on similar sets of facts. In one illustrative case three siblings ranging in age from five to nine had spent three and one-half years in numerous, sepa-

33. 259 Or. 291, 486 P.2d 567 (1971).

34. *Id.* at 302, 486 P.2d at 572.

35. *Id.* at 303, 486 P.2d at 572.

36. *Id.* at 303-04, 486 P.2d at 572-73.

37. For the foremost legal and psychoanalytical theories in the field of child placement, see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). These authors advocate legal recognition of the premise that the healthy development of each child requires continuity of the relationship with the adult who cares for him and meets his emotional and psychological needs. *Id.* at 31-32.

rate foster care placements. Their mother's whereabouts were unknown, and the welfare department petitioned to terminate the rights of the children's father. The court conceded the father's inability to establish an economically and emotionally stable home for the children. The decision was complicated, however, by the fact that the father periodically had demonstrated interest in the children; the oldest child, in fact, wished to remain with the father. Ultimately the court denied termination and adoption—attention to the children's emotional attachments and the father's legal rights precluded the children's securing of permanent homes.[38]

Reaching the opposite conclusion, however, does not always solve the problems of the child. In another case a child's need for stability and permanence was recognized and met at the cost to the child of a continuing relationship with a biological parent.[39] The parental rights of the mother of a six year-old girl were terminated when the court found the child to be permanently neglected. As the dissent pointed out, however, the mother displayed no intention of abandoning her child; she had, in fact, visited her regularly twice a month. The dissent observed that the mother had a "generally inadequate and defeatist attitude towards life," suffered a deeply ingrained "generalized lassitude," and noted that "any change of life style [was] fraught with fears and tension."[40] Notwithstanding these factors, he was reluctant to terminate the mother's rights because she might be helped to function at such a level that she could regain custody of her child. Facts in the record made it appear unlikely that the mother would become able to care for the child. Given this child's age and her mother's demonstrated interest, however, one can assume that the relationship with her mother was of considerable importance to the child. Severance of such a relationship is not likely to be the best alternative for the child's development. In this case, attention to the child's need for a permanent home with a capable parent outweighed the normally superior custodial right of the biological mother to retain custody.

The circumstances of children of divorced parents and foster children often are analogous. Children from disrupted families tend to develop their own immature and primitive fantasies about the cause of the disruption.[41] Following parental separation, death of a parent, or removal from the parental home, the child almost invari-

38. State *ex rel.* Juvenile Dep't v. Crabtree, 23 Or. App. 183, 541 P.2d 1311 (1975).

39. *In re* "Female" B., 49 A.D.2d 615, 370 N.Y.S.2d 672 (1975).

40. *Id.* at 615, 370 N.Y.S.2d at 674.

41. Derdeyn, *Children in Divorce: Intervention in the Phase of Separation*, 60 PEDIATRICS 20, 21-22 (1977).

ably entertains distorted fantasies of the absent parent. In these situations, as well, visits with non-custodial parents may be of great benefit. Authors addressing the value of contact with the non-custodial divorced parent have written that

> visitation precludes the need for nurturing any unwholesome and energy-consuming obsession with establishing a rendezvous with the non-custodial parent and provides an avenue by which the child can test the reality of images which are a product of his own fantasies and the impressions of others that have been communicated to him.[42]

Following long-term foster care, then, adoption is not always the most constructive legal or emotional alternative. The absoluteness of adoption makes it difficult for judges to justify terminating parental rights, and decisions which could lead to permanent placements are thus precluded. The either-or characteristic of adoption also may not be in the best interest of children who will benefit from maintaining contact with their past. Permanent and secure arrangements other than traditional adoption can and should be made for these children. Some courts and legislatures have begun addressing this need for alternative placement arrangements.

## III. Case Report

A case involving the termination of rights of the parents of two siblings in foster care brought the authors together and confronted them with the fact that none of the usual legal alternatives available to these children adequately met their emotional needs. The two children involved were Julie and Tom Jennings, twelve and ten years of age, respectively. The local welfare department removed them from their home because their parents neglected them severely. The father's alcoholism and the mother's limited ability to cope with family crises had led to a long history of Jennings family chaos, often the subject of welfare department intervention in the years prior to the removal of the children. They spent twenty-two months in the home of Mr. and Mrs. Wallace, who had two children of the Jennings children's approximate ages.

In this twenty-two month period, during which Mr. and Mrs. Jennings visited their children three times, the family court held numerous hearings in connection with the welfare department's petitions for permanent custody of the children. The court initially accepted the arguments for delay which were based on psychiatric testimony concerning the perceived needs of the parents for emo-

42. Benedek & Benedek, *Postdivorce Visitation: A Child's Right*, 16 J. Am. Acad. Child Psych. 256, 261-62 (1977).

tional and vocational counseling, and for time to arrange employment and adequate housing. As it became apparent that the parents were unable so to utilize the time granted and that the children were suffering from their status of uncertainty, the court denied motions for further extensions. Recognizing the presence of conflicting interests between the children's need for stable relationships with their adult caretakers and their parents' need for an opportunity to reorder their lives before being faced with the irreversible loss of their children, the court asked one of the authors to consult regarding final disposition of the children.

