Legal Aspects of Foster Care*

SANFORD N. KATZ**

When a court separates a child from its biological parents and awards custody to a child welfare agency, the agency usually places the child with foster parents. Eventually, it is thought, the child will be reunited with its biological parents and the natural family relationship reestablished. Since there has been no judicial termination of all the biological parents' rights, both the court and the agency view the disposition as temporary and the legal rights of the natural parents are held in abeyance.¹

Approximately 200,000 neglected children live with foster families in the United States in any given year.² While behav-

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²Professor of Law, Boston College Law School. Editor-in-Chief, Family Law Quarterly.


An interesting question is whether a natural parent could recover for the wrongful death of his natural child when that child is in the foster care of another as a result of court intervention. Or conversely, whether such a foster child could recover for the wrongful death of its natural parent.

2. S. Low, *Foster Care of Children—Major National Trends and Prospects*, U.S. Department of Health, Education and Welfare, Children's Bureau 1–2 (1966). "An estimated 287,200 children were living in foster care throughout the United States on March 31, 1965, either in foster family homes served by social agencies or in child welfare institutions for neglected, dependent, and emotionally disturbed children. The rate of children in foster care was 4.0 per 1,000 children under 18 years of age in the U.S. population. This estimate does not include a large, but unknown, number of children living in 'independent' foster family homes who were placed by parents, relatives or others without the assistance of a social agency. Nor does it include a much smaller, but also unknown number of children placed directly in foster family homes by juvenile courts (a practice that occurs to a significant extent only in a few States) or placed by other agencies that do not report to the Children's Bureau.

Assuming that the rate will continue to change in the direction and at the pace at
ioral scientists have developed a sociological profile of foster care as an institution and a psychological and socioeconomic portrait of foster parents, the legal implications of the foster family setting have received scant consideration. This article will deal with these implications.

Institutional Origins and Common Law Background

Little is known about the origins of foster care. Although fosterage was practiced among the Anglo-Saxons, the Welsh, and the Scandinavians, the institution reached its peak of development in ancient Ireland. An examination of the Irish institution reveals a sharp contrast between it and its modern counterpart. Fosterage in ancient Ireland was based on a voluntary contract between natural parents and foster parents, both usually members of the upper class. The goals of the institution were to provide a means of training children and, by forming close bonds between families, to promote social cohesion. Social status was the controlling factor in fosterage. In addition to determining the fee that natural parents were to pay the foster parents, social status determined the legal obligations that attached to the network of relationships established, as well as the nature of the food, clothing, training, and discipline the child was to receive.

Foster care, as the term is generally used today, is quite

which it was changing during the 1961-65 period, the number of children in foster care in 1975 is projected to be 364,000, a 27 per cent increase over 1965 or an annual increase of about 2 percent. The 1975 rate is estimated at 4.7 per 1,000 children.

The number of children in foster family homes on March 31, 1965, is estimated at 207,800, a rate of 2.9 per 1,000 children.


4. W. Hancock & T. O'Mahony, Preface to 2 Ancient Laws and Institutes of Ireland, Senchus Mor, Part II, XLVI (1896).

5. P. Joyce, 2 A Social History of Ancient Ireland 14 (1913).

6. Id. at 17.

7. Commission for Publishing the Ancient Laws and Institutes of Ireland, 2 Ancient Laws and Institutes of Ireland, Senchus Mor 151-5, Part II (1869).

8. Id. at 149-51.
different from the ancient Irish institution. It is an agency-supervised placement for children, generally from the lower and lower middle classes, whose natural parents are unable to provide them with proper care and who are therefore provided with substitute parents, most often recruited from the lower middle class. Since foster care is theoretically a temporary arrangement, it is generally an alternative to institutional care, with the child receiving the advantages of a family setting and the state benefitting economically.

