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Elizabeth K. Schuster

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# Foster Parents' Emerging Due Process Rights in Pennsylvania

## I. Introduction

Foster family care is the temporary care by foster parents of children whose parents are unable or unwilling to properly care for them.<sup>1</sup> Under the auspices of the state,<sup>2</sup> children, generally of lower and lower-middle class natural families, are placed by foster care agencies with lower-middle class foster families.<sup>3</sup> Children are removed from their natural home by court order<sup>4</sup> or pursuant to a voluntary agreement<sup>5</sup> between the natural parents and the foster care agency.

One benefit of foster care is that natural parents are able to work out the problems that necessitated their child's removal with the aid of social welfare caseworkers and without the stress created by normal parental duties.<sup>6</sup> Irrespective of this benefit, the focus of foster care is serving the child's best interest.<sup>7</sup> Since this interest is

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1. Rarely is a child removed from his home because of his own problems, but rather, removal is "necessitated by the failure of parents to meet the needs of children." Geiser, *The Shuffled Child and Foster Care*, 10 TRIAL No. 3, 27 (1974).

2. Although the concept of foster family care includes any substitute parenting of a child not one's own, this comment will focus on state-created foster care programs rather than on independent arrangements.

3. See Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 284-85 (1971) (development of foster care). See also Lewis, *Foster Family Care: Has It Fulfilled Its Promise?*, 355 ANNALS - PROGRAMS AND PROBLEMS IN CHILD WELFARE 31 (1964).

4. By the authority of Pennsylvania's Juvenile Act of 1972 (No. 333) PA. STAT. ANN. tit. 11, §§ 50-101 *et seq.* (Purdon 1977), a child may be forcefully removed from his home. See notes 21-24 and accompanying text *infra*.

5. Voluntary agreements are also known as entrustment agreements, and the terms will be used interchangeably in this comment. See notes 25-28 and accompanying text *infra*.

6. In Pennsylvania the goals of foster care are as follows:

- A. The purpose of foster-family care is to provide children with the experiences in family living which are essential to their constructive growth and development when their own parents are unable to provide this.
- B: Foster family care is not intended to supersede parental rights, responsibilities, and relationships but is intended to protect the rights of children.
- C. The agency works with the child, his own family, and the foster family toward the end that the child may be reestablished in his own home when this is feasible or toward the best plan for the welfare of the child.
- D. Foster homes are an extension of the agency, and there should be mutual understanding between the agency and the foster parents regarding the responsibilities each carries in relation to the child in placement and his family.
- E. The agency should have a sufficient number of approved foster homes available so that selection of a home can be related both to the needs of the child and the capacities of the foster parents.

Pa. Dept. of Public Welfare, C & Y MANUAL tit. 4300, § 4302 (1969).

7. *Id.*

presumably best served in his natural home<sup>8</sup> the goal is to return the child as soon as possible.<sup>9</sup> Unfortunately, foster care often becomes long-term placement, including several transfers among foster homes.<sup>10</sup>

When a child remains in a foster home for a long period of time<sup>11</sup> the child and his foster parents often form strong attachments.<sup>12</sup> This is particularly true when the child is placed shortly after birth and his foster parents are the only parents he has known. Because of their emotional bond, foster parents may seek to retain custody when the agency attempts to remove the child from their home.<sup>13</sup> In the past, foster parents' claims to custody were derived solely through their satisfaction of the child's "best interest."<sup>14</sup> Courts have been reluctant to award foster parents custody, especially when the agency intends to return the child to his natural parents who enjoy a strong presumption in their favor.<sup>15</sup> In recent years, however, courts have become more receptive to foster parents' petitions for continued custody.<sup>16</sup> Concurrently, statutory regulations have afforded foster parents more due process protection in preremoval procedures.<sup>17</sup>

A recent, novel appeal for custody was pleaded in *Smith v. Or-*

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8. See 14 DUQ. L. REV. 284 (1976).

9. In Pennsylvania the goals defined in note 6 *supra* have been recently affirmed as follows:

The goals of these social services are to maintain and increase family stability, to keep children in their own families and, when temporary placement out of the home is necessary, to maintain the child's relationship with his/her family and community life while striving to return the child home as soon as possible.

7 PA. BULL. No. 53, at 4039 (Dec. 31, 1977).

10. According to Gioffre, *Report of the Task Group on Rights and Responsibilities of Persons in the Foster Care System* (Jan. 1978), in Pennsylvania the average length of placement for a foster child is 3.5 years. The longer the child remains in foster care, the more likely that the child will be returned to foster care or never re-united with his parents. See 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. 623, 662 (1976), in which the writer states, "While the figures vary from state to state, the available data indicate that between 40 percent and 80 percent of all children presently removed from home by court order are never returned to their parents." See generally Geiser, *supra* note 1; Levine, *Caveat Parens: Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1 (1973).

11. The time period required for an emotional bond to develop depends on the child's age, maturity, and previous foster care experience, among other factors.

12. For an excellent discussion of the psychological ramifications of the foster care relationship, see J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). In particular, these authors explain that the foster parents may come to replace the function of the natural parents in satisfying the child's emotional needs. In this event, the foster parents become the child's "psychological parents."

13. It is noted that there may be other motives such as pity for the child.

14. The "best interests" of the child is a general welfare standard referring to the physical, mental, and moral welfare of the child. See *In re LaRue*, 244 Pa. Super. Ct. 218, 226, 366 A.2d 1271, 1275 (1976) (description and applicability of "best interests" standard).

15. 14 DUQ. L. REV. 284, 288-89 (1976).

16. See, e.g., *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974); see also Note, 36 U. PITT. L. REV. 715 (1975) (discussion of *Stapleton*).

17. See notes 42-49 and accompanying text *infra*.

ganization of *Foster Families for Equality and Reform*,<sup>18</sup> in which foster parents asserted a right, independent of the child's, to protection under the due process clause of the fourteenth amendment. They claimed a liberty interest in the protection of the foster family for which certain procedural safeguards were required. Even though the Supreme Court decided the case on statutory grounds, *Smith* could have an important impact on foster parents' rights. This comment will examine foster parents' emerging rights in the context of Pennsylvania's foster care system. Pennsylvania's statutory and regulatory scheme will be discussed, and foster parents' emerging rights under the due process clause will be analyzed, including a close examination of *Smith* and the cases that construe it. Finally, the potential impact of these developing rights on Pennsylvania's system will be explored.

## II. Pennsylvania's Foster Care System

Foster family care is a state-created and substantially state-funded<sup>19</sup> program of aid to children and their parents, which is coordinated by the Department of Public Welfare<sup>20</sup> but administered on the county level. The parties involved in the child's placement are the foster care agency, the natural parents, and the foster parents.

### A. Removal From Natural Home

A child may be involuntarily or voluntarily removed from his natural parents' custody and placed with the foster care agency. Before the child may be involuntarily removed Pennsylvania's Juvenile Act of 1972 (No. 333) requires a judicial determination that the child is "deprived"<sup>21</sup> and proof of "clear necessity"<sup>22</sup> for the re-

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18. 431 U.S. 816 (1977).

19. The State pays 75% of the costs of foster care and reimburses the county foster care agency for the costs of placement, supervision, and maintenance. Natural parents are expected to support their children in foster homes according to their ability to pay. Federal monies may also be involved through the Aid to Families with Dependent Children Program (AFDC). 7 PA. BULL. No. 53, at 4041, 4050 (Dec. 31, 1977).

20. The Pennsylvania Department of Public Welfare defines foster care as "a social service which provides substitute family life for a planned period of time for a child who has to be separated from his natural or legal parents." Pa. Dep't. of Pub. Welfare, C & Y MANUAL tit. 4300, § 4301 (1969).