Julie and Tom Jennings, Mr. and Mrs. Wallace, and the Wallace children were interviewed by the psychiatric consultant. Julie and Tom were told that the purpose of the meeting was for the consultant to help the judge determine what decision would be best for them. Excerpts of the report to the court follow.

### *A. Report of Psychiatric Consultation*

#### (1) Findings

Julie and Tom Jennings felt accepted and comfortable in the Wallace home and enjoyed comfortable relationships with the Wallace children. Both children volunteered examples of their biological parents' inadequate provision of basic needs (food and necessary medical care). They explained how different and how nice it was for the Wallaces to do such things as go to school to find out about their progress. Julie also mentioned that they could talk about any problem, regardless of its nature, with the Wallaces, unlike the situation with their biological parents.

In spite of their positive feelings about Mr. and Mrs. Wallace, however, both children also wished to return home. Tom simply wanted to return to his parents' home and could give no specific reason for his desire. Julie, more realistic than Tom about the problem, felt that her father had to stop drinking before this would be possible. They expressed concern about their parents and felt that returning to them would somehow make things better. Both children were aware of the Wallaces' concern for them, a concern they did not sense was manifested by their biological parents. Paradoxically, the children showed a protective concern for their biological parents and felt they should be home taking care of their biological parents.

Both children, when seen separately and asked to draw a picture of their family, drew idealized scenes. Julie seated the entire family at a meal and Tom drew the family playing baseball to-

gether. Tom drew his mother with a very sad face, saying it was because she did not see her children. He also expressed feelings of inadequacy by picturing himself with a baseball bat containing a hole so that the ball might pass through the bat even if he swung correctly. Tom felt that he *should* be back with his mother in order to make her feel better. Julie, a bit older, had the same feelings but believed that she had a better chance in life with the Wallaces. Both of these children felt guilty and responsible for their absence and, most directly, for making their mother sad. The obvious equation in their minds was that if they were to return to their parents, they would no longer have to feel guilty.

Notwithstanding the passage of twenty-two months, the arrangement presumably was temporary, and the children had always expected that they would return home. They clung to this hope because, from their point of view, there was no alternative to the current, "temporary" situation.

In terms of emotional realities, the children viewed their relationship with Mr. and Mrs. Wallace in a way approaching that of a parent-child relationship, muted somewhat by everyone's realization that this was supposed to be a temporary arrangement. The Wallaces were not financially able to adopt these children, although their attachment was strong, and they wished to continue to care for the children.

Julie and Tom felt cared for by Mr. and Mrs. Wallace, and they felt themselves to be, in essence, part of the Wallace family. At a fantasy level they expected that a return to their parents would provide some emotional relief, and therefore they wished to return home. The layman would find it unusual to see children of this age (ten and twelve years) invest so heavily in fantasy (reunion with biological parents) to the relative exclusion of reality (current loving relationship with the Wallaces).

### (2) Recommendation

The optimal situation for these children was continued care by Mr. and Mrs. Wallace under a permanent arrangement. These children would benefit from the knowledge that their home with the Wallaces was secure, so that both they and the Wallaces no longer would be limited in their relationships by their temporary state. The children, because of their feelings about their biological parents, should have the possibility of continuing contact with them. This was acceptable to Mr. and Mrs. Wallace.

The usual alternatives—(1) termination of parental rights with

consequent availability for adoption, (2) continued foster care under the current arrangement, and (3) return to the custody of Mr. and Mrs. Jennings—had important shortcomings, since none of them matched the emotional realities of Julie and Tom Jennings' lives. Termination might offer Julie and Tom stability and continuity, assuming the Wallaces' ability to adopt. Because adoption did not appear possible, however, termination of parental rights introduced the possibility of an unacceptable eventuality—adoption by strangers. This would disrupt the relationship with the Wallaces and possibly separate the children from each other. Continued foster care also was unacceptable. The temporary nature of their current status impeded both the children and the Wallaces, in spite of a very successful relationship, in their commitments to each other. These children required a definitive resolution of their custody to help them invest more in current living and less in fantasy. The third alternative, return to the custody of the biological parents, was unacceptable also, because of the inability of the parents adequately to assume their parenting responsibilities. The wishes for family reunion were basically neurotic in character, and the children would not find the sought-for emotional relief by returning to their biological parents. They would, in fact, feel extremely anxious and unsupported if placed with their biological parents, and would suffer the loss of the only realistic parent-child relationship current in their lives.

The optimal resolution of this issue involved a truly permanent arrangement allowing these children to stay with the Wallaces. Regardless of whether Mr. and Mrs. Jennings' parental rights were formally terminated, a permanent settlement was needed which would cut off their access to the courts to intervene in the lives of these children, while still allowing the children to have contact with Mr. and Mrs. Jennings at the discretion of Mr. and Mrs. Wallace. The "temporary" nature of foster care was itself detrimental to these children at this time. They remained unsettled because of the temporary situation and very anxious regarding the upcoming trial. They required a final resolution of the current situation to free them from excessive involvement with the past and unrealistic hopes for the future.