A foster parent is one who, although not legally related to the child by direct parental blood ties, nor decreed a parent in formal adoption proceedings, assumes the role of a parent. This status most commonly arises when a court awards guardianship and custody of a child to a child welfare agency which in turn delegates the parental role to persons chosen by the agency. Less commonly, foster status may arise in other ways. For example, a court may award guardianship and custody to persons other than the natural or adoptive parents, such as when a divorce court awards custody of a child to an aunt rather than to either of the spouses. Or it may arise as a result of persons who, because of legal defects in an adoption decree, are legally only adoptive parents. Finally, a person may be considered a foster parent if he or she cares for another's child through a formal or informal arrangement or by voluntarily caring for a foundling.

In these situations, the legal rights and duties of foster parents are determined by the common law doctrine of in loco parentis. Under this doctrine, persons holding themselves out as parents are held to similar, and often the same, standards as natural parents. Courts use the in loco parentis doctrine to impose on foster parents the same responsibilities as natural parents with respect to providing their children with proper

11. It is well known that the cost of maintaining a child in an institution far exceeds the cost of maintaining it in a foster family. For example, in Massachusetts it costs approximately seven times more per week to maintain a child in an institution than in a foster family.
health, education, and environment conducive to the development of sound moral character.

Unless specifically decreed by a court, the parental right to legal custody does not attach to foster parents. In other words, foster parents seem to have more duties than rights. This statement, however, may be misleading, for foster parents do in fact enjoy the right to custody without benefit of the label. A de facto custodial interest develops in a foster parent when the foster relationship continues over a period of time. Courts are reluctant to interfere with this interest, and when they attempt to interfere, the foster parent is generally notified and given an opportunity to appear and defend his or her interest. A continuing foster relationship, if secure and orderly, is typically protected against even a natural parent’s unreasonable intrusion.

A natural parent who wishes to interfere with the foster parent relationship (established in ways other than through court or agency intervention) must, as any other individual, carry the burden of proving the foster parent’s unfitness, as well as the burden of showing that the child’s needs will be best served by a change in the custodial arrangement.

Under certain conditions, a foster parent may terminate the relationship with a foster child. The most important of these conditions is that the foster parent must intentionally perform a positive act—which ordinarily implies obtaining the consent of all parties in interest—severing all aspects of the relationship.


The fact that a foster parent may terminate his relationship with his foster child more freely than either a natural or adoptive parent was used as the basis for applying less rigid standards for removing the foster child from the custody of its foster parents in State ex rel. Gilman, 249 Iowa 1233, 1235-39, 91 N.W.2d 395, 399 (1958): “The importance of the difference of the status of a natural or adoptive parent, on the one hand, and one merely standing in loco parentis, as in the case before us, is found in the fact that the defendant has made no attempt to adopt [his six-year-old foster child] during the several years he had custody of the child. He is still free to disavow his responsibility as a parent at any time. We do not say he has such an intent; but the right to do so and the possibility are there.

Viewing the entire picture, we think the trial court was amply justified in holding that
Announcing a decision to terminate the relationship while continuing to live with the child is insufficient. A foster parent may not choose to honor the right to enjoy companionship, for example, and fail in the duty to provide support.

The fact that a person has only a foster relationship with a child will ordinarily not relieve him of the obligation to provide financial support. In enforcing a foster parent's support duty, courts have held that persons acting in the role of natural parents assume the duties of natural parents. Foster parents, therefore, may be required to reimburse those who undertake to support their foster children.

Contractual Aspects of the Foster Parent-Child Relationship

A distinction must be drawn between the legal implications of the foster parent-child relationship that emerge from the common law doctrine of in loco parentis and the foster parent-child relationship created by agencies under court authority. The status of the individual chosen by an agency to become a foster parent hinges on whether the agency deems him to be an

the best interest of the child requires that the defendant be permanently deprived of custody, and the boy sent to a child-placing institution. From there he may eventually be placed in the home of suitable adopting parents, where he will have not only food, clothing and shelter, and love and affection, but security, with freedom from constant shifting about and from the uncertainties and unfavorable influences to which he has heretofore been subjected.