21. "Clear and convincing" evidence that the child is "deprived" is required for the child to be involuntarily removed. PA. STAT. ANN. tit. 11, §§ 50-102(4), 50-320(c) (Purdon 1977). Although the statute uses the term "dependent" to include more than deprivation, the courts often employ the statutory definition of dependent when referring to deprived children. A "dependent child" is a child who,

- (i) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals; or
- (ii) has been placed for care or adoption in violation of law; or
- (iii) has been abandoned by his parents, guardian, or other custodian; or

removal.<sup>23</sup> Upon these findings the court will award temporary legal custody of the child to the foster care agency if this would be in the child's best interest.<sup>24</sup> If the parents voluntarily<sup>25</sup> place the child with the agency, they will sign a revocable entrustment agreement<sup>26</sup> that confers legal custody with the agency. Upon the natural parents' revocation the agency must petition the court as in an involuntary removal case and reaffirm its legal custody by court order. Otherwise, it must promptly return the child.<sup>27</sup> The presumption that the child's best interests are served in his natural parents' custody is rebutted only by an adjudication of deprivation. Therefore, when the child is placed pursuant to court order or retained in foster care after a finding of deprivation, the natural parents must prove that their restored custody will enhance the child's welfare. Clearly, it is

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(iv) is without a parent, guardian, or legal custodian; or

(v) while subject to compulsory school attendance is habitually and without justification truant from school.

PA. STAT. ANN. tit. 11, § 50-102(4) (Purdon 1977).

22. In PA. STAT. ANN. tit. 11, §§ 50-101(b)(3), 50-321 (Purdon 1977), the statute refers to "necessary" removal, which has been construed by courts to mean "clear necessity." See note 23 *infra*.

23. See *In re Clouse*, 244 Pa. Super. Ct. 396, 368 A.2d 780 (1976); *In re LaRue*, 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976); *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974); *In re Rinker*, 180 Pa. Super. Ct. 143, 117 A.2d 780 (1955).

24. PA. STAT. ANN. tit. 11, § 50-321(a)(2) (Purdon 1977). State intrusion into the family is predicated upon high judicial standards. As the court explained in *In re Rinker*, 180 Pa. Super. Ct. 143, 148, 117 A.2d 780, 783 (1955),

It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity. Yet, of course, there are cases where such authority must be exercised for the protection and welfare of children.

See also *Milligan v. Davison*, 244 Pa. Super. Ct. 255, 367 A.2d 299 (1976); *In re Custody of Myers*, 242 Pa. Super. Ct. 225, 363 A.2d 1242 (1976); *In re DeSavage*, 241 Pa. Super. Ct. 174, 360 A.2d 237 (1976).

25. See *Levine*, *supra* note 10. The author contends that in many cases "voluntary" transfer of legal custody is really the product of threat, coercion, or misinformation or bias of caseworkers. *Levine* further suggests that caseworkers are often guilty of a "child-rescuing" moralism and of not respecting the rights of natural parents. *Id.* at 16-17.

26. See *Lee v. Child Care Serv. Del. County Inst. Dist.*, 461 Pa. 641, 337 A.2d 586 (1975), (Supreme Court of Pennsylvania upheld voluntary placement agreements as not in violation of natural parents due process rights); see also *In re LaRue*, 244 Pa. Super. Ct. 218, 235, 366 A.2d 1271, 1280 (1976) (Cercone, J., concurring). *In re LaRue* Justice Cercone said,

Entrustment agreements do not 'disrupt' the child-parent relationship; they merely evidence the fact that the parent has decided that the child's interests will best be served, temporarily, by placing him in the custody of CWS [Child Welfare Service]. Entrustment agreements, therefore, offer flexibility to the statutory scheme which requires a deprivation hearing if the natural parents do not consent to placing the child with CWS. Furthermore, since a finding of deprivation has the effect of stigmatizing the natural parent, very often a consensual entrustment agreement of a child will be far less disruptive to the future of a parent-child relationship than a deprivation hearing would be.

*Id.* at 236-37, 366 A.2d at 1280. Cf. *In re LaRue*, 244 Pa. Super. Ct. 218, 237, 366 A.2d 1271, 1281 (1976) (Hoffman, J., dissenting) (entrustment agreements defeat parents' rights to custody). See generally *Geiser*, *supra* note 1, at 27, 29 (deprivation hearings arouse strong feelings of anger, resentment and bitterness in the natural parents, which makes it less likely that the parents will reclaim their children).

27. *In re LaRue*, 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976).

much more difficult for a natural parent to regain custody when his child has been adjudicated deprived.<sup>28</sup>

Throughout these attempts to regain custody, the agency retains legal custody of the child. The natural parent, however, still holds some basic parental rights of consent.<sup>29</sup> In addition, the natural parents are expected to visit the child regularly in the foster home and help the agency with long-term planning for the child.<sup>30</sup>

### *B. Placement with Foster Parents*

After acquiring legal custody the foster care agency attempts quickly to place the child with foster parents who are carefully screened for their compatibility with the child.<sup>31</sup> Foster parents are usually paid for their services, which include daily supervision of the child and provision of adequate food and clothing. The agency, however, maintains ultimate decision-making authority for emergency medical care, change in placement, placement plan objectives, and school curriculum.<sup>32</sup> In addition, the agency maintains some control over the foster parents through its legal right to veto decisions made by foster parents about the child. As a last resort in controlling the foster care relationship, the agency may remove the

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28. The court in *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974), explained that once the child has been adjudicated deprived the standard of "clear necessity" is no longer applicable. The unity of the family has already been destroyed.

29. These include the right to

1. Consent to marriage
2. Consent to enlistment in the armed forces
3. Consent to major medical, surgical, and psychiatric treatment
4. Consent to officially change religious affiliation
5. Consent to obtain a driver's license [and]
6. Consent to enter binding financial agreements, *i.e.*, promissory note for attending higher educational institutions.

Gioffre, *supra* note 10, at 9-10.

30. Unjustified failure to do these things may constitute grounds for involuntary termination of natural parents' rights to their child. PA. STAT. ANN. tit. 1, § 311 (Purdon 1977).

31. For details of selection of foster homes, see Pa. Dep't of Pub. Welfare, C & Y MANUAL tit. 4300, § 4312 (1969). Once the home is selected, the foster agency assigns a caseworker to it who shall,

1. Prepare the foster family for accepting the child into the home.
2. Have regular contacts with the foster parents, at least every two months, and more often when indicated, to assist them in carrying out their responsibilities toward the child.
3. Assist the foster family in understanding and accepting the role of the child's own parents in the child's life.
4. Prepare the foster family for changes in plans for the child.

*Id.* But see Geiser, *supra* note 1, at 35. Geiser states,

There is little or no preparation or support for foster parents. A few meet the child before his placement; the rest do not. Three-quarters of the foster parents don't realize or are completely unaware of the extent of the handicaps of the child who will be placed with them. Only a handful receive any training prior to the child's placement. Foster parents also rarely see a social worker after placement.

32. Gioffre, *supra* note 10, at 18.

child from the foster home if it later determines that the home is unsuitable.<sup>33</sup>

### C. Rights of Foster Parents

Should the agency attempt to remove the child from the foster home, Pennsylvania provides foster parents some due process protection in their relationship with the agency. Unless foster parents voluntarily turn over the child upon the agency's request, in which event their position becomes that of a "mere stranger or volunteer" with no standing,<sup>34</sup> foster parents have statutory authority to contest the agency's decision for removal.<sup>35</sup> Their standing is secured by the Juvenile Act of 1972 (No. 333), which states that "any interested person" may be a party to a custody dispute.<sup>36</sup> In addition to the statutory right to participate in a custody dispute based on the Act, the Attorney General of Pennsylvania has issued an opinion<sup>37</sup> that foster parents have a statutory right to a preremoval hearing based on both local agency law<sup>38</sup> and administrative agency law.<sup>39</sup> Furthermore, foster parents have the right to seek a stay order that enables them to retain custody of the child during the custody proceeding.<sup>40</sup> According to foster care regulations, this right in-

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33. Any agency may seek to relocate the child in another foster home if it determines that relocation would be "appropriate and desirable." Pa. Dep't of Pub. Welfare, C & Y MANUAL tit. 4300, § 4362(B) (1975). No other guidelines are set forth except that the child may be immediately removed to protect him from abuse or neglect. *Id.* § 4361(D). The result of this indefiniteness is that children may be removed for a variety of reasons. It is particularly noteworthy that a child may be removed if the agency determines that the foster parents have become too emotionally attached. See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 818 n.1 (1977).

