

March 1964

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Recommended Citation

Sanford N. Katz. "Community Decision-Makers and the Promotion of Values in the Adoption of Children." *Social Service Review* 38, (1964): 26-41.

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COMMUNITY DECISION-MAKERS AND THE PROMOTION OF VALUES IN THE ADOPTION OF CHILDREN

SANFORD N. KATZ

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WE NO longer think of the adoption of children as merely the juridical act creating certain civil relations between people.¹ It is really a social process² by which a child becomes a member of another family.

¹ The definitions of "adoption of children" vary. "A juridical act creating between two persons certain relations, purely civil, of paternity and filiation" (6 Demolombe's Code Napoleon § 1). "Adoption is a means of creating the legal relation of parent and child between a child deprived of the care and protection of his own parents and the person wishing to take the child into his own home" (Emelyn Foster Peck, *Adoption Laws in the United States*, p. 1 [Children's Bureau Publication No. 148; Washington, D.C.: Government Printing Office, 1925]). "Adoption is the legal and social process by which the child of one pair of parents becomes the child of other parents" (Clyde Getz, "Adoption," *Social Work Year Book*, 1957, p. 82). "Adoption is the method provided by law of establishing the legal relationship of parent and child between persons who are not so related by birth, with the same mutual rights and obligations that exist between children and their natural parents" (Child Welfare League of America, *Standards for Adoption Service* [New York: The League, 1958], p. 1). "Adoption is a legal process, but also it is a very human affair" (Margaret Kornitzer, *Adoption* [London: G. P. Putnam's Sons, 1959]). None of these definitions is wholly satisfactory.

² I am using Professor McDougal's definition of social process. He defines it "in terms of participants pursuing values by applying institutions to resources" (Myres S. McDougal, "Law as a Process of Decision: A Policy-oriented Approach to Legal Study," *Natural Law Forum*, I [1956], 65).

As a social process it involves a number of community institutions. Each institution represents decision-makers who exert influence on one another. The ultimate decision-maker in an adoption is the judge.

The judge must make a number of factual determinations. He must also make use of wide discretionary powers. He must consider such so-called guides as "the best interests of the child." He must interpret terms such as "good moral character," "proper persons to adopt," and "when practicable." How will a judge decide a dispute? How will he interpret these terms?

It is not enough to say that a judge decides an adoption dispute by "looking up the rules of law" and then applying them to the facts of the case before him. In this field, the "rules" enunciated by a legislature through its adoption statute are really statements of community preferences for certain policies. It is the application of these preferences to the facts of the case that is the difficult job for a judge. It is at this point that a judge is influenced not only by his own set of values and his own preferences for a certain result but also by a number of institutions in the community and the values they in-

corporate.³ Governmental institutions, individual families, communication institutions, health institutions, and religious institutions have an impact on the decision he reaches in the case before him. In this paper an attempt will be made to discuss the role of these institutions in the decision-making process as well as to present recommendations for their future role. Also, there will be a discussion of the values that are promoted by some of these institutions in the adoption process.

GOVERNMENTAL INSTITUTIONS

Legislative and executive influence.—Governmental institutions at all levels have some impact on decision-making in an adoption case. These institutions include the executive, legislative, and judicial branches of the government, lawyers as officers of the court, administrative tribunals, and federal, state, and local welfare agencies.

Legislation gives adoption a legal base. There was no common law of adoption. In fact, Massachusetts was the first state to provide legal machinery to effectuate the adoption of a child.⁴ In 1926, seventy-five years after the Massachusetts act was passed, England enacted its adoption statute.⁵

Unlike the Roman law, in which the primary concern of adoption was the continuity of the adopter's family and in which emphasis was placed on inheritance and succession,⁶ adoption legislation in the United States has been based primarily on the welfare of

the child. Adoption has been a process of selecting fit parents for children, not finding children for parents. Until recent years there had been ten or more families making application to adopt for every child legally available for adoption.⁷

Since the law of adoption is statutory, the major influence on a judge's decision is the adoption legislation itself. It is his guide, and it reflects much of the prevalent adoption practice. Generally, adoption legislation has as its aim the protection of children by enunciating a policy of promoting their physical and emotional well-being. Also, it strives to be fair to his natural and adoptive parents by including provisions designed to protect their rights and interests.

In drafting state legislation in this field, legislators are influenced by the views of interested local groups (e.g., public and private social welfare agencies, professional associations, and civic organizations). Also, they are affected by the recommendations of the federal government, most directly by the Children's Bureau of the United States Department of Health, Education, and Welfare. In the adoption field the Children's Bureau has provided strong leadership recently by the publication of a manual entitled *Legislative Guides for the Termination of Parental Rights*

³ See William W. Buckland and Arnold D. McNair, *Roman Law and Common Law* (Cambridge: The University Press, 1936), pp. 39-42.

⁴ See Florence G. Brown, "Adoption," in *Social Work Year Book, 1960*, p. 85. Since the publication of that article, there is evidence that the trend has reversed. See Katharine B. Wheeler, "Meeting the Drop of Adoption Applications," *Child Welfare*, XLI (June, 1962), 270; John Matteford, "Decrease in Adoptive Applicants Related to Birth Rates," *Child Welfare*, XL (November, 1961), 30-31; and T. J. S. Waxter, "Drop in Adoptive Applicants," *Child Welfare*, XL (September, 1961), 29.

⁵ See Harold D. Lasswell and Myres S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," *Yale Law Journal*, LII (March, 1943), 236.

⁶ Mass. Laws 1851, p. 324.

⁷ 16 and 17 Geo. V, chap. 29; 17 Halsbury, Laws of England, § 1406-23 (2d ed., 1935).

*and Responsibilities and the Adoption of Children.*⁸ Certain provisions reflecting the policies mentioned above will be briefly discussed and criticized.