### *B. The Decision*

The court did not adhere to the usual legal alternatives, but accepted instead the consultant's advice. Parental rights were terminated, the children remained in foster care with the Wallaces, and provision was made for the welfare department to arrange visits

by the children with their biological parents at Mr. and Mrs. Wallace's request.

### C. *Follow-Up One Year Later*

A year after the decision, the Wallaces had almost completed the process of subsidized adoption. Julie, then thirteen, wished to take the Wallace name but was concerned about her biological parents' possible anger. Tom, then eleven, had less enthusiasm for the adoption and wished to retain the Jennings name, which was agreeable to the Wallaces. The children had visited once with their mother, and Julie had a fairly active correspondence with her. Tom was writing his mother occasionally at the urging of his sister. The Wallaces continued to allow the children to visit their biological parents whenever they wished to do so. Julie spoke much more openly of her biological parents than did Tom, and was getting along very well academically and with peers. Although Julie felt duty and affection toward her biological parents, she had made firm attachments to the Wallace family and to her life with them. Tom remained overinvolved with the past, failing to make an optimum investment in his current life. Psychiatric intervention still was a possibility to help him modify his apparent feelings of guilt regarding his biological parents.

## IV. Recent Developments in the Law of Child Placement

Critics of indeterminate decisionmaking standards often desire to shift back to the legislature the responsibility for formulating more definite criteria upon which judges may base their decisions.[43] On the other hand, the tradition of wide judicial discretion in complex custody determinations is still viable to some, including one judge who expressed her reservations about judicial determination this way: "[T]here can be no single or final definition that will encompass the myriad variations in the social histories, parental attitudes or actions, the conditions of the parents and the life prospects for the child."[44] Governmental branches are responding to the increasing recognition of the limitations imposed by the conventional options for placement of children after long-term foster care. State legislatures are considering new statutory schemes designed to give greater flexibility of choice. Courts, faced with the frustra-

43. *See generally* Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 599 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985 (1975).

44. *In re* P., 71 Misc. 2d 965, 969, 337 N.Y.S.2d 203, 208 (Fam. Ct. 1972).

tion of day-to-day family crises, have fashioned their own placements, as did the court in our case study. Additionally, commentators concerned with the limited nature of traditional child placements have suggested other alternatives, some of which may be implemented within existing statutory schemes.

### A. *Legislative Developments*

#### (1) Legislative Encouragement of Adoption

The number of children available for adoption has decreased substantially in recent years.[45] Increasing acceptance of single parenthood, growing awareness of birth control methods, and the availability of medically safe and legally sanctioned abortions[46] contribute to this reduction. Increasingly, those available for adoption are older and minority children, both of whom are less readily adopted. In addition, some children tend to remain in foster care as a result of physical, medical, or emotional handicaps.[47]

Many states[48] have enacted subsidized adoption laws which provide financial assistance for expenses borne by people willing to adopt hard-to-place children.[49] These statutes

> provide a subsidy for a child when prospective adoptive parents are unable to assume full financial responsibility for the child during his minority. The subsidy would help with the costs of special medical care and with additional expenses incurred because of a child's continuing disabilities; facilitate adoption by many minority group families; minimize the special economic drain of rearing several children from the same biological family who should remain together.[50]

Subsidized adoption offers considerable potential for many children presently suffering from the indefiniteness of foster care. So far, however, it has not been widely exploited.[51] In an attempt to breathe

45. Derdeyn, *Adoption in Evolution: Recent Influences on Adoption in Virginia,* 70 S. MED. J. 168 (1977).

46. *Contra,* Maher v. Roe, 432 U.S. 464 (1977) (Court held that there is no constitutional requirement that public funds be used to finance abortions for indigent women).

47. Derdeyn, *supra* note 45, at 169.

48. Over forty jurisdictions now have subsidized adoption statutes, Katz & Gallagher, *Subsidized Adoption in America,* 10 FAM. L.Q. 3, 7 (1976).

49. Watson, *Subsidized Adoptions: A Crucial Investment,* 51 CHILD WELFARE 220, 224 (1972).

50. Katz & Gallagher, *supra* note 48, at 4. One study found the costs of continued foster care and attendant administrative expenses to be less than the costs of subsidies to an adopting family. CHILD CARE ASSOCIATION OF ILLINOIS, SUBSIDIZED ADOPTION: A STUDY OF USE AND NEED IN FOUR AGENCIES (1969) *as reported in* Katz & Gallagher, *supra* note 48, at 6. The savings in emotional costs through the provision of a permanent home to an otherwise homeless child cannot be estimated.

51. For instance, because of the peculiarities of Medicaid regulations (with regard to children requiring special medical or psychological attention) and the reluctance of both

life into the program and to encourage interstate adoptions, Senator Cranston recently introduced in the United States Senate a bill that will provide states with federal subsidies for such adoption subsidy payments.[52]

### (2) Recent Enactments

At least four states opt for some balance between rigid legislative edicts and open judicial discretion. In so doing they make substantial strides forward in providing workable guidelines for their courts and child care agencies.