34. In *Commonwealth ex rel. Ebel v. King*, 162 Pa. Super. Ct. 533, 58 A.2d 484 (1948), foster parents voluntarily relinquished the child to the agency, which planned to transfer the child to another foster home. Then, the fosterparents filed a writ of habeas corpus to regain custody, but the court denied the action. The court said that the foster parents executed the foster care contract by handing over the child, and that the court could not consider the best interests of the child. The foster parents had lost their rights under the contract and had legal rights to custody no better than those of a stranger.

35. Foster parents generally sign a contract with the foster care agency agreeing not to try to obtain adoption or guardianship. As the court said in *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 381, 324 A.2d 562, 568 (1974), such a contract is "voidable by the courts when the best interests of the child conflict with it." See *Commonwealth ex rel. Children's Aid Soc'y v. Gard*, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949); *Commonwealth ex rel. Bankert v. Children's Servs.*, 224 Pa. Super. Ct. 556, 307 A.2d 411 (1973); *Commonwealth ex rel. Berg v. Catholic Bureau*, 167 Pa. Super. Ct. 514, 76 A.2d 427 (1950); XV WILLISTON, CONTRACTS § 1744A (1972); see also *In re Custody of Rosenthal*, 103 Pa. Super. Ct. 27, 157 A. 342 (1931) (relationship of parent and child is a status, not a property right). See generally Levin, *supra* note 10.

36. PA. STAT. ANN. tit. 11, §§ 50-302, 50-314 (Purdon 1977). See *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974); cf. *Ciammaichella Appeal*, 369 Pa. 278, 85 A.2d 406 (1952) (in action brought by natural parents against the agency, foster parents were allowed to intervene and litigate at all stages of the proceedings).

37. 4 PA. BULL. No. 27, at 1334-1335 (June 29, 1974).

38. PA. STAT. ANN. tit. 53, § 11302 *et seq.* (Purdon 1977).

39. PA. STAT. ANN. tit. 71, §§ 1710.1 *et seq.* (Purdon 1977).

40. The court in *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371,

cludes retention pending appeal.<sup>41</sup>

In 1975 the Department of Public Welfare published amendments to foster care regulations that more clearly define foster parents' due process protections in custody disputes and their rights during the foster care experience.<sup>42</sup> First, no child may be placed in foster care unless a written agreement is executed between the agency and the foster parents that details plans for the child while in foster care.<sup>43</sup> Second, foster parents must be notified of the agency's intent to relocate the child.<sup>44</sup> Third, foster parents are entitled to an informal preremoval hearing upon request, at which they may be accompanied by a "spokesman of their choice."<sup>45</sup> The burden of proof at the hearing "shall be upon the agency to establish that the proposed relocation is the least detrimental long-term placement alternative."<sup>46</sup> Last, foster parents may appeal the agency's decision.<sup>47</sup> They have a right to paid legal counsel, to retain custody of the child pending appeal,<sup>48</sup> and to a further appeal to the Common-

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384-85, 324 A.2d 562, 569 (1974), condoned the foster parents' action to obtain a stay order and said,

[T]he Stapletons' decision to seek a legal determination of their status with respect to Brent [the foster child] by filing a petition under the Juvenile Act, in the meantime obtaining a stay order enabling them to retain custody of him, was a responsible course of action, which the courts should encourage rather than discourage.

41. Pa. Dep't of Pub. Welfare, C & Y MANUAL tit. 4300, § 4363(B)(4) (1975).

42. *Id.* §§ 4360 *et seq.* (1975).

43. A. No child shall be placed in foster family care by the agency unless:

1. Such placement is based on a written plan consented to by the foster parents and agency. The child, natural parents, and other interested parties shall be involved in the planning process. Such plan shall include but not be limited to:

Reasons for placement.

Anticipated length of placement.

Health care for the child.

Social and education needs for the child.

Plan for visiting.

Plan for supervision of placement.

Mechanism for the revision of plan as needed.

Terms of reimbursement.

*Id.* § 4361(A)(1) (1975).

44. When an agency determines that it would be appropriate and desirable to relocate a child in foster family care, in addition to established casework practice, the agency shall inform the foster parents by certified mail, return receipt requested. Such notice of agency intention shall be by means of a letter prescribed by the Department. . . . This letter notifying foster parents of the intention to relocate and of their opportunity for prior hearing shall be sent on agency stationery. . . . Failure to request a hearing will constitute a waiver of any rights pursuant to these regulations.

*Id.* § 4362(B) (1975).

45. For the complete hearing procedure see *id.* § 4363 (1975).

46. *Id.* § 4363(A) (1975). By this choice of words, "least detrimental alternative," the State may be recognizing that this is a more realistic standard than serving the child's "best interest," because the child's separation from the foster home will likely be traumatic for all involved.

47. Pa. Dep't of Pub. Welfare, C & Y MANUAL tit. 4300, § 4363(C) (1975).

48. *Id.* By allowing the child to remain with the foster parents pending appeal, the State is recognizing the child's need for a stable environment. In *Sartoph v. Sartoph*, 31 Md. App. 58, 67, 354 A.2d 467, 473 (1976), the court explained,

The custody of children should not be disturbed unless there is some strong rea-



wealth Court.<sup>49</sup>

These regulations are intended to protect the foster parents as representatives of the child's interest. Foster parents' expanding rights under the statutory system are unmistakably derivative.<sup>50</sup>

#### D. Derivative Custodial Rights of Foster Parents

While the child is in foster care, foster parents become his de facto parents.<sup>51</sup> Particularly in long-term placements, foster parents may also become his "psychological parents,"<sup>52</sup> replacing the natural parents in satisfying the child's emotional needs. In a custody dispute between natural and foster parents the court will consider this emotional attachment only when a determination was made that the child was deprived.<sup>53</sup> Otherwise, the child must be returned to his natural parents without regard to his relationship with the foster parents.<sup>54</sup>

Determining whose custody would best serve the child's welfare is a delicate, difficult decision. The best interest of the child is not determined by whom would provide the child the "better" home or the more financially secure life.<sup>55</sup> As the court explained in *In re*

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son affecting the welfare of the child. To justify a change in custody, a change in conditions must have occurred which affects the welfare of the child and not of the parents. The reason for this rule is that the stability provided by the continuation of a successful relationship with a parent who has been in day to day contact with a child generally far outweighs any alleged advantage which might accrue to the child as a result of a custodial change. In short, when all goes well with children, stability, not change, is in their best interests.

*See note 66 infra.*

49. Pa. Dep't of Pub. Welfare, C & Y MANUAL tit. 4300, § 4363(C)(3) (1975). *See note 45 and accompanying text supra.*

50. Courts, however, have recognized that custody with the foster parents may serve the child's best interest. *See, e.g., Commonwealth ex rel. Children's Aid Soc'y v. Gard*, 362 Pa. 85, 66 A.2d 300 (1947); *Commonwealth ex rel. Bankert v. Children's Servs.*, 224 Pa. Super. Ct. 556, 307 A.2d 411 (1973).

51. In *D'Auria v. Liposky*, 197 Pa. Super. Ct. 271, 177 A.2d 133 (1962), the court ordered a new trial because there was some evidence, which had not been considered by the lower court, that would support a finding that the foster parents stood *in loco parentis* to the child. In this case the foster child was suing the foster parents for money she alleged her foster parents were saving for her. The court said,

While it does not appear that any of our decisions expressly sanction finding a relationship *in loco parentis* between foster parent and foster child, there is nothing in our case which indicates that such a relationship could not arise, particularly in a case where the foster parent has assumed or incurred substantial financial obligations in raising the child.