18. That there is a duty to support under these circumstances is evident from public welfare law. The "man-in-the-house" rule, or, as it is sometimes called, the "substitute parent" policy, was stated in People v. Shirley, 55 Cal. 2d 521, 524, 360 P.2d 33, 34 (1961); "[U]nder regulations of the State Board of Social Welfare a stepfather living in the home is responsible for the support of the mother of a needy child unless incapacitated and unable to support. . . . A man living in the home assuming the role of spouse has the same responsibility as that of a stepfather for the mother and the needy children. See also N. Pacht, Support of Defendants in the District of Columbia: Part I, 9 How. L. J. 20, 36-38 (1963); J. tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status, Part III, 17 Stan. L. Rev. 614 (1965).
19. In re Harris, 16 Ariz. 1, 140 P. 825 (1914); Howard v. Randolph, 134 Ga. 691, 68 S.E. 586 (1910); Faber v. Industrial Comm., 352 111. 115, 185 N.E. 255 (1933); Foreman v. Henry, 87 Okla. 272, 210 P. 1026 (1922); Rosky v. Schmitz, 110 Wash. 547, 188 P. 493 (1920); Ellis v. Cary, 74 Wis. 176, 42 N.W. 252 (1889). See also In re Adoption of Cheney, 244 Iowa 1180, 59 N.W.2d 685 (1953); Britt v. Allred, 199 Miss. 786, 25 So.2d 560 (1946); Hollis v. Thomas, 42 Tenn. App. 407, 303 S.W.2d 751 (1957); State ex rel. Gilroy v. Superior Court, 37 Wash. 2d 926, 226 P.2d 882 (1951).
20. See Rudd v. Fineberg's Trustee, 277 Ky. 505, 126 S.W.2d 1102 (1939).
employee or whether he is a person simply selected by the agency to perform the function of a foster parent. Foster parents most commonly are not considered employees, but rather are persons unconnected with the agency's organization. Their rights and duties are determined by a placement contract, a standard-form agreement whose provisions are drafted by the agency and acquiesced in by the foster parents. The provisions of the contract normally supersede the common law doctrine of *in loco parentis*.

A further distinction should be drawn between the ostensible expectations of the foster parent-child relationship and the contractual basis which establishes it. As the Child Welfare League of America *Standards for Foster Family Care Service* states:

> The ultimate objectives of foster family care should be the promotion of healthy personality development of the child, and amelioration of problems which are personally or socially destructive. Foster family care is one of society's ways of assuring the well-being of children who would otherwise lack adequate parental care. . . . Foster family care should provide, for the child whose own parents cannot do so, experiences and conditions which promote normal maturation (care), which prevent further injury to the child (protection), and which correct specific problems that interfere with healthy personality development (treatment). Foster family care should be designed in such a way as:
> to maintain and enhance parental functioning to the fullest extent;
> to provide the type of care and services best suited to each child's needs;
> to minimize and counteract hazards to the child's emotional health inherent in separation from his own family and the conditions leading to it;
> to make possible continuity of relationship by preventing replacements;
> to facilitate the child's becoming part of the foster family, school, peer group and larger community;
> to protect the child from harmful experiences;
> to bring about his ultimate return to his natural family whenever desirable and feasible.

These expectations should be compared with the harsh legalistic language in a representative foster care contract:

> In consideration of being accepted as foster parents by the Agency we agree as follows:
> 1. The child placed with us will be accepted by us as a member of our family, and will receive our affection and care as foster parents. The Agency will furnish a monthly board payment, payable at the end of

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each month. At the time of placement, we will be notified of the specific rate for the child placed with us.

The Agency will provide for the child’s clothing, medical and dental expenses.

We will be reimbursed for certain other expenditures made, as described in the Foster Parents’ Manual, provided they have been previously authorized by the Agency.