A major contribution made by the Bureau in its suggested legislation is in the requirement that, in a non-relative adoption, the placement must be made by a licensed social service agency and that judicial proceeding to terminate the rights of the natural parents in the child must antedate the petition for adoption. The requirement of agency placements in non-relative adoptions has been controversial for many years.⁹ There are some who argue that it cannot be proved that children thrive better in a home chosen by an agency than in one chosen by private parties. There are too many variables, and the task of reaching any serious conclusion is, of course, difficult.¹⁰ There are risks inherent in every adoption. Not only is the lessening of risks important in the requirement of agency placement, but also the opportunity for regulation. Regulation makes possible the policing of those socially desired goals of adoption practice or those values in adoption which the enlightened and interested members of the community seek to promote.

⁸ U.S. Children's Bureau, *Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children* (Publication No. 394; Washington, D.C.: Government Printing Office, 1961) (hereinafter referred to as "MTA" [Model Termination Act]). For a discussion of the guides, see Sanford N. Katz, "Judicial and Statutory Trends in the Law of Adoption," *Georgetown Law Journal*, LI (Fall, 1962), 64-95.

⁹ See, e.g., Joseph H. Reid, "The Role of the Social Agency in Adoption," in "Adoptions: A Panel Discussion," *Pediatrics*, XX (August, 1957), 369-72; Charles S. Stevenson, M.D., et al., "Current Problems in Child Adoption," *Postgraduate Medicine*, XXIV (November, 1958), 522-29.

¹⁰ See Helen Witmer et al., *Independent Adoptions* (New York: Russell Sage Foundation, 1963).

Involvement by the government through institutions, such as public child welfare agencies or by private institutions through private agencies, is justified at the placement stage because of the community's proper concern for the child's well-being as well as that of the natural and adoptive parents. It is at this point that the community's concern is most meaningful. The court-ordered social investigation that occurs in many states after the child has been in the adoptive parents' home for anywhere from six months to a year might be too late to be healthy for the child or fair to his parents. Agency placement at the beginning of the adoption process can, in the long run, lessen the likelihood of a child's being shifted from one home to another and then to a third. It can prevent hardships and disappointments that would result if a court determined that a child ought to be removed from a home in which the prospective adoptive parents, after having the child in their home for a relatively long period of time, had become fond of him. It can provide the most adequate protection for all the parties.

The insistence in the Children's Bureau manual that termination of parental rights and responsibilities in the child precede the actual adoption and that the termination decree provide for temporary guardianship and for legal custody of the child is worthy of consideration by the states. There are two good reasons in support of the procedure. Separate termination and adoption proceedings lessen the opportunity for confusion of issues relevant to termination with issues pertinent to adoption. Also, the confusion of the child's status during the period from the natural parent's relinquishment or

release to the time of placement or the judicial decree of adoption (depending on the particular procedure used) is greatly diminished. Many agencies find that unless the child's status is clearly ascertainable when they obtain the child, their area of functioning is uncertain. They also find that the unmarried mother who has decided to give up her child for adoption wants to be sure of the child's well-being as well as her own responsibilities or freedom from them. The belief in the field is that early voluntary termination helps toward clarity and ease of planning for the child's life.

Early involuntary termination of parental rights also can be most beneficial to the child. The Children's Bureau manual suggests that abandonment, substantial and continuous or repeated neglect, incapacity to discharge parental responsibilities, or evidence that the presumptive parent is not a natural parent of the child be grounds for involuntary termination.¹¹ The New York State Legislature has refined its neglect provision further, with the twin goals of promoting the child's well-being and being fair to the natural parents. In New York it was found that a great many children had become accustomed to foster care as a way of life. They had lost their opportunity for adoption because they had passed the age of "adoptability."¹² In 1959, the New York Legislature passed the "permanently neglected child" statute,

¹¹ *MTA*, § 4(b).

¹² It has been found that it is more difficult to place children six years old and older than it is to place infants. Adjustments are more difficult for the older child than for the younger one. For a discussion about placement of older children, see Anne Leatherman, "Placing the Older Child in Adoption," *Children*, IV (May-June, 1957), 107-12.

which gives jurisdiction to the Children's Court to terminate parental rights in a proceeding brought by an agency having the child in its care. In order for an agency to be successful in its claim for custody with power to consent to the child's adoption, it must show that the child's parents have failed substantially and continuously for a year or more to maintain contact with him "although physically and financially able to do so" and "notwithstanding the diligent efforts of such agency to encourage and strengthen the parental relationship."¹³

The Children's Bureau manual provides that parental consent to an adoption must be written and acknowledged before an officer authorized to take acknowledgments and must be witnessed by a representative of a child-placement agency or of the court. These requirements of form are designed to impress upon the parent's mind the seriousness of the act she is performing and also minimize the opportunities for fraud, coercion, and misunderstandings. Other states have similar provisions. For example, the new Illinois Adoption Act requires proper forms and methods of execution and acknowledgment¹⁴ and contains the prohibition against immediate consent or surrender of the child.

But these safeguards are empty unless agencies follow them honestly and to the letter as well as in the spirit of the act. If this were done, cases like the recent *Karr v. Weihe*¹⁵ would not arise. In that case, a natural mother brought a writ of habeas corpus to recover custody of her infant son from

¹³ N.Y. Sess. Laws 1959, chap. 449, § 2(24).

¹⁴ Ill. Rev. Stat., chap. 4, § 9.1-10 (1959).

¹⁵ 30 Ill. App. 2d 361, 174 N.E. 2d 897 (1961).

a private Illinois child welfare agency. The agency had received custody of the child four days after his birth by virtue of purported surrenders and consents executed by both natural parents about ninety-six hours after the birth of the child. The mother claimed that her surrender and consent were given to the agency through fraud and duress. She maintained that at the time she signed the documents she was under the influence of drugs, was emotionally troubled, was misinformed about the nature and effect of the documents, and was fraudulently induced to sign the papers by her husband, who had misrepresented certain facts to her.

According to the opinion of the Illinois appellate court, the natural mother had been acting under the mistaken belief that her surrender of her child to the child welfare agency was only temporary and that she could get her baby back within a year. The representative of the child welfare agency who obtained the parents' consents knew of these misunderstandings yet did nothing at the time of the signing of the forms to dispel them. In granting relief to the natural mother, the court emphasized the duty to inform her of the nature of the acts she was performing. The absence of information about the surrender and consent was tantamount to deception and fraud, making her actions revocable.