197 Pa. Super. Ct. at 278-79, 177 A.2d at 136. *See Commonwealth v. Cameron*, 197 Pa. Super. Ct. 403, 179 A.2d 270 (1962) (one standing *in loco parentis* to a minor child has the same rights and responsibilities as between natural parent and child).

If foster parents successfully asserted the status of being *in loco parentis* to the foster child, they theoretically would have the same rights to custody that the natural parents had.

52. "Psychological parent" is a term referring to the person who satisfies a child's emotional needs for warmth, love, and security. *See note 12 supra.*

53. *See notes 21-28 and accompanying text supra.*

54. *Id.*

55. In *Commonwealth ex rel. Grillo v. Shuster*, 226 Pa. Super. Ct. 229, 312 A.2d 58 (1973) (custody dispute between the natural parents), the court affirmed the principle that the relative wealth of the parties is irrelevant so long as the child is raised in a "decent manner."

A child cannot be declared 'neglected' merely because his condition might be improved by changing his parents. The welfare of many children might be served by taking them from their homes and placing them in what the officials might consider a better home. But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.<sup>57</sup>

Courts, however, are guided by the legislative statement of purpose in the Juvenile Act, which declares that the court should preserve the family unit when possible,<sup>58</sup> but must protect the physical, mental, and moral development of the child.<sup>59</sup> Thus, the custody determination is likely to be a subjective judgment.<sup>60</sup>

In reaching a custody decision, Pennsylvania courts have increasingly recognized that the child's best interest is served by custody with the psychological parent, who is frequently the foster parent.<sup>61</sup> These courts have determined that the "presumption in favor of the natural parents may weaken with the passage of time."<sup>62</sup> *In re John F.*<sup>63</sup> exemplifies judicial recognition of the foster parents' important role in the child's life. In this case several children of the natural family were placed in different foster homes pursuant to a neglect determination. After many years of continuous foster care,

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56. 180 Pa. Super. Ct. 143, 148, 117 A.2d 780, 783 (1955).

57. *Id.* at 148, 117 A.2d at 783.

58. PA. STAT. ANN. tit. 11, § 50-101 (Purdon 1977).

59. *Id.* § 50-321 (Purdon 1977).

60. For a discussion of the court's considerations see *In re LaRue*, 244 Pa. Super. Ct. 218, 229, 366 A.2d 1271, 1276 (1976); See also *Auman v. Eash*, 228 Pa. Super. Ct. 242, 323 A.2d 94 (1974). Compare the dissent in *In re LaRue*, 244 Pa. Super. Ct. 218, 252-53, 366 A.2d 1271, 1288-89 (1976) (Hoffman, J., dissenting) in which Justice Hoffman said that the court must consider many factors in determining whether there are compelling reasons to continue foster care including the following:

"facts and circumstances surrounding the [entrustment] agreement to determine if the parents' rights to custody had been abused"; "efforts of the parents to preserve a relationship with their child"; "effect of continued foster care on a child"; and "comparative ability of the two sets of parents to meet the physical, mental and emotional needs of the child."

61. In *Commonwealth v. Gard*, 362 Pa. 85, 66 A.2d 300 (1949), the court, taking the child's viewpoint, compared the removal of the foster child from an emotionally secure home to kidnapping. The court in *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974), held similar views. In *In re Clouse*, 244 Pa. Super. Ct. 396, 368 A.2d 780 (1976), the court found that the child's best interest would be served by continued foster care because the probability of the mother being able to care for the child was so uncertain. See also *In re Adoption of R.I.*, 468 Pa. 287, 361 A.2d 294 (1976) (court granted foster parents' petition to terminate the natural parents rights to permit foster parents to adopt child); *Commonwealth ex rel. Donie v. Ferree*, 175 Pa. Super. Ct. 586, 106 A.2d 681 (1954) (best interests of child served in custody of foster parents rather than with grandmother).

62. *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 390, 324 A.2d 562, 572 (1974).

63. 125 P.L.J. 67 (1977).

in each home the natural mother petitioned for custody feeling she was now able to care for them. The court found that although the natural mother was able to provide proper care for the children, her custody would not benefit them. Therefore, the court refused to disturb the excellent parent-child relationships that had developed between the children and their foster parents.

This analysis openly recognizes the importance of maintaining the child's relationship with the parent who best satisfies the child's emotional needs. The court explained the application of the best interests test<sup>64</sup> thus,

Initially, the Court shall determine whether the child has developed a substitute parent-child relationship with the third party with whom the child is placed. In making this determination, the existing relationship between the natural parent and the child shall be extremely relevant.

If it is determined that no substitute parent/child relationship has developed, the child shall be returned to the natural parent unless compelling reasons exist for keeping the child outside the home.

On the other hand, if it is determined that a substitute parent/child relationship has developed, the natural parent's claim shall be denied unless the natural parent establishes that the child's return will promote the child's best interest. In such a situation, the Court shall apply no presumption in favor of the natural parent.<sup>65</sup>

Under this approach the natural parent's traditional rights are protected only until a substitute parent-child relationship develops between the child and foster parent. The court believed that in foster care, the child's interest *requires* placement with one who will become the psychological parent, and that this relationship should be encouraged, protected, and allowed to develop.<sup>66</sup>

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64. The best interests test requires a determination of whose custody would best enhance the child's welfare. For a discussion of "best interests" and when this test is applicable, see notes 14, 21-28 *supra*.

This case dealt with children who had been placed in foster care pursuant to a determination of deprivation. The court contended that if the children had been voluntarily placed, the best interests test would still be applicable. The court relied on *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974), for the proposition that the "clear necessity" standard of deprivation cases applies only to the situation in which the court is asked to disrupt an existing natural parent/child relationship. 125 P.L.J. 67, 74 (1977).

This conclusion is clearly contrary to the decision in *In re LaRue*, 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976), in which the court held that the "clear necessity" test applies in custody disputes subsequent to the natural parents' voluntarily placing the child in foster care. *In re LaRue* was decided six days prior to *In re John F.* and it is possible that the latter court had not yet been advised of the higher court's determination.

65. 125 P.L.J. 67, 70 (1977) (emphasis added).

66. The court wanted to maximize "the child's opportunities for maintaining a continuous relationship with one adult." *Id.* at 71. Furthermore, the court noted that "substantial harm is presumed to arise from a child's removal from a good environment in which he or she has resided for a lengthy time . . . ." *Id.* at 70.

Other states have recognized the importance of the psychological parents. In New York, for example, the Court of Appeals in *Bennett v. Marrow*,—App. Div. 2d—, 399 N.Y.S.2d 697 (1977) *aff'g*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976), affirmed the lower

Foster parents' rights are expanding and are given a higher priority in custody disputes.<sup>67</sup> Nevertheless, this expanding recognition is constrained by a statutory and regulatory scheme in which foster parents continue to derive their standing solely through the child's interest.<sup>68</sup>

### III. Emerging Independent Rights of Foster Parents

In addition to statutorily protected rights that are derived from the child's interest, foster parents have asserted an *independent* right to due process protection. They claim a "liberty interest"<sup>69</sup> in the integrity of the foster family, which qualifies for protection under the due process clause of the fourteenth amendment. This right must be examined in light of due process requirements and the impact of

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court's award of custody to the foster mother rather than to the natural mother. The court found that although the natural mother was able to provide the child with necessities, she was unable to provide the child with needed emotional support. During the eight year custody span, the foster mother had become the child's psychological parent, and their separation was held to be potentially detrimental to the child. See Wald, *supra* note 10, at 667-68. Wald states,

It is claimed that children are injured in three ways unless they are guaranteed stable placements. First, each time a child is separated attachments may be broken generating insecurity and an inability to form future attachments. The inability to form attachments may permanently impair a child's ability to form love relationships. Second, subjecting children to multiple placements destroys continuities that are important to the child's development. For example, with each new placement a child must adjust to new adult expectations about appropriate behavior, a new physical environment and perhaps a new 'sibling,' peers, school, etc. Third, a child left in foster care without a permanent home may be psychologically damaged by her uncertain status. This may retard her socialization and cognitive development.