2. We will notify the Agency of any change or plans for change in our own life, which may affect the child placed with us. This will include, but is not limited to vacation plans, illnesses, job changes, moving, and any change in the composition of our family.

3. We will notify the Agency immediately if the child placed with us becomes ill, and we will comply with the Agency’s arrangements for medical and dental care.

4. We are aware that the Agency has the responsibility for making plans with regard to the child’s relationship with his or her own relatives. We will cooperate with the arrangements made by the Agency worker for visits between the child and his or her own relatives.

5. We acknowledge that we are accepting the child placed with us for an indeterminate period, depending on the needs of the child and his family situation. We are aware that the legal responsibility for the foster child remains with the Agency, and we will accept and comply with any plans the Agency makes for the child. This includes the right to determine when and how the child leaves us, and we agree to cooperate with the arrangements made toward that end.

6. Should we find ourselves unable to continue giving foster care to the child placed with us, we will notify the Agency promptly, and will cooperate with the Agency in making the change of placement as easy as possible. For this reason, we will give the Agency as much time to make such change as is needed, unless our situation is emergent.

As can be seen from the provisions as set forth above, the stated goals of foster care, centering on the welfare of the child, the quality of the foster parent-child relationship, and the preservation of the natural parents’ interests, are neither stated nor implied in the contract.

Because of the ambiguities inherent in the attempt to reconcile the goals of foster care programs with the provisions in placement contracts, conflicts inevitably arise between the agency and the foster parents. In resolving these disputes, the agency often asserts the provisions of the contract in support of its position and in opposition to the foster parents’ assertion that they are furthering the very goals which foster care programs ostensibly seek to promote. Thus, disputes between agencies and foster parents raise grave doubts as to whether the best interests of the child are the paramount consideration in foster care programs, as well as whether foster parents are, in
fact, viewed as "one of the crucial human resources for the care of children who must leave their own homes."\textsuperscript{23}

The process by which these disputes are resolved and the considerations that bear upon their resolution are illustrated by the following two cases, \textit{In re Jewish Child Care Association}\textsuperscript{24} and \textit{In re Alexander}.\textsuperscript{25}

\textit{The Case of Laura}

The history of Laura, the five-and-a-half-year-old whose custody was at issue in the New York case of \textit{In re Jewish Child Care Association}, resembles that of many other children similarly involved in the struggle of foster parents to make permanent their relationship with their foster children over the objections of placement agencies. When Laura was thirteen months old, she was placed by the Jewish Child Care Association, a foster care agency, with Mr. and Mrs. Sanders, a childless couple in their thirties. Laura's mother, who was eighteen years old and unwed, had been unable to care for the baby at birth and had voluntarily placed her with the New York City Department of Welfare, which transferred the child's custody to the Jewish Child Care Association (hereafter referred to as the Agency).

At placement, the Sanderses were required to sign a document in which they accepted the standard conditions of foster care.\textsuperscript{26} Among other things, the couple promised to give Laura affection and care, to follow the Agency's regulations regarding the boarding arrangement and any illnesses or changes in the family situation, and they agreed to cooperate with the Agency's plans for continuing a relationship with the child's natural mother. If the couple became unable to continue as foster parents, they promised to work with the Agency in making an orderly transition to another placement. The Sanderses acknowledged that they were accepting Laura for an in-

\textsuperscript{23} P. Hall, \textit{Foreword to D. Fanshel, Foster Parenthood \textit{v} (1966).}
\textsuperscript{24} 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (1959).
\textsuperscript{25} 206 So.2d 452 (Fla. 1968).
\textsuperscript{26} See supra note 22 and accompanying text.
determinate period and were aware that the legal responsibility for the child remained with the Agency.