#### *(a) California*

The question whether to terminate parental rights is integral to the legal analysis of the permanent placement of children outside the home of their biological parents.[53] A termination hearing often provides the pivotal point in determining the nature and length of the placement which is legally available to the child. It is thus central to the problem of continuity of physical and emotional care for a child in foster care.

California addresses these problems by focusing on the duration of foster care, the effect on the child of a return to the parents, and the likelihood of the parents' prospective ability to adequately perform parental duties.[54] The legislature mandates an order of preference for placement determinations: (1) biological parents; (2) current caretakers irrespective of family relationships; and finally, (3) other "suitable" persons.[55] The prevalent requirement of a finding of *parental* unfitness has been eliminated in favor of a concentration on the interests of the child[56] in placement determinations. Even

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foster parents and local welfare departments to move for adoptive placement when the adopting parents cannot afford traditional adoption, only thirty-five subsidized adoptions have taken place in Virginia as of May 1, 1977, although the law providing for them has been in force since 1974. Twenty-five of the children adopted under this plan were placed with their foster parents. (Based on a personal conversation with Mrs. Neville Weeks, adoption specialist, Virginia Department of Welfare, Richmond, Virginia.)

52. S. 961, 95th Cong., 1st Sess., 123 CONG. REC. 3801-07 (Marcb 9, 1977), *passed as amended, id.* 17,880 (October 27, 1977).

53. This paper does not focus on removal, voluntary or otherwise, of children from biological parents. But trying to avoid that issue does not allow us to sidestep completely all the problems inherent in public intervention in the family. Only the question of initial state intervention may be escaped entirely. *See* Wald, *supra* note 12.

54. CAL. CIV. CODE § 232(7) (West Supp. 1978).

55. CAL. CIV. CODE § 4600 (West Supp. 1978).

56. *Compare id. with* Rocka v. Roanoke County Dep't of Pub. Welfare, 215 Va. 515, 518, 211 S.E.2d 76, 78 (1975) (decision mandates that before terminating parental rigbts the court must find both that the parent is unfit and that the "best interest of the child" requires such termination).

with statutory guidelines that favor natural parents, the lower courts apparently endeavor to narrow the vestiges of parental preference with far greater frequency—at least in reported decisions[57]—than a reading of the statute would lead one to predict. Some courts ignore the statute altogether,[58] while others recognize its presence but base their decisions on "best interests" principles.[59] Significantly, knee-jerk affirmation of inchoate parental rights can no longer be expected.

Recently enacted California legislation focuses even more sharply on the length of time a child is out of the natural parents' home,[60] because permanent and continuous "parental" relationships are deemed essential to the child. Placements preferred include (1) adoption, (2) permanent foster care, and (3) guardianship. Though the state requires rehabilitation services for parents during the initial separation from their children, a premium is placed on prompt and final adjudication of the children's placement.

### *(b) Virginia*

The Virginia legislature recently revamped its juvenile code, shifting significantly from its previous notion of supremacy of parental rights. Incorporating the idea that all persons develop close relationships when they associate with each other for a period of time, the statute expands the conventional "parent" concept to include all who stand in that role relative to a child, implying that the notion of "property" rights of biological parents in their children is distinctly on the wane.

The new enactment abandons the "best interests" and "welfare of the child" standards as the criteria for permanent termination of "residual" parental rights. In their place, the Code sets forth specific standards to guide judicial discretion. The neglect or abuse must be a "serious and substantial threat to [the child's] life, health or development," with no reasonable likelihood of a reformation of those conditions.[61] The presence of certain specified problems is deemed prima facie evidence of inability to correct the causes of

57. Professor Mnookin estimated that, during the late 1960's and early 1970's, "about one in every thousand cases where a California court has ordered foster care placement has resulted in a reported appellate opinion." Mnookin, *supra* note 43, at 609.

58. *E.g., In re* Adoption of Michelle Lee T., 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975).

59. *In re* Reyna, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976).

60. S.B. 30 (codified in CAL. WELF. & INST. CODE § 366.5 (West Supp. 1978)) (described in Mnookin, *Foster Care Program*, 1 CHILDREN'S RIGHTS REPORT 6, 8-9 (March 1977)).

61. VA. CODE § 16.1-283(B) (Supp. 1978).

the neglect or abuse. For example, a mental handicap or addiction to drugs (including alcohol) that interferes with child care duties and parental failure to use or to "respond" to rehabilitative services designed to prevent further abuse or neglect creates such a presumption.[62]

Here, too, prompt and final determinations are sought. Termination of parental rights follows parental failure, within twelve months, to maintain contact with children or to "remedy" the conditions that lead to the placement.[63] The required filing of a foster care plan[64] and the periodic review of foster care placements[65] are designed to eliminate indefinite foster care placements.