*Id.*; see note 48 *supra*.

67. *But see In re Johnson*, 86 Ariz. 297, 345 P.2d 423 (1959) (when the court changed a dependency finding no notice to foster parents was necessary, nor could foster parents present evidence), *Roussel v. State*, 274 A.2d 909 (Me. 1971) (court denied foster parents the right to keep the child in their home pending the hearing to contest the custody decision because otherwise the efficient administration of the foster care system would be jeopardized).

Some states, however, are attempting to expand the rights and responsibilities of their foster parents. For example, in California a bill was introduced that would authorize persons licensed to provide foster care to consent legally to their foster child's ordinary medical and dental care, participation in various school related activity, and joining and participating in community oriented groups. Calif. AB 937 (Young). In Iowa, a bill was introduced that would make foster parents liable for the torts of their foster children. Iowa SF 2031 (Kelly).

68. In *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), the court said,

Particularly rejected is the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child. Third party custodians acquire "rights"—really the opportunity to be heard—only derivatively by virtue of the child's interests being considered, a consideration which arises only after, as the cases have always held, the parent's rights and responsibilities have been displaced.

69. A "liberty interest" is a constitutionally protected right to liberty. Liberty is not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See also *Meachum v. Fano*, 427 U.S. 215 (1976).

*Smith v. Organization of Foster Families for Equality and Reform*,<sup>70</sup> a key case in the area.

### A. Due Process Standards of Review

The due process clause of the fourteenth amendment prohibits states from depriving persons "of life, liberty, or property without due process of law." This guaranty demands both procedural and substantive protection from arbitrary state action.<sup>71</sup>

Although substantive due process requires that state laws do not offend basic concepts of liberty and justice,<sup>72</sup> satisfaction of substantive due process requirements depends on the nature of the deprivation involved. If the state law infringes on a fundamental interest<sup>73</sup> or is based on a suspect classification,<sup>74</sup> a strict scrutiny test is employed to determine if this deprivation is justified by a compelling state interest.<sup>75</sup> If the law infringes on a protected interest that is neither a fundamental interest nor the basis of a suspect classification, the deprivation need only be rationally related to a legitimate goal of government.<sup>76</sup>

To make a claim of deprivation of procedural due process, one must demonstrate both the denial of a protected interest and the constitutional inadequacy of the procedures used to deny the interest.<sup>77</sup> Whether a protected interest is derived from constitutional guarantees<sup>78</sup> or state law,<sup>79</sup> procedural safeguards are required for its termi-

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70. 431 U.S. 816 (1977).

71. See generally Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689 (1977); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

Substantive due process guarantees that protected interests may not be contravened without adequate justification. Procedural due process, on the other hand, guarantees that protected interests may not be denied without fair procedures, which are generally understood to be notice and opportunity to be heard. The Court in *Bodie v. Connecticut*, 401 U.S. 371 (1971) said that before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing. *Id.* at 379. The hearing required, however, is only one "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

72. See *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Powell v. Alabama*, 287 U.S. 45, 67 (1932). See also *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969). Substantive due process protects those interests that have been incorporated from the first eight amendments in the fourteenth, see, e.g., *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (first amendment rights) and those that have been inferred from the Bill of Rights. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Lochner v. New York*, 198 U.S. 45 (1905) (right to contract).

73. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

74. Suspect classifications include discrimination based on race, alienage, and legitimacy.

75. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

76. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955).

77. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). See also *Eubanks v. Clarke*, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977) (due process violations in transferring mental patients from low security institutions to high security institutions).

78. These include express and inferred rights. See note 72 *supra*.

79. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that termination of state-

nation. To determine whether an interest is constitutionally protected, one "must look not to the 'weight,' but rather to the *nature* of the interest at stake."<sup>80</sup> Due process is flexible, however, in the kinds of safeguards required to protect these interests once the interests are found.<sup>81</sup> No definite rule exists on what procedures are required.<sup>82</sup> Rather, the Court uses a balancing test to make this determination by weighing the private interests at stake, the likelihood of erroneous deprivation under the present system and the probable value of additional procedures, and the Government interest.<sup>83</sup>

Since foster parents have alleged a liberty interest to obtain increased procedural protection in custody disputes, the nature of their interest must be within the interests protected by the fourteenth amendment.<sup>84</sup> In addition, the necessity of additional safeguards to protect this interest must be demonstrated. The balancing test is applied by weighing the child's interest in a stable and emotionally satisfying environment, the foster parents' interest in satisfaction of their own and the child's emotional needs, and the Government's interest in the preservation of the foster care system and in administrative convenience. Finally, the value and utility of additional procedural safeguards must be considered. The balance of these interests will focus on the quality of the emotional bond in each fos-

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created benefits was subject to due process constraints. Although the state was not required to extend the benefits, once it did, the grantee's entitlement to the benefits was protected by the due process clause. *See, e.g., Perry v. Sinderman*, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). *But see Meachum v. Fano*, 427 U.S. 215 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976) (if government creates the interest, it can define the scope of procedural protection that is required for termination of this interest).

80. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972) (Court found no hearing was required prior to "non-renewal of a nontenured state teacher's contract"). *See also Fuentes v. Shevin*, 407 U.S. 67 (1972).

Whereas interests "important" to the individual were once enough to implicate the due process clause, *Bell v. Burson*, 402 U.S. 535 (1971), the Court now requires that the nature of the interest be within the confines of the fourteenth amendment. *E.g., Meachum v. Fano*, 427 U.S. 215 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

81. To say that the concept of due process is inflexible does not mean that judges are no longer to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedures. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). Thus, due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (informal hearing was required by due process clause before the state could revoke parole).

82. Cases in which the Court has applied this balancing test include, for example, *Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

83. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

84. The importance of the foster parents' interest in the foster family to themselves and to the foster child is not a determining factor.

ter parent/child relationship, for it is this bond that gives rise to the liberty interest in the foster family. Therefore, whether foster families have a liberty interest requiring added protection must be determined case by case.

*B. Smith v. Organization of Foster Families for Equality and Reform*<sup>85</sup>

In *Smith* foster parents asserted a liberty interest<sup>86</sup> in the continuance of the foster family. They alleged that New York's hearing procedures for termination of foster care afforded them insufficient due process protection of their right to family privacy.<sup>87</sup> Basically, New York's procedures provided foster parents ten days advance notice of removal, a preremoval conference with the agency upon request and, subsequent to this conference, a full adversary administrative hearing, subject to judicial review, with no stay or removal pending the hearing and judicial review.<sup>88</sup> A three judge district court granted the foster parents declaratory and injunctive relief, and state and city officials appealed.<sup>89</sup> On appeal the Supreme Court reversed, finding that whatever interest foster parents have, these procedures were adequate to satisfy any due process protection required.<sup>90</sup> This failure to reach the constitutional issue is unfortunate, for its resolution is pivotal in determining the exist-

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85. 431 U.S. 816 (1977).

86. See note 69 *supra* for a definition of liberty interest. In the lower court, 418 F. Supp. 277 (S.D.N.Y. 1976) (three judge court), foster parents also alleged a property interest in the foster family, which they did not raise on appeal. If it had been considered, it is unlikely that the court would have found such an interest to exist. Parents have no property interest in children in the constitutional sense. See *Commonwealth v. Kraus*, 185 Pa. Super. Ct. 167, 138 A.2d 225 (1958). Furthermore, children are "persons" within the meaning of the fourteenth amendment and are entitled to due process protection. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967).