During the first year after placement, the Sandersons spoke with the Agency about adopting Laura. They were told that adoption was not possible and were asked to help the child understand her relationship to her natural mother. The child had seen her natural mother once during the first year of placement. During the second year of foster care, the Sandersons again mentioned their desire to adopt Laura. The Agency refused to consider the proposal and required the couple, as a condition for keeping the child, to sign a statement acknowledging that they had the child only on a foster home basis. The Sandersons persisted in their efforts to adopt Laura, unsuccessfully seeking approval from the child’s natural mother, grandmother, and other relatives. When the Sandersons requested permission to take Laura with them on an out-of-state vacation, the Agency refused, asserting that the child should be returned to her natural mother during that time. Laura, then four years old, had lived with the Sandersons for three years and had seen her natural mother only twice. She was not to see her mother again until the litigation over her custody began.

The Sandersons’ constant efforts to adopt Laura, along with the Agency’s belief that the couple had become too emotionally attached to the child, prompted the Agency to demand Laura’s return. The couple refused and the Agency brought a writ of habeas corpus to obtain the child’s release from the Sandersons’ home. From the perspective of the foster parents, the Agency’s decision to seek the writ was potentially beneficial for various reasons. It allowed the Sandersons to bypass administrative remedies and to obtain an immediate judicial review of the Agency’s decision denying request for adoption. Considering their strained relations with the Agency, the Sandersons’ chances for administrative relief would probably have been slim. Furthermore, since a habeas corpus proceeding is a method by which a court may explore the question of the child’s welfare.  

beyond the narrow issue of the legal right to custody, the fact that the Agency was Laura's legal guardian did not place it in a significantly advantageous position.

In the trial court proceedings to determine whether Laura’s “best interests” would be served by a custodial change, the testimony was focused on the effect the proposed change would have on the child’s natural mother as well as on the child’s own physical and emotional well-being. The line of questioning at the trial seemed to be based on the assumption that the goal of the proceedings was to determine how Laura’s needs could best be secured in light of the natural mother’s inability to raise the child.

The trial judge heard testimony from the foster parents, representatives of the Agency, the Department of Welfare, and a psychiatrist. The Agency acknowledged that the Sanderses had taken good care of the child and were providing her with a comfortable home environment. However, it claimed that, because of the great love of the foster parents for the child, Laura should be removed from their custody and placed in a “neutral environment” where foster parents would be called “aunt” and “uncle” instead of “mother” and “father” and where “there would not be this terrible pull on the child between her loyalty to her foster parents and her mother.” In other words, the Agency did not claim that the foster parents were depriving the child of love, but rather that they were indulging her with too much love. The effect of their indulgence on the child, the Agency urged, was a strain on her relationship with her natural mother.

A large part of the trial consisted of the interrogation of a psychiatrist called by the foster parents. In his testimony, he analyzed the effect of a custodial change on Laura’s emotional


development. In his opinion, the Sanderses' love for the child had positive rather than damaging emotional effects; indeed, Laura's removal from her foster parents would be detrimental to her emotional growth. He stated that latency was a critical period in a child's development and that, at Laura's age, she needed the security of the sustained relationship with her foster parents.

The trial judge apparently either was not sufficiently convinced by the psychiatric testimony or was persuaded by the Agency's argument that the child was becoming too attached to her foster parents, thus threatening her "relationship" with her natural mother. He decided to remove Laura from her foster parents and to allow the Agency to regain custody and place her in a "neutral environment." After the intermediate appellate court affirmed the decision of the trial court, the Sanderses appealed to the New York Court of Appeals, which held in favor of the Agency in a split (4–3) opinion.

In the New York Court of Appeals' opinion, there is a discernible and major shift in emphasis from that found in the lower court's opinion. The trial court viewed the "best interests of the child" doctrine in terms of securing Laura's health needs in light of her natural mother's situation. The New York Court of Appeals interpreted "the best interests of the child" in terms of preserving the continuity of biological family loyalty.