Interestingly, the Code avoids complete severance of parent-child relationships when a child over fourteen years of age objects.[66] In adding this provision, the legislature evidenced at least some understanding of the principles that led the *Jennings* court to terminate parental rights but still allow visitation for the children. Though strictly limited, this provision exemplifies the legislative opportunity to allow courts the flexibility to consider the psychological needs of children. The obvious remaining question is whether the courts will accept the opportunities offered them, or whether they will remain wedded to the restricted alternatives available in the past.

### *(c) Minnesota*

In 1978 Minnesota joined the growing number of states whose legislatures are responding to the problem of conflict of rights in a termination procedure. Minnesota law[67] now requires a case plan for every child in foster care, either court ordered or voluntary. This plan must contain (1) reasons for placement, (2) responsibilities of the social service agency, (3) financial and visitation responsibilities of the parents, and (4) expected date of return home. The plan must be signed by the parents, the child placement agency, and if possible the child, and the plan must be reviewed every six months.

Under the statute parents have the right to counsel in the preparation of the case plan, and they must understand their obligations under it. As in the other states the notion of providing permanency for the child is central to the thrust of the statute. If a child is not

62. *Id.* § 16.1-283(B)(2).
63. *Id.* § 16.1-283(C).
64. *Id.* § 16.1-281.
65. *Id.* § 16.1-282.
66. *Id.* § 16.1-283(E).
67. 1978 MINN. LAWS ch. 602.

returned home within eighteen months, the agency is required to file a neglect, dependency, or termination petition.

### *(d) New York*

Because the New York legislature recognizes as paramount the child's need for continuous emotional support from the adult caretaker, New York laws are perhaps the most heavily weighted in favor of the rights of foster parents.[68] Foster parents enjoy preferred status in adoption proceedings,[69] and are deemed interested parties in proceedings concerning the custody of their foster children.[70] So strong is this emphasis on permanent placement that revocation of foster placement is allowed if the foster parents fail, within six months of initial placement, to institute proceedings for adoption.[71] Children in foster care are subject to periodic reviews of their circumstances, with particular attention paid to the development or disintegration of their relationship with the biological parents.[72]

New York succinctly stated its position: long-term, indefinite foster care placement should be avoided. In its stead New York places prime importance on recognizing permanent emotional relationships that develop between children and adults in the foster home. Disappointingly, the available options are limited to continued foster care or adoption. For those children for whom either of these options is not perfectly suited, the legislature has offered no alternative.

## (3) Model Acts

Drafters of two model acts hope to bring uniformity to the variety of state parental-rights-termination statutes. Each one addresses to some extent the dilemma of child placement alternatives.

Drafted by a group of juvenile court judges,[73] the Model Statute

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

69. *Id.* § 383(3) (McKinney 1976).

70. *Id.* Whether this section makes foster parents "parties" to an action in the normal sense, that is, entitled to notice and an opportunity to be heard, over whom jurisdiction is indispensable to any proceeding, is not clear from the statute. Clearly such status is preferred, since it is quite possible that foster parents are the only "parents" known to a child.

71. *Id.* § 384-b(3)(a) (McKinney Supp. 1977).

72. *Id.* § 392(2), (3), (5-a), (7) (McKinney Supp. 1977). New York's foster care program underwent a thoughtful analysis by Justice Brennan in Smith v. Organization of Foster Families, 431 U.S. 816 (1977). Though the failings of long-term, temporary foster care were deplored, the New York statutes withstood constitutional attack because the procedure available for questioning foster care placements and removals met the due process standards outlined in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). 431 U.S. at 850-51.

73. Neglected Children Committee, National Council of Juvenile Court Judges, *Model Statute for Termination of Parental Rights*, 27 Juv. Just. 3 (Nov. 1976).

for Termination of Parental Rights[74] provides that the court, in determining whether parental rights in children should be ended, may consider whether the parent failed to stay in contact with his or her child. The court may consider the length and depth of the relationship existing within the foster family "to the extent that [the foster child's] identity is with that family."[75] The primary weakness of this proposal is that it provides no middle ground between termination of parental rights and continued foster care.

An Oregon reform proposal offers a wider range of choices.[76] After finding neglect or abandonment—carefully defined in the act—the court may choose from a variety of dispositional options. In addition to conditional and unconditional dissolution of the parent-child relationship, a court may sever parental control without terminating all rights. Such an order awards custody to another person or agency and "regulate[s] in the manner least detrimental to the child, the relationship between the child and the parent."[77] This kind of order, properly attuned to the child's relationships, supports the integrity of the foster family without severing the biological parent-child tie.

### *B. Permanent Placement Without Severance of Contact with Biological Parents: Case Law Developments*

While new developments in the law of child placement probably occur every day, their impact is limited in that they occur most often in family courts such as the one that heard the *Jennings* case: a court not-of-record, which issues no written opinions, and from which only a de novo appeal is allowed. Such a decisionmaking process presents almost insurmountable difficulties in establishing reliable precedents. First, unless required to present written opinions, courts need not justify or explain admittedly difficult decisions, and they unintentionally may escape a degree of consistency in decisionmaking.