87. For discussion of the right to family privacy, see notes 97-100 and accompanying text *infra*.

88. For details of the New York removal procedure, see N.Y. Soc. Serv. L. §§ 383(2), 400, and 450.10 (McKinney 1976).

89. *Organization of Foster Families for Equality and Reform v. Dumpson*, 418 F. Supp. 277 (S.D.N.Y. 1976) (three judge court).

90. The Supreme Court endeavors to reach a decision on the narrowest grounds possible. See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). In *Smith*, the Court said,

As this discussion suggests, appellee's claim to a constitutionally protected liberty interest raises complex and moral questions. It is unnecessary for us to resolve those questions definitively in this case, however, for like the District Court, we conclude that 'narrower grounds exist to support' our reversal. We are persuaded that, even on the assumption that appellees have a protected 'liberty interest,' the District Court erred in holding that the preremoval procedures presently employed by the State are constitutionally defective.

431 U.S. 816, 847 (1977).

Interestingly, the concurring opinion did not agree with the majority's cautious approach toward the liberty issue and said, "Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects." *Id.* at 857-58 (Stewart, J., concurring).

ence of a right in the foster parent independent of the child's. The Court's analysis of the issue, however, is instructive.

The Court discussed two possible liberty interests of the foster family<sup>91</sup>—the right “to be heard before being condemned to suffer grievous loss”<sup>92</sup> and the “right to family privacy.”<sup>93</sup> Both of these rights have been protected by the fourteenth amendment in other contexts.<sup>94</sup> Although the lower court found New York's procedures constitutionally inadequate because disruption of a needed stable relationship between the foster parent and child might constitute grievous loss and, therefore, require due process protection,<sup>95</sup> the Supreme Court summarily rejected this reasoning. Rather, the Court determined that such a finding of grievous loss did not, “in and of itself, implicate the due process guarantee.”<sup>96</sup> Even though

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91. The Court found that the foster parents had standing to assert either interest. Under the grievous loss theory they were representing the child's right even though the child was represented by independent counsel (who denied that children had the right to avoid grievous loss). The Court noted that one may not ordinarily assert the “rights of another, himself a party in the litigation; the third party himself can decide how best to protect his interests.” 431 U.S. 816, 841 n.44 (1977). See *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Tileston v. Ullmar*, 318 U.S. 44, 46 (1943). See generally *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953). The Court, however, found that although appointed counsel was necessary to represent children since they often lack the capacity to protect their interests, appointed counsel is not their sole representative. Foster parents have “sufficient attributes of guardianship that their views on the right of the children should at least be heard, and hence, should be accorded standing.” 431 U.S. 816, 842 n.44 (1977). As to foster parents' standing under the family privacy theory, the Court said, “There can be, of course, no doubt of appellees' standing to assert this interest, which, to whatever extent it exists, belongs to the foster parents as much as to the foster children.” *Id.* at 842 n.45.

92. 431 U.S. 816, 840 (1977). See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring). See notes 94-95 and accompanying text *infra*.

93. 431 U.S. 816, 842 (1977). See notes 99-100 and accompanying text *infra*.

94. *E.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (grievous loss theory). See also *Meachum v. Fano*, 427 U.S. 215 (1976).

For cases in which the Court has afforded families substantive due process protection see, *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). For cases in which families have received procedural protection see, *e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *May v. Anderson*, 345 U.S. 528 (1953).

95. 418 F. Supp. 277, 282 (S.D.N.Y. 1976) (three judge court).

96. 431 U.S. 816, 840 (1977). The Court relied on *Meachum v. Fano*, 427 U.S. 215, 224 (1976), in which the Court said,

We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .

Similarly, we cannot agree that any change in the conditions of [a prisoner's] confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protection of the Due Process Clause.

In this case prisoners alleged a due process right to a pretransfer hearing when they were reassigned to less desirable prisons. The Court found that a criminal conviction meeting constitutional standards deprived a prisoner of his liberty interest. The Court in *Smith* apparently recognized no distinction between a prisoner's rights and the foster child's rights. But surely assignment to foster care does not extinguish the child's liberty interest. See *C.V.C. v. Superior Ct.*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973) (grievous loss theory entitled



the Court held the grievous loss theory to be inapplicable to foster families, it conceded that the right to family privacy might apply.<sup>97</sup>

This latter interest of family privacy has long been recognized by the Supreme Court as a liberty interest requiring due process protection.<sup>98</sup> Many aspects of family life have been protected in this manner<sup>99</sup> since, generally, there exists a "private realm of family life which the state cannot enter."<sup>100</sup> The issue addressed by the Court, therefore, was whether the nature of the relationship between the foster parent and child was sufficiently analogous to the concept of "family" already protected to qualify for similar protection.<sup>101</sup>

Although this Court did not resolve the issue, it noted several similarities and distinctions between natural and foster families. It recognized that although the concept of family was usually<sup>102</sup> understood as a biological relationship, the real importance of the family is in the emotional attachments and socializing functions.<sup>103</sup> Since the foster family may provide both, the Court could not dismiss the fos-

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preadoptive parents to procedural due-process). See generally Pearlman, *Foster Parents' Rights in Connecticut*, 5 CONN. L. REV. 36 (1972) (grievous loss theory applied to foster parents); Comment, *The Foster Parents Dilemma "who can I Turn to When Somebody Needs Me?"*, 11 SAN DIEGO L. REV. 376, 404-05 (1974) (comparison of rights of preadoptive parents and foster parents).

97. 431 U.S. 816, 842 (1977). Another claim for foster parents' liberty interest arises under the justifiable expectation theory. The Court has found that a liberty interest can arise when one has a justifiable expectation based on state law. *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976). See also *Saunders v. Packel*, 436 F. Supp. 618 (E.D. Pa. 1977); *Eubanks v. Packel*, 434 F. Supp. 1022 (E.D. Pa. 1977).

The lower court, 418 F. Supp. 277 (S.D.N.Y. 1976) (three judge court), held that foster parents had no justifiable expectation that foster placement would continue indefinitely. Foster parents are aware from the outset that placement is intended to be temporary, and the potential for placement to last several years was not persuasive. According to *Perry v. Sinderman*, 408 U.S. 593, 603 (1972), "mere subjective 'expectancy'" is not protected by procedural due process.

98. See cases cited in note 93 *supra*.

99. *E.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (freedom of personal choice in family matters); *Roe v. Wade*, 410 U.S. 113 (1973) (procreation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

100. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

101. 431 U.S. 816, 842 (1977). The Court stated, however, "recognition of a liberty interest in foster families for purposes of procedural protections of the Due Process Clause would not necessarily require that foster families be treated as fully equivalent to biological families for purposes of substantive due process review." *Id.* at 842 n.48.

102. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Marriage and adoption, however, are two examples of relationships that are protected as "families" and yet are not based on blood relationships. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marriage relationship protected by right of privacy). See also *Loving v. Virginia*, 388 U.S. 1 (1967).

103. The Court said,

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship.

431 U.S. 816, 844 (1977).

ter family as a collection of unrelated individuals.<sup>104</sup> Essentially, the Court incorporated the role of psychological parent in the concept of the family.<sup>105</sup>

The Court made two important distinctions between the foster family and the natural family. First, according to the Court, the natural family derives its traditional liberty interest in family privacy from "intrinsic human rights."<sup>106</sup> The foster family, however, asserts a liberty interest derived from a state-created contractual relationship.<sup>107</sup> While this did not defeat their claim, the Court reasoned that it was appropriate to measure foster parents' liberty interest by the degree the state recognized their rights. Since New York accorded their foster parents limited recognition, the Court would not consider "any but the most limited constitutional 'liberty' in the foster family."<sup>108</sup>

This approach, which necessitates a state by state examination to determine which states confer a liberty interest to their foster parents, seems reasonable only at first glance. A constitutionally protected right in the "family" should not be so arbitrarily determined and protected. Instead, the Court should have found that all foster parents who have a sufficiently natural, parent-like relationship with their foster child have a liberty interest. The degree of protection required to safeguard this interest, rather than recognition of the existence of the interest, would vary with the extent of state recognition of foster parents' rights.