To the majority of the Court of Appeals, the fact that the Sanderses were Laura's foster (rather than natural or future adoptive) parents was crucial. The court perceived foster parenthood as something less than full parenthood. By showing

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31. Id. The basis of the New York Supreme Court's opinion was as follows: "Respondents have, the court feels, become fond of the child to an extent which has resulted in an attempt by them to induce the mother to permit adoption by them; she has resisted these efforts and the conflict has resulted in this proceeding. The petitioner believes (quite correctly in the court's opinion) that it cannot suffer its established practice to be set at naught solely because respondents believe they can contribute more to the child's welfare than petitioner and the mother can. The court does not believe that the best interest of this child will be served by the condonation of a disregard of their own obligations and agreements by the respondents, however well-intentioned they may be. Id. at 403, 172 N.Y.S.2d at 631.
"extreme love," "affection," and "possessiveness" and by acting more like natural than foster parents, the Sanderses, in the court's estimation, had gone beyond the limits of their role as set out in the placement agreement. In essence, what the majority took as conclusive—namely, the "vital fact... that Mr. and Mrs. Sanders are not, and presumably will never be, Laura's parents by adoption,"—was the very issue the court was to decide.

The court stressed its concern for preserving the natural ties between Laura and her mother. "[I]n considering what is in Laura's best interests," the court wrote, "it was not only proper, but necessary... to consider the facts in terms of their significance to Laura's eventual return to her own mother.

And later the court stated:

What is essentially at stake here is the parental custodial right. Although Child Care has the present legal right to custody... it stands, as against the Sanders, [sic] in a representative capacity as the protector of Laura's mother's inchoate custodial right and the parent-child relationship which is to become complete in the future.

Finally, in its concluding remarks, the court crystallized its views on the best interests of the child as follows:

[T]he more important considerations 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.

In addition, the court in Child Care was concerned with three considerations, all interrelated (but not necessarily related to the best interests of Laura): the preservation of the natural mother's rights; the sanctity of the placement contract; and the maintenance of the Agency's prestige and authority in the community. In the final remark of his opinion for the Court of Appeals, Chief Judge Conway came to grips with these issues. While the interests of Laura and her natural mother (but apparently not those of the foster parents) were of significant importance, what was paramount was the integrity of the law, as manifested in the child placement contract and in a private agency's administrative decisions. In order to maintain author-

33. *Id.* at 229, 156 N.E.2d at 703, 183 N.Y.S.2d at 70.
34. *Id.* at 228, 156 N.E.2d at 703, 183 N.Y.S.2d at 69.
35. *Id.* at 229, 156 N.E.2d at 703, 183 N.Y.S.2d at 70.
36. *Id.* at 230, 156 N.E.2d at 704, 183 N.Y.S.2d at 71.
itly, these administrative policies had to be affirmed and the child placement agreement enforced: "[T]he program of agencies such as Child Care . . . may not be subverted by foster parents who breach their trust."\textsuperscript{37}

The majority in \textit{Child Care} was concerned with symbols: Judge Conway seemed compelled to preserve the sanctity of legal doctrines and, indirectly, the reputation of a community institution, since the Sandersons had been a threat both to the integrity and the stability of the placement contract\textsuperscript{38} and to the prestige of the Agency. To allow Laura to remain with her foster parents would have been to reward persons who failed to fulfill their promises and who had undermined the Agency's decision.\textsuperscript{39} It seems that by protecting community institutions, the court shifted its focus from Laura's welfare to other matters: on a jurisprudential level, it was the continuity of legal doctrine; on a practical level, it was the prestige of a social service agency.

\textit{Child Care} represents a legal struggle between a long-standing and dominant community institution of high prestige and a couple performing a function with low social status.\textsuperscript{40}

\begin{footnotes}


\footnoteref{38} \textit{But see note 45 infra} and accompanying text.