Lawyers.—If we take seriously what Sophonisba Breckinridge wrote almost thirty years ago, lawyers would play an insignificant role in the adoption process, and their influence on a judge would be minimal. Miss Breckinridge asked whether adoption of children was “a truly judicial procedure”¹⁶—i.e., a procedure to decide a dispute. She thought that no adoption should result

if there was a dispute. Once the issue of the competence of the natural parents was settled, she considered the completion of an adoption a simple ministerial act.

Her idea was not far from what in fact was the practice in the early part of this century in some southern states as well as in Texas, Iowa, and Pennsylvania.¹⁷ Save for Miss Breckinridge's important qualification of a “sound and thorough social inquiry” before transfer of custody of a child from his natural parents to his adoptive parents, adoption procedures in those states were very much like the formalities of a real-estate transfer.

Perhaps it is appropriate today to study what meaningful part the lawyer can perform in the adoption process. His role in divorce problems has been challenged by a lawyer who has stated:

I see no reason why social workers could not handle any potential divorce proceedings by investigating the persons involved and making a considered recommendation to the court. Any financial settlements that had to be reached could be handled by lawyers and the unhappy situation resolved in a civilized manner.¹⁸

Similarly, a number of writers have minimized the role of the lawyer in the adoption process. They have relegated the lawyer to performing two tasks: counseling and completing forms.¹⁹ However, these are only a part

¹⁶ Sophonisba P. Breckinridge, *The Family and the State* (Chicago: University of Chicago Press, 1934), p. 356.

¹⁷ See Peck, *op. cit.*, cited in Breckinridge, *op. cit.*, p. 358.

¹⁸ *New York Times*, October 9, 1963, p. 37C. Samuel G. Kling, author of *The Complete Guide to Divorce* (New York: Random House, 1963), is the source of the quotation.

¹⁹ See Ursula M. Gallagher, “Interprofessional Teamwork To Safeguard Adoptions,” *Children*, VI (May–June, 1959), 101–4.

of his job and the least complex at that.

In order to answer the question about the role of the lawyer in the adoption process, another question must be posed: In what arena is the lawyer functioning? The lawyer may be involved in the adoption process at various stages. Prospective adoptive parents may call upon him to locate a child for them, or an unmarried mother may request that he arrange a proper adoption. Many writers have cautioned him about his responsibilities in these situations.²⁰

When there are competing claims for the rights to the custody, control, and company of a child, the lawyer's role is that of direct participant in the judicial process. He is in his familiar arena—an adversary proceeding in court. He represents his client's interests by persuading the judge that the kind of disposition of the case for which he argues is the proper one. As counsel for the natural mother, he may be attempting to show that her consent was obtained through fraud. As counsel for the natural father, he may be attempting to prove the necessity for the father's consent, which the father has not given and will not give. As counsel for hopeful parents, he may be attempting to challenge an agency's rejection of the couple. As counsel for the agency, he may defend the decision to reject an applicant.

Perhaps a lawyer ought to have a role to play as counsel for the child in an adoption proceeding. He would be

²⁰ See, e.g., Alex Elson and Miriam Elson, "Lawyers and Adoptions: The Lawyer's Responsibility in Perspective," *American Bar Association Journal*, XLI (December, 1955), 1125-28 ff.; Alex Elson, "The Legal Profession's Responsibility in Adoption," *Child Welfare*, XXXV (March, 1956), 21-24; Gallagher, "Interprofessional Teamwork . . .," *op. cit.*

the protector of the child's rights as well as of his general welfare. He would have the authority to make independent investigations and to prepare his own records by making use of psychiatric and social service evaluations apart from agency reports. He would represent the child in court much like a *guardian ad litem*.

Little thought has been given to the fact that, while the child is the central figure in an adoption case with his best interests as the guide for the judge's decision, he is not entitled to notice of the proceedings,²¹ nor are his wishes necessarily made known or considered by the court,²² nor is he represented by counsel. Presumably the judge is supposed to look out for the child's best interests. His is the role of the "wise parent." But how can we expect a judge to be a dispassionate, objective observer and decision-maker on the one hand and subjective counselor to the child on the other?²³ This

²¹ See *Van Matre v. Sankey*, 148 Ill. 536, 36 N.E. 628 (1893); *Gibson*, Appellant, 154 Mass. 378 (1891).

²² Note what Judge Black of the Michigan Supreme Court stated in his dissent in a case concerning the termination of the natural parent's rights and responsibilities in her child: "[The judges in the majority] do not even consult the wishes and attachments of the child, and seem not to realize that children too have rights; rights that are—or at least should be—paramount when there is a conflict thereof with parental rights" (*In re Mathers*, 124 N.W. 2d 878 [1963]).

²³ I am asking essentially the same question posed by Mr. Justice Sutherland, although his remarks refer to an accused in a criminal proceeding: "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the Court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional" (*Powell v. Alabama*, 287 U.S. 45, 61 [1932]; see also *Carnley v. Cochran*, 369 U.S. 506, 510 [1962]).

is what we are asking of him when we say that special legal representation for a child would be an intrusion into the judicial function.

There is precedent for appointing counsel for children.²⁴ In fact, a much stronger case can be made for establishing the position of attorney for the child in an adoption proceeding than for having counsel in juvenile-court proceedings. For years, a battle has been waged over the question whether there is a right to counsel in the juvenile court. Pitted against the notion that even though, within those provisions of the Constitution which prescribe certain standards and procedures for criminal proceedings, the juvenile court proceeding is not a criminal proceeding, is the fact that an individual's rights and liberties are at stake and, an argument runs, these rights should be protected in the same manner as practiced in adult criminal courts. However, assuming the right to counsel is essential, there is some question about whether the lawyer's appearance will detract from the informality of the proceedings and thus whether his participation will conflict with the philosophy underlying the establishment of the court. These problems are still being debated even though the child's right to counsel is almost an established fact.²⁵ But an adoption proceeding is neither

criminal, nor quasi-criminal, nor informal. It is, as stated previously, a traditional adversary proceeding, and a counsel for the child would in no way clash with the method or form of the litigation.