The second distinction made between the foster family and the natural family was that the natural family's rights to family unity are superior to those of the foster family.<sup>109</sup> Although the natural par-

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104. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning ordinance that prevented more than two unrelated individuals to live together held constitutional).

105. The Court noted,

[T]his case turns not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.

431 U.S. 816, 845 n.52 (1977).

106. 431 U.S. 816, 845 (1977). See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). See also *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

107. According to the Court, however, "liberty interests may in some cases arise from positive law sources. . . ." 431 U.S. 816, 845 (1977). In *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974), for example, the Court recognized that

the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State-created right is not arbitrarily abrogated.

See note 79 *supra*.

108. 431 U.S. 816, 846 (1977).

109. It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have

ent may possess a greater liberty interest than does the foster parent, this does not mean that the foster family lacks *any* liberty interest.<sup>110</sup> Actually, the Court's reasoning suggests that the liberty interest of the foster family may be more significant in custody disputes in which the natural parent is not a party. Since many custody disputes concern transfer of the child to another foster home, the existing foster parent's liberty interest *should* be superior to the interests of the prospective foster parents.

Even if foster parents had a protected liberty interest, the Court found that New York's state and city preremoval procedures provide sufficient due process protection.<sup>111</sup> The Court determined that *automatic* preremoval hearings were unnecessary because the Court believed that foster parents who did not request a hearing presumably did not experience the strong emotional attachment to their foster child that gives rise to the liberty interest in the first place.<sup>112</sup> Moreover, the Court upheld the procedures even though the natural parents and the foster child were not parties to hearings that reviewed plans to transfer the child to another home.<sup>113</sup> In addition, the Court upheld a city procedure that did not extend hearing rights to the foster parents when the child was to be returned to his natural parents.<sup>114</sup> This resulted from a finding that "whatever liberty interest may be argued to exist in the foster family is significantly weaker in the case of removals preceding return to the natural parent, and the balance of due process interests must accordingly be different."<sup>115</sup>

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freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

*Id.* at 846-47 (citations omitted).

110. See Note, *Preadoptive Parents—Right to Due Process Hearing Prior to Custody Termination*, 40 Mo. L. Rev. 380 (1975) (an interest that would normally qualify for due process protection does not lose that protection because the interest is incomplete, imperfect or lacks certain elements). See also *Goss v. Lopez*, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

111. See note 88 *supra*. City procedures are similar.

112. 431 U.S. 816, 850-51 (1977).

113. *Id.* at 851-52.

114. *Id.* at 853.

115. *Id.* "[A] State does not violate the Due Process Clause by providing alternatives or additional procedures beyond what the Constitution requires." *Id.* at 853. Also, the Court upheld a state requirement that the child live with the foster parent at least 18 months before the foster parent was entitled to a preremoval judicial hearing. The Court stated,

If New York sees 18 months rather than 12 as the time which temporary foster care begins to turn into a more permanent and family like setting requiring procedural protection and/or judicial inquiry into the propriety of continuing foster care, it would take far more than this record provides to justify a finding of constitutional infirmity in New York's choice.

### C. *Judicial Interpretation of Smith*

At least two courts have construed *Smith*. Neither court, however, found that foster parents have a due process right protected by the fourteenth amendment.

In *Drummond v. Fulton County Department of Family and Children's Services*,<sup>116</sup> foster parents appealed the agency's rejection of their application for adoption of their foster child. The foster parents were white and the child was of mixed heritage. The foster parents claimed that the agency falsely used race as a criteria in rejecting their application,<sup>117</sup> and they asserted a liberty interest in the continuance of their foster family.<sup>118</sup> The Fifth Circuit Court of Appeals, however, found that there was no such interest in this case.<sup>119</sup>

Employing the reasoning of *Smith*, the court determined that the process through which foster parents are selected in Georgia did not give rise to a liberty interest in the foster family. Whereas Georgia selected its adoptive parents on the basis of the quality of permanent care they would give the child, it selected foster parents only in terms of the quality of temporary care they would provide.<sup>120</sup> Hence, Georgia considered the foster care relationship temporary from its beginning. Furthermore, the court reasoned that foster parents had no justifiable expectation that the relationship would continue undisturbed under Georgia's foster care system.<sup>121</sup> Finally, the court stated that foster parents could not have a "true" liberty right, because their interests flowed from repealable state laws rather than from inherent human rights.<sup>122</sup> Although this analysis would also ex-

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*Id.* at 854-55.

116. 563 F.2d 1200 (5th Cir. 1977).

117. The court found that race is a relevant factor in the adoption decision if not used to discriminate, and its use as a factor was not unconstitutional. *Id.* at 1204. See also, *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977); *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972) (three judge court).

118. The Drummonds also asserted a liberty interest based on a "stigma to their reputation alleged to accrue upon the rejection by the agency of the application to adopt Timmy." 563 F.2d 1200, 1206 (5th Cir. 1977). The court rejected this argument.

119. *Id.*

120. The goal when selecting adoptive parents is "to duplicate the relationship that most persons have with their natural parents during their entire lives." *Id.* Foster parents, however, are selected "only on the basis of the quality of temporary care they can be expected to provide." *Id.* at 1207.

121. *Id.* See note 97 *supra*. Moreover, the court found that the child had no personal liberty right to a "stable environment." 563 F.2d 1200, 1208 (5th Cir. 1977).

122. True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights they have a more stable source in our notion of intrinsic human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it.

*Id.* at 1207. See *Bishop v. Wood*, 426 U.S. 341 (1976); note 79 *supra*.

clude adoptive parents from having a liberty interest since adoption is a state-created relationship, parenthood by adoption is accorded the legal status of natural parenthood.<sup>123</sup> Nevertheless, the court found that Georgia's procedures, which offered foster parents virtually no due process protection, were constitutionally adequate.<sup>124</sup>

Another case that relied on *Smith* is *In Matter of Louis F.*,<sup>125</sup> in which foster parents had initiated a foster care review proceeding to free their foster child for adoption. In this dispute with the natural parent, the foster parents had been denied access through prehearing disclosure to confidential agency reports regarding the foster child and natural mother. The court affirmed this decision because it believed that foster parents' interests were adequately protected when the availability of the records was premised upon both proof of necessity and prior screening by the court.<sup>126</sup> The rights of natural parents were thereby protected by "encouraging open communication"<sup>127</sup> with the agency and by not allowing third parties to "acquire some sort of squater's rights to another's child."<sup>128</sup>

#### IV. Effects of Constitutional Claim on the Pennsylvania System

In Pennsylvania foster parents' rights have not been considered in a constitutional framework. Comparison with the Court's analysis of New York's system in *Smith* is instructive on the issue. Pennsylvania has recognized, as did the Supreme Court, that foster families may function like natural families in providing a child with necessary emotional support and socialization.<sup>129</sup> Therefore, like the Supreme Court, Pennsylvania does not dismiss foster families as a mere collection of unrelated individuals. Rather, the state respects the interests of foster families by providing a statutory and regulatory scheme whereby foster parents enjoy certain rights with respect to the child.<sup>130</sup>

As previously discussed, *Smith* suggests that the existence of foster parents' liberty interest in that State<sup>131</sup> is strongly related to the existence of such provisions. Pennsylvania's procedures safeguard foster parents' interests to an even greater extent than do New York's.<sup>132</sup> Procedural similarities in the two systems include prior

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123. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 n.51 (1977). See note 102 *supra*.

124. 563 F.2d 1200, 1209-10 (5th Cir. 1977).

125. 42 N.Y.2d 260, 366 N.E.2d 824, 397 N.Y.S.2d 735 (1977).