\footnoteref{39} Subsequent to this case, another dispute between foster parents and an agency arose. After much publicity, the agency relented and the child was allowed to remain with her foster parents. \textit{See} \textit{In re St. John}, 51 Misc.2d 96, 272 N.Y.S.2d 817 (Family Ct. 1966), rev'd sub nom. Fitzsimmons v. Liuni, 26 App. Div.2d 980, 274 N.Y.S.2d 798 (3d Dep't 1966), \textit{commented on} in \textsc{H. Foster & D. Freed,} \textit{Family Law,} 19 \textsc{Syracuse} \textsc{L. R.} 478, 479-91 (1967); \textsc{H. Foster & D. Freed,} \textit{Children and the Law,} 1966 \textsc{Annual Survey of American Law} 649, 660-61.

\footnoteref{40} Apparently in response to the \textit{Liuni} case, the New York State Legislature passed the following act: "Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of two years or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoption placements. However, final determination of the propriety of said adoption of such foster child shall be within the sole discretion of the court, as otherwise provided herein." N.Y. SOC. WELFARE LAW § 383.3 (McKinney Supp. 1969).

\footnoteref{37} D. Crystal, \textit{What Keeps Us from Giving Children What We Know They Need?} 37 \textsc{The Social Service Review} 136, 137 (1953): "The plain fact is that fosterparenthood in our society—that is, being associated with a social agency for the purpose of rearing other people's children—evokes a series of negative associations in the mind of the public. . . . To be a foster-parent is to invite immediate practical questions from friends and neighbors as to economic motive, primarily, and in a sense to take on the stigma attached to being the recipient of 'welfare.' "

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As a consequence, the child's best interests—theoretically the guiding principle in child custody cases—were subverted. Laura experienced two placements in addition to the Sanderses in a two-year period subsequent to the decision. The outcome in *Child Care* is thus in direct contradiction to the theories of those child development specialists who would avoid multiple placements because "the greatest damage to healthy psychological development is instability—and the kinds of impediments that interfere with the process of identity formation." 

**The Case of Michael**

Another illustration of the manner in which courts handle attempts by foster parents to adopt the children in their care is *In re Alexander*, a 1968 Florida case involving a two-year-old infant named Michael. Several days after he was born, a Florida Juvenile and Domestic Relations Court committed Michael to the Department of Welfare for subsequent adoption. Immediately after the Department was awarded custody, it placed the infant in the foster care of Mr. and Mrs. Alexander. As a condition of placement, the Alexanders were required to sign a Placement Agreement, stating among other things, that they would not attempt to adopt the child.

Mr. and Mrs. Alexander were a couple in their late forties who had served as foster parents for the Department on previous occasions. Their annual income was about $5,000. Mr. Alexander held both a full- and part-time job. They lived in a modest home, neat and well kept. Although Mr. and Mrs. Alexander had no natural children of their own, Mrs. Alexander had four sons, ages twenty-three, twenty-eight, thirty, and thirty-four, by her first marriage. None of Mrs. Alexander's sons had completed high school. All except the youngest

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41. See Goldstein & Katz, supra note 22, at 1033–34.
44. The Placement Agreement stated simply, "No action for adoption or guardianship may be taken." Brief for Appellant, Appendix at 1.
seemed to be having difficulties of one kind or another. At the
time of this proceeding, Mrs. Alexander was a grandmother.

Mr. Alexander refused to allow his wife to work outside the
home. Mrs. Alexander stated that as a consequence, she was
limited to child rearing as a means of occupying her time;
otherwise she would feel "restless" as well as unproductive.
The role of a foster mother provided her with an opportunity to
satisfy her own needs, including her maternal needs, and at the
same time meet her husband's demands.45

During the two years that Michael lived with the Alexanders,
Mr. and Mrs. Alexander sought to obtain the approval of the
Department to adopt him. They were told that adoption was not
possible because of the Placement Agreement which stated that
they would not try to adopt the child,46 and they were requested
to return Michael to the Department. On advice of their coun-
sel, the Alexanders surrendered the infant and the Department