There are family courts that allow counsel for children in neglect and delinquency proceedings. For example, the New York Legislature found that "counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determination of fact and proper orders of disposition."²⁶ To realize these purposes the New York Family Court Act established a system of "law guardians." While the text of the act does not fully explain the duties of a "law guardian," it does state that a "law guardian" refers to an attorney . . . to represent minors.²⁷ Presumably he will act not only as an advocate but, because of the label "guardian," as one responsible for his client's general welfare. That is to say, his duties go beyond carrying out the wishes of his client, the child, but include looking out for his over-all interests. For example, if counsel thought it wise and in the interest of the child, he might have to disclose information to the court which the child might not wish revealed. Also, since the act sets up the administrative machinery for providing the "law guardian" (e.g., by utilizing the personnel of a local legal aid society, individu-

²⁴ I am omitting references to appointment of counsel for incompetents in incompetency proceedings, but an analogy to that precedent would be relevant. See Frank T. Lindman and Donald M. McIntyre, Jr. (eds.), *The Mentally Disabled and the Law* (Chicago: University of Chicago Press, 1961), p. 29.

²⁵ See Orman W. Ketcham, "The Unfulfilled Promise of the American Juvenile Court"; Paul W. Alexander, "Constitutional Rights in the Juvenile Court"; and Alex Elson, "Juvenile Courts and Due Process," in *Justice for the Child*, ed. Margaret Keeney Rosenheim (New York: Free Press of Glencoe, 1962), pp. 22-43, 82-94, 95-117.

²⁶ New York Family Court Act, § 241. For a discussion of the act and the role of the lawyer, see Monrad G. Paulsen, "The New York Family Court Act," *Buffalo Law Review*, XII (June, 1963), 420-41; Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," *Buffalo Law Review*, XII (June, 1963), 501-21; Nanette Dembitz, "Ferment and Experiment in New York," *Cornell Law Quarterly*, XLVIII (Spring, 1963), 510-11.

²⁷ New York Family Court Act, § 242.

al attorneys, etc.²⁸) and for his compensation,²⁹ he takes on the mantle of a court-appointed official.

Precedent aside, given that an adoption proceeding is an adversary proceeding, counsel for the child can help in the orderly administration of the family law process. As an advocate, guardian, officer of the court, or whatever he is labeled, the lawyer can provide the judge with an important and useful source of information—the child's views and an expression of his feelings. These may not necessarily be in conflict with the position of other interested parties, but they would be available, and certainly they are relevant and important. Although it is not always feasible to police the adoption process as early as the placement stage, in spite of the fact that early scrutiny might alleviate many present and future hardships, something can be done to assure the maximum presentation of all the facts in the court proceeding. If "the best interests of the child" are to be sought, certainly the child should be consulted; and this should be done in a formal and regular manner.

In the absence of counsel a child might have to act as his own attorney. That is, in effect, what a fourteen-year-old boy did in his own adoption proceeding. In that case,³⁰ the natural father attempted to bar the adoption of his son by his sister and brother-in-law by withholding his consent, which he argued was necessary to effectuate the adoption. The child had lived apart from his natural parents almost his entire life. He had become fully integrated into the family of his aunt and uncle. The judge approved the adop-

tion. It is valuable to note what the judge wrote in his opinion:

The child has regarded and refers to plaintiffs as mother and father and accords them the admiration, obedience, love and devotion of a son. It is the child's expressed desire to be adopted by the plaintiffs and to be personally known as Robert Dickinson Jacques. This he has made known to his natural father. The situation which distresses the father most is the child's willingness to have his name changed. The father's attitude in this respect has so disturbed the child that from the witness stand he expressed a wish that the court make a decision for him.

The adoptive child persisted in his desire to be adopted, even though subject to proper vigorous cross-examination concerning the legal and moral effect of permitting the adoption. The boy's testimony and the report of the State Board of Child Welfare . . . indicates his understanding and desire with respect to these proceedings.

There could be no doubt in any one's mind that the adoptive child is above average intelligence for one his age and that he has attained that ripened discretion which enables him to determine what his own interests and welfare demands, and that he possesses the impartial acumen necessary to make an accurate appraisal of the facts surrounding the proceedings.³¹

It seems that the judge was struck by the child's behavior on the stand. Would not the child have been spared what must have been a serious emotional experience in the courtroom by having a personal legal representative?

Without counsel a child can lack protection from agency policies and decisions. Agencies may believe they are representing children in their custody as a lawyer would. Sometimes, however, what they consider to be in the best interests of the child may be clouded by their concern for the best interests of the agency. Someone should be available to protect the child's interests. That person should be free from con-

²⁸ *Ibid.*, § 243.

²⁹ *Ibid.*, § 245.

³⁰ *In re Jacques*, 48 N.J. Super. 523, 138 A. 2d 581 (1958).

³¹ *Ibid.*, at 531; 138 A. 2d 585.

cerns for administrative regularity, conflicts, and precedents for political repercussions.

Note what happened in *In re Jewish Child Care Association*.³² In that case a writ of habeas corpus was brought by an agency to obtain a child from foster parents with whom it had placed the child. The child had lived with the foster parents for almost her entire life. When the foster parents refused to give up the child, the agency brought the suit.

During the first year of the foster-home arrangement the foster parents had expressed a desire to adopt the child but had been told that theirs was a boarding home and that adoption was out of the question. Three years later, they were asked to sign a paper to the effect that the child had been placed with them for boarding purposes only. The foster parents persisted in their desire to adopt the child but were repeatedly told that they could not do so. Yet the child had remained with them for four and one-half of her five years of life. There was nothing in the court's opinion to indicate that the child's natural mother cared for the child or had any interest in her.