Second, the nature of the issues also militates against the establishment of sound legal principles through progressive decisions

74. The model statute bears the unmistakable imprint of the juvenile court judges. The preamble to the proposed act states that "all orders and judgments of the Juvenile Court shall be affirmed on appeal unless the trial court committed a gross abuse of discretion, legal error to the substantial prejudice of the appellant, or the judgment is clearly and manifestly against the weight of the evidence." *Id.* at 5.

75. *Id.*

76. Slader, Robart, & Pike, *Suggested Draft, Model Dissolution of Parent-Child Relationship Act,* § XXI (Metropolitan Pub. Defender's Office & Oregon Children's Servs. Div., April 1976) (copy on file with the *Vanderbilt Law Review).*

77. *Id.*

in child care cases. As Professor Mnookin has pointed out, issues of child custody and child placement involve decisions concerning interpersonal relationships and predictions about the future course of those relationships:

> A determination that is person-oriented and requires predictions necessarily involves an evaluation of the parties who have appeared in court . . . . The result of an earlier case involving different people has limited relevance to a subsequent case requiring individualized evaluations of a particular child and the litigants. Prior reported cases now provide little basis for controlling or predicting the outcome of a particular case.[78]

Perhaps the most instructive trend in the few reported cases is the movement toward increasingly flexible placements. Even the historically limited statutory schemes leave room for imaginative placements consistent with the developmental needs of a child. For example, an intermediate appellate court in Oregon reached, without the aid of specific statutory directives, a result that provided some of the benefits of adoption without a complete severance of contact with the biological parents.[79] Two children, subjected to a five-year period of custody skirmishes, rebounding placements, and uncertainty, finally were allowed to remain in the home of nonparent relatives who had provided the only comparatively constant relationship throughout the drama. That continuity enabled the court to override the historically impregnable parental claim to custody. The parents were allowed to visit.

Two recent English decisions also break traditional barriers to stepparent adoptions.[80] In both cases the courts found exceptional circumstances which allowed them to approve adoption and, at the same time, permit the non-adopting parent to maintain existing relationships with his child through continued visits. The differing religious, cultural, and racial heritages of the biological fathers were sufficient justifications for the courts to break new ground with their opinions.

In a third situation, involving disputes between parents and nonrelatives, courts are searching for the proper placement of children. In *Ross v. Hoffman*,[81] the court looked for and found "exceptional circumstances" to justify a finding that a "babysitter" of eight years, who had provided full time care five days each week, was the proper custodial "parent." While awarding custody to the

78. Mnookin, *supra* note 29, at 253.

79. Reflow v. Reflow, 24 Or. App. 365, 545 P.2d 894 (1976).

80. *In re* S, [1975] 1 All E.R. 109 (C.A. 1974); *In re* J, [1973] 2 All E.R. 410 (Fam. 1973).

81. 33 Md. App. 333, 340, 364 A.2d 596, 601 (Ct. Spec. App. 1976), *modified*, 280 Md. 172, 372 A.2d 582 (1977).

"babysitter," the judge found that the child's interests called for "liberal" visitation by the biological mother.

In *Bennett v. Jeffreys*,[82] in which a mother sought custody of an eight-year-old daughter whom she had placed in the care of another woman just after birth, the Court of Appeals of New York defined the conditions under which it can consider the best interests of the child with regard to a contest between a parent and a third party:

> The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. If any of such extraordinary circumstances are present, the disposition of custody is influenced or controlled by what is in the best interest of the child. In the instant case extraordinary circumstances, namely, the prolonged separation of mother and child for most of the child's life, require inquiry into the best interest of the child.[83]

On remittitur, the family court awarded custody to the foster mother and visitation to the biological mother. The Supreme Court affirmed.[84]

The concept of continued contact with their children by noncustodial parents also finds official sanction in states that allow placement of a child with a guardian, one who has the "rights and responsibilities of a parent except for the duty to support" the child.[85] Guardianship allows the court to retain for the child a "familiar environment where the child has his emotional ties"[86] and does not force the judge to sever ties with the child's original family when that would be undesirable. Guardianship steers

> a course between the finality of a decree of adoption and dismissal of an adoption petition [when that would benefit the child]. Blood relationships may coincide with the psychological ties of the child. In such a situation, these ties are worthy of preservation, just as strong emotional attachments should not be severed, when they relate to de facto rather than natural parents.[87]

A California appellate court struck this balance in In re *Guardianship of Marino*.[88] In that case a child whose mother died soon after childbirth was raised in the family of his mother's sister "as if he were their own son."[89] After a six year silence, the father rediscovered an interest in his child and sought custody. Psychiatric

82. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

83. *Id.* at 543, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

84. Bennett v. Marrow, 59 A.D.2d 492, 399 N.Y.S.2d 697 (1977).

85. Taylor, *Guardianship or "Permanent Placement" of Children*, 54 CALIF. L. REV. 741, 742-43 (1977).

86. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 42 (1975). *See also* Taylor, *supra* note 85, at 745.