126. *Id.* at 261, 366 N.E.2d at 825, 397 N.Y.S.2d at 736.

127. *Id.*

128. *Id.*

129. See notes 16, 62-67 *supra* and note 144 and accompanying text *infra*.

130. See notes 42-49 and accompanying text *supra*.

131. See notes 106-08 and accompanying text *supra*.

132. Compare the provisions in note 45 *supra* with those in note 88 *supra*.

notice of removal, an administrative hearing upon request, and the recourse of appeal. Only in Pennsylvania, however, may the child remain in the foster home pending appeal.<sup>133</sup> Therefore, under the reasoning in *Smith* Pennsylvania's foster parents enjoy a liberty interest at least as significant as and probably greater than New York's.

#### A. *Suggested Approach to Recognition of a Liberty Interest*

Although the existence of this interest in foster families is uncertain so far, Pennsylvania *should* recognize this interest. Under its present system foster parents' rights, responsibilities for and benefits to the child are sufficiently analogous to those of natural parents to require comparable constitutional protection.<sup>134</sup> The foster family's interest is within the protection of the fourteenth amendment because of its similarity to the natural family's interest. Just as adoptive families have been included within the concept of the family, so should foster families who have achieved a natural family-like relationship.

In recognizing this interest, however, Pennsylvania should apply a sliding scale to safeguard the liberty interest. Foster parents would have the least extensive protection in custody disputes with the natural parents.<sup>135</sup> When these interests are balanced it is clear that natural parents have the superior *constitutional* interest.<sup>136</sup> Thus, the extent of protection accorded foster parents would be limited in this situation. Foster parents, however, would have the greatest protection of their liberty interest in conflicts with the agency. These conflicts may occur, for example, when the agency merely intends to transfer the child to another foster home. The balance of these interests would be in favor of the constitutional interest of the foster parents and the emotional interest of the child and against the purely

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133. *Id.*

134. See notes 31-52 and accompanying text *supra*.

135. The Attorney General of Pennsylvania issued an opinion that foster parents have procedural rights in the termination of foster care. Although he found statutory authority for his opinion, his basic premises are equally applicable in this constitutional framework. He stated,

We do not believe that the rights growing out of the fundamental family relationship are less significant merely because the parent is a foster parent, rather than a natural parent. A foster parent or a foster child necessarily develops the same feelings of love and loyalty as a natural parent or child, and, indeed, departmental regulations state that a major goal of foster care is to provide 'experiences in family living which are essential to the child's growth and development when their own parents are unable to provide this.' § 4302(a). Moreover, when the family relationship is at stake, the Supreme Court has looked to the reality of the emotional bonds, not to formalities. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968).

4 PA. BULL. No. 27, at 1334 (June 11, 1974).

136. This is in accord with Pennsylvania law and *Smith*. See notes 8, 109 and accompanying text *supra*. They may not have a superior *statutory* right, however, if the child had been adjudicated deprived. See notes 21-28 and accompanying text *supra*.

statutory, legal interest of the agency. Finally, foster parents' rights in comparison with those of prospective adoptive parents would be more evenly balanced. In this situation, case by case determination of whether it would be in the child's best interest to be relocated in a permanent home with the potential adoptive parents or to remain in the nonpermanent but emotionally satisfying home of the foster parents must be made. This sliding scale approach to the degree of protection required to safeguard the foster parents' liberty interest offers the flexibility that a more uniform approach could not provide. Through use of a sliding scale, consideration can be given to the significance of each party's claim to custody; and the interests of all the parties would be weighed more accurately.

### *B. Constitutionality of the Present System*

If Pennsylvania recognized this liberty interest in the foster family, would its *present* procedures provide constitutionally adequate protection? The Court's approval in *Smith* of the sufficiency of New York's procedures leads to the inference that Pennsylvania's provisions would also meet approval since the termination procedures of the two states are similar.<sup>137</sup> Pennsylvania, however, has afforded foster parents more recognition in the foster care system than has New York.<sup>138</sup> Therefore, Pennsylvania's foster parents require greater due process protection to safeguard a necessarily more substantial liberty interest.

Under the sliding scale approach the extent of additional safeguards required varies with the significance of the interests of the parties to the custody dispute. First, foster parents' constitutional rights in a custody dispute with the natural parents are adequately protected because foster parents may achieve an equal status with the natural parents when the child has been adjudicated deprived.<sup>139</sup> One area in which foster parents should have more protection is in obtaining access to confidential agency files.<sup>140</sup> When it appears unlikely that the natural parents will reclaim their child, foster parents should have access to these files in preparing their case in a foster care review proceeding to free the child for adoption. If the natural parent/child relationship has deteriorated beyond repair, the foster parents' interest in satisfying the child's needs deserves more protection than the constitutional interest of natural parents who have lost

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137. Compare the provisions in note 45 *supra* with those in note 88 *supra*.

138. *Id.* For example, in Pennsylvania, unlike in New York, foster parents may retain custody of the child pending appeal.

139. Both the natural parents and the foster parents would be required to prove that their custody would serve the child's interest.

140. *Contra*, *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977).

actual interest in the child. Furthermore, the foster parents' interest in this situation outweighs the agency's interest in encouraging open communication with the natural parents.

Second, foster parents should have expanded procedural safeguards in disputes with the foster care agency. The former's constitutional interest outweighs the latter's statutory interest. For example, the agency should be required to meet a higher standard of proof than "unsuitability" of the foster home when it attempts to remove the child and relocate him in another foster home.<sup>141</sup> This higher burden of proof need not be as stringent as that which must be met when the child is removed from his natural home<sup>142</sup>, but unless the child is actually harmed in some way in the foster home, a more compelling reason for removal should be demonstrated than "unsuitability."

Last, foster parents appear to be adequately protected against intervention by prospective adoptive parents. In Pennsylvania foster parents are given first priority when the child becomes available for adoption.<sup>143</sup> If their application for adoption is rejected, however, the agency should be required to prove that the prospective adoptive parents will best serve the child's interest. Although it is theoretically preferable for the child to be placed in a permanent home, actual removal from a foster home in which close emotional bonds have developed may be detrimental to the child.<sup>144</sup>

These examples suggest that Pennsylvania's recognition of this interest would open new avenues of due process protection for foster parents. The scope of these avenues would be determined on a case by case basis considering all factors. The first issue to be resolved would be whether that particular foster family possessed the qualities of the natural family that give rise to the liberty interest. Then, considering all the facts and Pennsylvania law, the extent of protection required must be determined.

## V. Conclusion

Foster parents' rights have expanded within Pennsylvania's statutory and regulatory framework. This expansion is largely the result of a growing realization that foster parents may best enhance the child's welfare when they have become his psychological parents. These rights, however, *derive* from the child's interest. In addition

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141. See note 33 and accompanying text *supra*.

142. The higher burden of proof is adjudication of deprivation and clear necessity for removal. See notes 21-22 and accompanying text *supra*.

143. Adoption Regulation § 2-1-66 states that "foster parents with whom a child is already in placement shall be given priority consideration for adoption."

144. See notes 48, 66 *supra*.



to statutory rights, foster parents have asserted an *independent* right to constitutional protection of the foster family under the due process clause of the fourteenth amendment. Like expanding statutory rights, these developing constitutional rights are based on the concept that the foster family may function like a natural family and, therefore, deserve comparable constitutional status. Although the constitutional issue has not been conclusively determined by the Supreme Court, its resolution could have a significant impact on foster parents' rights in Pennsylvania. Foster parents would enjoy due process protection in areas other than termination of foster care, particularly in decisions made and activities controlled by the foster care agency.

Foster care is a crucial program for the welfare of children. Certainly they should receive the best care possible. As foster parents may provide this care, there is added impetus for Pennsylvania to recognize a liberty interest in the foster family. Its recognition can only serve a primary goal of foster care, protecting the child.

ELIZABETH K. SCHUSTER