The agency wanted the child removed from the home of the foster parents. Even though the agency stated that the foster parents were well qualified in every respect, had taken good care of the child, and were providing her with an excellent home environment, it thought that they had become too attached to the child and that a conflict could arise between the child's loyalty to her natural parent and to her foster parents. It wanted to place the child in what it called a "neutral environment." The New York Court of Appeals with

three judges dissenting affirmed the decision of the lower court. It held that the trial justice had not abused its discretion in deciding to remove the child from the home of the foster parents.

Chief Judge Conway, writing for the majority of the court, stated:

That the Sanders have given Laura a good home and have shown her great love does not stamp as an abuse of discretion the Trial Justice's determination to take her from them. Indeed, it is the extreme of love, affection and possessiveness manifested by the Sanders, together with the conduct which their emotional involvement impelled, that supplies the foundation of reasonableness and correctness for his determination. The vital fact is that Mr. and Mrs. Sanders are not, and presumably will never be, Laura's parents by adoption.

We are, of course, not unmindful that the result we reach may cause distress to the appellants. However, the most important consideration of the child's best interests, the recognition and preservation of her mother's primary love and custodial interest, and the future life of the mother and child together, are paramount.³³

We may differ over Judge Conway's analysis of what was the "vital fact" in the case, or we may argue about what Laura's best interests were. Were they, as the majority of the court would lead us to believe, the removal of the child from what admittedly was a happy home life, where the child was a member of a family, to an unknown placement? The dissent was opposed to this solution. It called the result tragic and said:

[It came about] because of the mistaken notion that the courts are bound to accept an administrative policy of the Agency as controlling their determination rather than to exercise their own traditional power and authority in accordance with the evidence. While administrative practices have a useful place in the handling of ordinary matters of administration, such test is wholly inappropriate in this setting. Here we are not dealing

³² 5 N.Y. 2d 222, 156 N.E. 2d 700 (1959).

³³ *Ibid.*, at 229, 230; 156 N.E. 2d, at 703, 704.

with routine problem of administration, but rather with the fundamental concept underlying the broad and enlightened social welfare program of the State respecting the care and custody of indigent and neglected children, every aspect of which is to be tested in the light of which will best promote their individual welfare.³⁴

What is important and missing in the opinion is an expression of the child's feelings, how she perceived the situation, and what her desires were. Perhaps a lawyer could have brought these factors to the court's attention.

The lawyer's role in the adoption process should not be minimized or confined to office practice. The lawyer is the protector of the individual's rights. In the cases referred to, there were justiciable issues with important effects on the interests, well-being, and expectations of many people. In our society such disputes have been assigned for decision to the court, with its tradition of fair procedures, its sanctions, and the respect afforded it by the community.

Child welfare agencies.—Child welfare agencies have been the traditional investigative arm of the court, and their influence on the judge has been direct and profound. In recent years it has been the practice in many American jurisdictions, before an adoption is decreed, to provide the court with a study of the child, his natural parents, and his adoptive parents. Whether the study is mandatory or discretionary varies according to the particular state.³⁵

The court-ordered social investigation is crucially important to the judge. It has a recommending function. Note the language of the Illinois statute:

The court shall appoint an agency or a person deemed competent by the court to investigate accurately, fully, and promptly, the allegations contained in the petition; the

character, reputation, and general standing in the community of the petitioners; the religious faith of the petitioners and, if ascertainable, of the child sought to be adopted; and whether the petitioners are proper persons to adopt the child and whether the child is a proper subject of adoption.³⁶

In order to determine "whether the petitioners are proper persons to adopt the child and whether the child is a proper subject of adoption," the social worker has to make a number of judgments and predictions. He must be concerned with whether the proposed adoptive parents will be satisfactory not only immediately but for the total span of childhood years and thereafter. This is the same question with which the caseworker must be faced at the placement stage. As David Fanshel has stated, "the caseworker must select couples who would appear to have the ingredients necessary for good performance with the child not only as an infant, but also when he becomes a toddler, a preschooler, a ten-year-old, an

³⁵ E.g., in New York (N.Y. Dom. Rel. Law §§ 112[5], 113, 115-a[3], 116[2]-[3]) and Illinois (Ill. Rev. Stat., chap. 4, § 9.1-6 [1961]) it is mandatory, while in Mississippi (Miss. Code Ann. § 1269-05 [1956]) and Nevada (Nev. Rev. Stat. § 127.210[4] [1959]) it is discretionary. The District of Columbia makes the investigation mandatory unless the petitioner is a spouse of a natural parent of the adoptee, which natural parent consents to the adoption or joins in the adoption petition, in which case the investigation is discretionary (D.C. Code Ann. § 16-216 [1961]). Other jurisdictions treat this problem in still different ways. See, e.g., Md. Ann. Code, Art. 16, § 76 (1957)—mandatory except when the court "has such intimate and personal knowledge of the facts and circumstances" as to render an investigation unnecessary.

³⁶ Ill. Rev. Stat., chap. 4, § 9.1-6 (1959). The Virginia statute is more explicit about the function of its court-ordered social investigation. After a statement about the contents of the investigation report, the statute reads: "In making his report the Commissioner shall also include his recommendation as to the action to be taken by the court on the petition" (Va. Stat. Ann., chap. 14, § 63-349 [1949]).

³⁴ *Ibid.*, at 230-31; 156 N.E. 2d, at 704.

adolescent, etc."³⁷ In other words, the adoptive applicant is selected to do the "job" of parent and, hopefully, that of a good parent.³⁸

What are these "ingredients necessary for good performance with the child"? What factors are important to the caseworker in his evaluation of the adoptive parents? Generally speaking, there are similar concerns for writing a social investigation for the court as there are for agencies selecting adoptive parents at the placement stage. Writing about the breadth of knowledge necessary for good social work practice, Alfred Kadushin chose a particular problem: the screening interview of an adoptive applicant in a public welfare agency. The following quotation illustrates what Kadushin believes are some evaluating factors:

In order to offer effective services the worker needs to know the agency regulations regarding age, fertility examinations, and health conditions of applicants. . . . She needs to know the desirable physical conditions of a good adoptive home, of a good adoptive neighborhood. She needs to know and understand something about the optimum age differential between adoptive parents and the child. . . . She needs to know: the diagnostic significance of information regarding the applicants' developmental history, work history, health history, the history and current functioning of the marriage; the clients' conceptions of parenthood, expectations as to rewards and deprivations of parenthood, expectations about the child they hope to adopt, and their age, sex, nationality, and class preferences in relation to the child they hope to adopt.³⁹

³⁷ David Fanshel, "Approaches to Measuring Adjustment in Adoptive Parents," in *Quantitative Approaches to Parent Selection* (New York: Child Welfare League of America, 1962), pp. 18-35.