87. Bodenheimer, *supra* note 86, at 49 (footnote omitted).

88. 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973).

89. *Id.* at 954, 106 Cal. Rptr. at 656.

testimony suggested that Mr. Marino viewed his son Donald largely as a chattel,[90] and characterized Donald as a boy extraordinarily dependent upon his caretaker "parents."[91] Seeking Donald's continued healthy emotional development in his only "home," the court named Donald's caretakers his guardians. Despite the long period of neglect by the father, however, the court allowed him regular visitation.[92]

In each of these cases, then, a court structured a placement according to its perception of the emotional needs of the child,[93] basing its decision in part on the "exceptional" circumstances present in each case. Nevertheless, it was only in "unusual" cases that these courts felt free to construct placements tailored to the children's needs. In the majority of cases courts still feel constrained to adopt traditional dispositional alternatives. But close analysis of these decisions shows that in each one a court found it possible under *existing* law to fashion a remedy to meet a child's need for a permanent placement with caring adults and for continued communication with a non-custodial biological parent. Thus it seems clear that immediate solutions are possible even in states that have no prospect of legislative reform.

## V. THE NEED FOR FLEXIBLE DISPOSITIONAL ALTERNATIVES

Child custody law still lacks the kind of flexibility that might better suit the broad variety of issues confronting it. Courts should more freely utilize individual alternatives molded to fit the myriad situations in which children find themselves. They need not remain wedded to wooden legal categories into which children must be squeezed no matter how uncomfortable the fit. The absoluteness of termination of parental rights can in some instances be modified to afford stability to the foster or adoptive family, without necessarily costing the child continuity with his or her biological family.

Present adoption statutes are being applied in a social climate

90. The father asked the psychiatrist: "If you had an iron that belonged to you wouldn't you want it back?" *Id.* at 955, 106 Cal. Rptr. at 657.

91. *Id.* at 955, 956 & n.1, 106 Cal. Rptr. at 657, 658 & n.1.

92. The only foundation for such an outcome is found in the psychiatric testimony. *Id.* *See also* San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 496 P.2d 453, 101 Cal. Rptr. 541 (1972).

93. Other examples of this individualized dispositional pattern arise in related areas: Mimkon v. Ford, 66 N.J. 426, 437, 332 A.2d 199, 204 (1975) (maternal grandparents allowed to visit a child even after adoption by the father's new spouse, such continued visits being beneficial to the child). *Contra,* Browning v. Tarwater, 215 Kan. 501, 524 P.2d 1135 (1974). *See generally* Note, *Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child,* 15 J. FAM. L. 51 (1976).

very different from the one existing when they were enacted. The first general laws for adoption came into being in this country in the 1850's,[94] a time when there were great numbers of parentless children. Until very recently, adoption primarily involved infants surrendered voluntarily by their mothers. Presently, the same legal construct is expected to meet the needs of older, abused, and neglected children with memories of, and perhaps emotional ties to, biological parents. When the abused and neglected older child becomes a member of a new family by adoption, that family is by no means indistinguishable from the "natural" family, despite the implicit legal pronouncement to the contrary.

The absoluteness of the break with biological parents necessitated by termination of parental rights makes it extremely difficult for courts to make decisions in this area. All too often a judge will not terminate parental rights, and the child simply remains in foster care.[95] In the past, the central issue was the biological parent's right to "ownership" of the child. Society has progressed to the point that a non-biologically related adult can under certain circumstances attain "ownership." That absolute break, however, also has important emotional consequences, some of which are deleterious to both children and parents. Loyalty conflicts generated by hostile and competing adults can be quite crippling for younger children.[96] For older children, on the other hand, some contact with biological parents may be of value, whether they remain in stable foster care or are adopted. There is no sound reason to continue in the belief that adoption requires that biological parents be banished, or that a child's emotional connections with biological parents preclude the creation of healthy and stable placements.

Courts now recognize that emotional damage is an inevitable by-product of the uprooting of a child from his "psychological parents"—regardless of their biological tie to the child—and his placement with a parent figure who has had little or no contact with the child.[97] Still, judges find it difficult to ignore the pleas of persons claiming an "interest" in children despite their lack of an emotional relationship. A sympathetic description of this situation is provided by Judge Polier in her characterization of the clash which occurs when an attempt is made to terminate the rights of an adult who, but for biology, is a stranger to the child:

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94. *See generally* H. WITMER, E. HERZOG, E. WEINSTEIN, & M. SULLIVAN, INDEPENDENT ADOPTIONS: A FOLLOW-UP STUDY (1963).

95. Derdeyn, *supra* note 31.

96. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 37.

97. *See In re* Reyna, 55 Cal. App. 3d 288, 301, 126 Cal. Rptr. 138, 147 (1976).