³⁸ See Alfred Kadushin, "A Study of Adoptive Parents of Hard-To-Place Children," *Social Casework*, XLIII (May, 1962), 227-33. Kadushin's conceptualization of the selection process for adoptive applicants is much like an analysis of occupational choice.

Is there not a presupposition of a system of values underlying Kadushin's remarks about the screening interview? One can detect the concern for such values as welfare, wealth, affection, respectability, and enlightenment.

Yet social workers do not speak in terms of values. To them the process of selecting adoptive parents involves the use of "standards" and "qualifications." In discussing how the availability of children affects the selecting process, Kadushin has written:

The agency will maintain ideal standards as long as the supply of fully qualified applicants who are ready to become adoptive parents exceeds the supply of children. When the number of children exceeds the number of fully qualified applicants, the agency will lower its qualifications for adoptive parents.

The first modification in standards is likely to be made in qualifications having little or no functional importance for the effective performance of the "position" of adoptive parent. Religion, in this sense, is a non-functional qualification for parenthood.⁴⁰ One can effectively discharge the functions of parenthood as either a Protestant or an agnostic. Emotional stability, however, is a functional qualification. Hence the adoption agency is likely to be more willing to accept

³⁹ Alfred Kadushin, "The Knowledge Base of Social Work," in *Issues in American Social Work*, ed. Alfred J. Kahn (New York: Columbia University Press, 1959), pp. 44-45.

⁴⁰ But compare this with what Father Bowers has written: "[We] do not look at religion merely in terms of the values that it may hold for this or that individual, but as a basic and fundamental obligation that falls upon man as a created being, upon every man. Religion is a duty incumbent upon man as man, irrespective of the values that may accrue to him from it. As we consider the role of religion in the life of the child and its importance in evaluating adoption homes, it will be essential to remember that from the Catholic viewpoint religion is something more than a value to the child. It is also an obligation basic to his very nature" (Swithun Bowers, "The Child's Heritage: From a Catholic Point of View," in *A Study of Adoption Practice*, II, ed. Michael Schapiro [New York: Child Welfare League of America, 1956], 130-33).

a couple with different religious backgrounds than it is to accept an emotionally unstable couple.⁴¹

To illustrate how a judge is impressed with using the values suggested by Kadushin to determine a proper set of adoptive parents, *In re Jacques*⁴² is relevant. The judge wrote this about the parents:

The home of the plaintiffs is more than modest and adequate. It is situated in a very pleasant residential section and is within walking distance of schools and church. There is no question of the financial ability of the plaintiffs to provide in a proper fashion, not only for their own three children, but for the child sought to be adopted as well.⁴³

It has been shown beyond doubt that plaintiffs are capable, conscientious, of fine character, maintain a fine home, are solicitous of the welfare of the child sought to be adopted, and would make excellent parents, and are good, clean, wholesome, God-fearing Christian people with a real genuine parental affection for the young man.⁴⁴

There has been a great deal of discussion about the values promoted by social agencies in their placement practices.⁴⁵ It is unfair, however, to categorically indict all agencies for the rigidity of a few or to suggest that there is a fixed hierarchy of values that are promoted through agency practices.⁴⁶ As Kadushin pointed out, economics plays an important part in the formula-

tion of "standards" for selecting parents. Another factor that is taken into account is the particular kind of child available for adoption. Children with special needs (e.g., the physically handicapped, minority-group children, older children) demand special parents, and certain values are preferred over others in selecting these parents.

COMMUNICATIONS INSTITUTIONS

Mass communication helps enlighten the community. If the climate is right, it can change attitudes, it can persuade, it can mold public opinion.⁴⁷ While it may not necessarily or directly control outcomes in a particular dispute, its persuasive powers can rally community support for a given result. In this way the communications institutions affect community decision-makers.

It is not uncommon for the press to interest itself in custody and adoption disputes and to exert pressure on social welfare agencies to allow a child to remain with a couple who want to adopt him, when the welfare agency, for reasons it will not reveal, wants to remove the child.⁴⁸ A recent case which received publicity concerned an attempt by a New Jersey welfare agency to remove a four-year-old girl from the home of her foster parents, Mr. and Mrs. Combs, who wanted to adopt her. From the press reports it seemed that the decisive factor in the case was that Alice Marie,

⁴¹ See Kadushin, "A Study of Adoptive Parents . . .," *op. cit.*, p. 231.

⁴² 48 N.J. Super 523, 138 A. 2d 581 (1958).

⁴³ *Ibid.*, at 530, 138 A. 2d, at 584.

⁴⁴ *Ibid.*, at 532, 138 A. 2d, at 586.

⁴⁵ See, e.g., Joseph H. Reid, "Principles, Values, and Assumptions Underlying Adoption Practice," in *Readings in Adoption*, ed. I. Evelyn Smith (New York: Philosophical Library, 1963), pp. 26-37.

⁴⁶ For such an indictment, see Rael Jean Isaac, "Children Who Need Adoption: A Radical View," *Atlantic Monthly*, CCXII (November, 1963), 45-50.

⁴⁷ See, e.g., Wilbur L. Schramm (ed.), *The Process and Effects of Mass Communication* (Urbana: University of Illinois Press, 1954), pp. 209-14; Eugene L. Hartley *et al.*, "Attitudes and Opinions," *ibid.*, pp. 216-50; Joseph T. Klapper, "Mass Media and Persuasion," *ibid.*, pp. 289-320; Wilbur L. Schramm, *Responsibility in Mass Communication* (New York: Harper & Bros., 1957).

⁴⁸ For an interesting account of a disputed adoption case and the role of the press in the controversy, see Alton A. Linford, "The Miller Adoption Case," *Social Service Review*, XXXIV (December, 1960), 421-42.

a child with an IQ of 138, was too brilliant for her foster parents. Mr. Combs earned \$119 a week as a sheet-metal-worker, and the Combs lived in a home "without books"—a home in which the television set was the center of the family's intellectual activities. It was thought that the foster parents could not give Alice Marie enough intellectual stimulation. According to the welfare department's report, the foster parents were "below average to average cultural level," with high-school education.⁴⁹

Because they could make no administrative appeal from the department's decision, the foster parents took their appeal to the Appellate Division of the New Jersey Superior Court. The case was dismissed because the foster parents were not the child's blood relatives and therefore were not proper parties to the action. Mrs. Combs had notified the press about the dispute. Newspaper captions give the history of the case: "Foster Parents and State Battle for Bright Girl of 4," "Welfare Agency Bows To Let Couple Keep Girl," "Couple Win Adoption of 'Prodigy' 4."⁵⁰ According to the last article, the welfare department changed its decision to remove Alice Marie and prevent the adoption because it thought that its previous decision would not have been "in the best interests of the child."

The case is interesting for two reasons. It points up how effective the press was in its monopoly position for persuasion as contrasted with the ineffectuality of the welfare department. More important is the content of the

press reports. The focus of the reports was on the welfare department's emphasis on "enlightenment," suggesting that "affection" was less important. In fact, the *New York Times* titled its report: "Parents Plead Love in Bright-Girl Case."⁵¹ This is an appealing approach for purposes of community identification and support. Probably it would have had the same attraction and support had the case involved foster parents whom the welfare department considered "too poor" for adoptive parenthood. For the welfare department not to accept for adoptive parenthood a couple not intellectually keen or not economically affluent is an indictment against a large number of community parents.

In the long run, welfare agency policies are dependent upon community support, and compliance with any particular decision is affected by community attitudes. In competing with the press for support for its decision in a dispute like the one under discussion, welfare agencies are at a disadvantage. Because of confidentiality, the agencies are unable to disclose to the community all the facts of a particular case. What is available to the agencies is the opportunity through a continuous and sustained program to explain and seek community acceptance of their policies and programs. In fact, a mandate is given them by the Child Welfare League of America *Standards for Adoption Service*:

It is necessary to obtain public interest, understanding and support for development of the required resources, adequate financing, effective legislation and maintenance of standards.

The public should be informed of the services and safeguards which the unmarried

⁴⁹ For a fuller version of the facts and the history of the case, see New Jersey Legislature, Joint Welfare Investigating Committee, *Child Welfare in New Jersey* (Trenton, 1961), pp. 55-61.

⁵⁰ *Washington Post*, March 9, 1960, p. C6; March 16, 1960, p. A3; April 1, 1960, p. A3.

⁵¹ *New York Times*, March 9, 1960, pp. 1, 27.

mother and other parents, the child and the adoptive parents need, and which are offered only by social agencies.

Efforts should be made to change community attitudes and to help the public understand the facts.⁵²

At the same time, it is important that the mass media become aware of their responsibilities. They can perform the useful function of watchdog for questionable agency policies and practices. However, when they seize upon only one aspect of a case, as has been illustrated, this might be to the detriment of the personal interests of the individuals. Because of the important role communications institutions can play in the adoption process, their understanding of the problems is important. If they are to pass judgment, either directly or indirectly, on the actions of other community decision-makers, they must be as enlightened as the other decision-makers. This means that they need to understand all the facts. Short of this, they should show a certain amount of restraint.

HEALTH INSTITUTIONS

Just as the determination of the lawyer's role in the adoption process depends on the arena in which he works or the person or agency that he represents, the role of the physician is dependent on the identity of his patient and his base of operations.⁵³ Regardless of his base, however, he tries to advance values of health and well-being. He acts as a decision-maker and as an influence

⁵² Child Welfare League of America, *op. cit.*, pp. 56-57.

⁵³ See Ernest H. Watson, M.D., "The Physician and the Adoption of Children," *Journal of the Michigan State Medical Society*, LVI (March, 1957), 342-44; Morris A. Wessel, M.D., "The Pediatrician and Adoption," *New England Journal of Medicine*, CCLXII (March 3, 1960), 446-50.

upon other decision-makers in the community.

The obstetrician may suggest adoption of a child to a couple unable to have children of their own. He may be the first to discover that an unmarried woman is pregnant and may influence her in her decision regarding the child's future. The family physician, whatever his specialty, may be instrumental in the arrangement of a private adoption.

The pediatrician who examines a child about to be adopted may find it is defective or diseased, and his prognosis may impede an adoption. On the other hand, because of a defect in a child, a parent may be prompted through the recommendation of a pediatrician to give the child up for adoption.

Likewise, the psychiatrist may influence the decisions of childless couples to adopt a child, or of an unmarried mother to keep her child or give her child for adoption. His report to an agency or to the court may influence the decisions of the agency or the court.

Any of these physicians may act in private consultation or in an agency setting as part of an agency team. One writer has recommended that pediatricians and psychiatrists participate through agencies in adoption programs.⁵⁴ At least physicians should be aware of the adoption process. They should be encouraged to make use of community resources, such as social service agencies and social service departments of hospitals, so they will be enabled to make more enlightened decisions that may react beneficially on other decision-makers in the community.

⁵⁴ Samuel Karelitz, M.D., "The Role of Physicians and Hospitals in Adoptions in the United States," *Rocky Mountain Medical Journal*, LIV (August, 1957), 793-99.