> The parent may never have provided a home, may have maintained no real contact with the child, and may have no plans for making a home for the child. Still, the possible termination of parental rights comes as a jolt and is seen as punishment, forfeiture of what is theirs, and as a threat to self-esteem which must be fought.[98]

While such parental "interest" should be accorded less importance than the child's need for adequate parenting, the adult's assertion of rights in these types of cases is not, by definition, inimical to the child's welfare.[99] Even when a permanent placement with caring adults is secured, termination of parental rights followed by adoption is not always preferable to an arrangement allowing knowledge of or contact with biological parents.[100]

Some change is already taking place in the law. Foster children[101] and their foster parents[102] are being accorded standing to sue or at least to be heard in order to protect their interests. Creative custodial arrangements are being devised, as in the English cases coupling adoption with visitation.[103] Legislatures, too, are being asked to expand their placement guidelines. The Oregon Model Dissolution of Parent-Child Relationship Act allows for the suspension of those parental rights which are inconsistent with the least detrimental alternative available to the child.[104] The Oregon Model Act arguably requires that courts enumerate the rights, interests, and responsibilities that a parent possesses in and for his or her child. Such an enumeration will not be an easy process. Some elements that might be considered either in adoption or permanent foster care are (1) the right to be kept informed about one's child's progress; (2) an expectation of visitation, but only at the child's (or the court's or the guardian's) option; (3) a limited or conditional right of visitation vested in the parent; (4) a duty to contribute support; and (5) a right to limited or conditional custody. In considering individual cases courts can determine which components of the parent-child relationship should be preserved.

98. *In re* P., 71 Misc. 2d 965, 966, 337 N.Y.S.2d 203, 205 (Fam. Ct. 1972). *See also* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 17.5 (1968); Derdeyn, *Child Custody Consultation*, 45 AM. J. ORTHOPSYCH. 791, 793 (1975).

99. Derdeyn, *Child Abuse and Neglect: The Rights of Parents and the Needs of Their Children*, 47 AM. J. ORTHOPSYCH. 377, 384-85 (1977).

100. Derdeyn, *supra* note 31.

101. Organization of Foster Families v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976), *rev'd on other grounds sub nom.* Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

102. Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 854 (5th Cir.), *rev'd on rehearing en banc*, 563 F.2d 1200 (5th Cir. 1977); Reflow v. Reflow, 24 Or. App. 365, 545 P.2d 894 (1976).

103. *See* text accompanying note 80 *supra*.

104. *See* text accompanying note 76 *supra*.

Provisions must be made to insure that judges render written opinions and that all interested parties are given the opportunity to participate in the proceedings. In addition to biological parents, foster parents and children also are proper parties to termination and custodial adjustment proceedings.[105] After this proceeding, the court should be required to make written findings of fact and conclusions of law. An explanation of the course chosen helps insure a reasoned decision by a judge who must, for the record, consider the various alternatives that he or she ultimately rejects. It also makes an appellate court's task of review easier.[106]

Courts not infrequently face a situation wherein children placed long ago in foster care still feel or need an attachment to their parents. The current adoption practice of severing any and all connections with the biological parents may be extremely unsettling to these children, as it would have been to the *Jennings* children. Even when children are assured of a permanent home with their foster parents, either through permanent foster care or adoption, contact with their biological parents encourages a sense of continuity of self and the development of realistic attitudes[107] toward their biological parents and themselves. In such cases, the children should have a right to visit, a right vested in the child and under the control of the adoptive or permanent foster parents. Virginia did not have a provision for permanent foster care at the time of the *Jennings* trial,[108] but the *Jennings* court constructed an approximation of permanent foster care by terminating rights of the *Jennings* parents, continuing the placement of Julie and Tom Jennings in the Wallace home, and defining the children's right to visit their biological parents.

Most decisions cite "exceptional circumstances" to justify their creativity, flexibility, or deviance from traditional parental rights and standard custodial alternatives. The situation of the *Jennings* children, however, is by no means a unique one for children in foster care: for many there continues to be a memory of and an attachment

105. *See* Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835 (5th Cir.), *rev'd on rehearing en banc*, 563 F.2d 1200 (5th Cir. 1977); Organization of Foster Families v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976), *rev'd on other grounds sub nom.* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Katzoff v. Superior Court, 54 Cal. App. 3d 1079, 127 Cal. Rptr. 178 (1976).

106. Mnookin, *supra* note 29, at 279; Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 74 (1969). An example of sloppy oral decisionmaking is apparent in *In re* Guardianship of Marino, 30 Cal. App. 3d 952, 960, 106 Cal. Rptr. 655, 660-61 (Ct. App. 1973).

107. Wald, *supra* note 12, at 672.

108. Subsequent to the *Jennings* trial, Virginia's revision of the juvenile code included a provision for permanent foster care. VA. CODE § 63.1-206.1 (Supp. 1978).

to biological parents who are extremely unlikely ever to be able to care for them. These alternatives—the permanent care of a child by non-biological parents and a child's continuing relationship with biological parents—need not be mutually exclusive, and need not continue to present such a block to making dispositions in accordance with children's historical and emotional realities. It is possible to construct dispositions that afford the child the needed stability of a continuous placement and still avoid severing the child's connections with his or her past.