RELIGIOUS INSTITUTIONS

The influence of religion as a value and religious institutions as decision-makers in the adoption process is manifested in a number of ways. Child welfare agencies use "religion" as a factor in the placement of children. This is consistent with the philosophy in social work that all aspects of the lives of people, including the spiritual phase if that is important and meaningful to them, should be enhanced.⁵⁵ The Child Welfare League of America *Standards* states the position to which many non-sectarian agencies adhere:

A child should ordinarily be placed in a home where the religion of adoptive parents is the same as that of the child, unless the parents have specified that the child should be placed with a family of another religion. Every effort (including interagency and interstate referrals) should be made to place the child within its own faith, or that designated by his parents. If however such matching means that placement might never be feasible, or involves a substantial delay in placement or placement in a less suitable home, a child's need for a permanent family of his own requires that consideration should then be given to placing the child in a home of a different religion. For children whose religion is not known, and whose parents are not accessible, the most suitable home available should be selected.⁵⁶

The method of assigning adoptable children to the agency under the auspices of the church of which the natural mother or the child is a member, a practice common in many communities, is an early commitment to religion as a value to be enhanced in the social process of adoption, and it reflects the importance of religious institutions as de-

⁵⁵ See Sue W. Spencer, "What Place Has Religion in Social Work Education?" *Social Service Review*, XXXV (June, 1961), 168.

⁵⁶ Child Welfare League of America, *op. cit.*, p. 25.

cision-makers. This commitment to religion as a value to be promoted is perpetuated by sectarian child welfare agencies that require the placement of children in the homes of parents with the same religious affiliation as the agency. In a survey made of selected Catholic adoption agencies, it was reported:

Three out of every five agencies, including two of every three large ones, replied that they sometimes place a child in a family where one of the parents is non-Catholic. This is done in instances where the mother is Catholic or in families in which the non-Catholic party is willing to take instructions in the fundamental teachings of the Catholic Church. On the whole, however, the agencies seek to use adoptive couples both of whom are Catholic.⁵⁷

Jewish and Protestant agencies also use, in various degrees, religion as an important placement factor.⁵⁸

References to "religion" in adoption statutes reflect the legislature's regard for that value. In some statutes the concern for "religion" is indirectly expressed by requiring that the petition for adoption must contain the religious affiliations of the parties involved,⁵⁹ or by requiring that "religion" must be considered in the investigative report.⁶⁰

⁵⁷ National Conference of Catholic Charities, *Adoption Practices in Catholic Agencies* (Washington, D.C.: The Conference, 1957), p. 50.

⁵⁸ See Abraham G. Duker, "Jewish Attitudes to Child Adoption," and Charles G. Chakerian, "The Religious Component in Adoption: A Protestant Appraisal," in Schapiro, *op. cit.*, II, 134-50, 119-29.

⁵⁹ E.g., D.C. Code Ann. §§ 16-214(4) to -214(5) (1961) (the petition must state the race and religion of the child or his natural parents, and that of the petitioner); Iowa Code Ann. § 600.1 (Supp. 1962) (the petition shall state the race and religious faith as nearly as may be of the petitioner or petitioners and of the child).

⁶⁰ E.g., Conn. Gen. Stat. Rev. § 45-63 (Supp. 1961) (the preadoption report should indicate the religion of the child and that of his natural and

There seems to be a direct concern for the value in those states that require that "religion" be considered in the disposition of the case.⁶¹ In either situation, the result is to influence the judge in his decision.

To write of adoption that it is a juridical act creating certain civil relations between two persons is to state a conclusion rather than a description. Adoption is not an act; it is a process. Many people and institutions have participated in this process by the time a final decree of adoption is granted by a court. The decisions that have been made comprise not only the readily identifiable ones of, for example, the natural mother's decision to place the child with a particular family, the decision of the court staff to recommend the adoption through its social-investigation report, the decision of the judge to ap-

prove the adoption, but also include other less obvious ones throughout the process. The other decision-makers may be less dramatic, but their impact is no less important. If, therefore, there are to be effective and meaningful discussions about the adoption process, whether the purpose of these discussions is to evaluate, reform, or revise the process, the participation of these people is necessary.

There is a noticeable promotion of values in the adoption process. To suggest that enhancing "the best interests of the child" is the goal in adoption clouds what is really occurring. It is important to realize that values are promoted and to question whether these values are either meaningful or proper in establishing a parent-child relationship. Once the policies are ascertained, the entire adoption process should be designed to protect, foster, and develop these social values. An attempt has been made to indicate that it is consistent with promoting the welfare and well-being (values generally accepted as vital in the process) of the child and of his natural and adoptive parents for the state to control the reorganization of a family. It is also consistent with this policy to have a child represented by counsel in a dispute regarding the reorganization of his family relationships. Questions have been raised about social welfare agencies' imposing some values on applicants or encouraging other values which may be in conflict with those held by some members of the community. These are questions for investigation and thought by interested community decision-makers.

adoptive parents); Ga. Code Ann. § 74-411 (Supp. 1961) (suitability of racial and religious affiliations must be investigated); Ill. Rev. Stat. ch. 4, § 9.1-6 (1959) (the religious faith of the petitioners, if ascertainable shall be a part of the investigation); Mich. Stat. Ann. § 27.3178(545)(e) (Supp. 1959) (preadoption investigation must consider the racial and religious backgrounds of the child and the petitioner); N.H. Rev. Stat. Ann. § 461:2 (Supp. 1961) (preadoption investigation is to give due regard to the respective race and religion of the child and the petitioner); Ohio Rev. Code Ann. § 3107.05(e) (p. 1960) (religious and racial backgrounds of child and petitioner must be investigated prior to the adoption); Wash. Rev. Code § 26.32.090 (Supp. 1958) (preadoption investigation report must indicate the religion of the child).

⁶¹ E.g., Colo. Rev. Stat. Ann. § 4-1-7(f) (Supp. 1960); Mass. Gen. Laws Ann. ch. 210, § 5B (1958); N.Y. Const., art. VI, § 18; N.Y. Dom. Rel. Law §§ 113, 117; N.Y. Soc. Welfare Law § 373(3); N.Y.C. Dom. Rel. Ct. Act § 88; R.I. Gen. Laws Ann. § 15-7-12 (1956); Wis. Stat. Ann. § 48.82(3) (1957).