45. Id. at 2-4.
46. The legal enforceability of a statement of this kind was at issue in Adoption of
McDonald, 43 Cal.2d 447, 274 P.2d 860 (1954). In that case, foster parents signed an
agreement with an adoption agency which included, among other provisions, a require-
ment that any request for adoption of the child placed with them had to be approved by
the agency, and a stipulation that if after one year the agency was satisfied with the
training of the child and the character of the foster parents' home, it would allow the
adoption. The agreement further provided that the agency had the right to remove the
child previous to legal adoption if at any time the circumstances warranted it. About
eight months after the placement of the child, the foster father committed suicide. Later
the agency demanded the return of the child. The foster mother refused to give up the
child and petitioned a court for adoption without securing the agency's consent. The
trial court granted the adoption, having concluded that the agency's consent was
unnecessary.

One of the arguments which the agency made in its appeal to the California Supreme
Court was that the foster mother was estopped from pursuing the adoption by virtue of
the agreement she and her husband signed at the time of placement. Addressing himself
to this argument, Justice Traynor wrote: "The [State] department [of Social Wel-
fare]... has no power by regulation or otherwise to add to or detract from the rules for
adoption prescribed in the Civil Code. ... Thus, neither appellant, the department, the
county agency, nor any private agency had the right by regulation or by agreement to
deprive petitioner of the rights granted her by section 226 of the Civil Code to petition
the court and have the court determine whether the petition should not be granted. If
the department could give a licensed agency the right to control the adoption of a
relinquished child, it could give such an agency the right to control the adoption of any
child not subject to parental control. The statutory provisions governing adoption
cannot be so circumvented.

In a proceeding such as this the child is the real party in interest and is not a party to
any agreement. It is the welfare of this child that controls, and any agreement others
may have made for its custody is made subject to the court's independent judgment as
to what is for the best interests of the child." Id. at 461, 274 P.2d at 868; see also Cal.
CIV. CODE § 224(n) (Supp. 1964).
immediately placed him in another foster home. The Alexanders immediately sought the advice of another lawyer, and when he urged them to resume their adoption efforts, the case was heard in a court located in the same county as the Department.

At the trial court level, the case raised the issue of the power of the Department to exclude the Alexanders from adopting Michael. This question was framed in terms of the necessity of the Department's consent to the adoption and the extent to which the Placement Agreement was to be enforced. Ancillary to these considerations was the question of whether the child's best interests would be served by the adoption. The Department argued the case principally on the technical legal issues of contract and procedural law. It urged the enforcement of the placement agreement, seeking thereby to oust the court from jurisdiction over the case. Alternatively, it raised the unsuitability of the Alexanders as adoptive parents, pointing to the fact that they were older than most adoptive couples and that their financial situation was not as secure as the Department would demand. The Alexanders argued that the Department, through its contract with them, could neither deprive the court of its right and duty to determine the child's best interests nor withhold its consent to the adoption. They also argued that they were fit parents for Michael.

The trial court decided in favor of the Alexanders. In a brief opinion, it upheld their contention that a welfare department could not divest the court of its inherent power to determine the ultimate best interests of a child, even though, as a legal matter, the authority to deal with the child on a day-to-day basis had been delegated to the Department.47

Subsequent to the decision of the trial court, the case received wide publicity in the local papers.48 Thus, when the Department ultimately appealed the case, it was faced not only with the necessity of overcoming legal obstacles, but also with

47. In re Adoption, No. 155465-C (Fla. Cir. Ct., March 24, 1967). See Appendix.
the problem of strong local prejudice in favor of the Alexanders. The focus of the newspaper articles was naturally on the emotional aspects of the case. They stressed the personal qualifications of the Alexanders and their professed love for the child in contrast to the rigid bureaucratic position of the Department. The newspapers printed the opinions of local officials who portrayed the Welfare Department as cold blooded and "all knowing" and quoted a school principal as saying that "welfare workers had no concern for the welfare of children and their custody, and the only interest they have is in their rules."49

It is difficult to believe that these reports did not influence the appeals court when it decided to affirm the trial court by adopting its findings in toto.50 Unlike some situations, for example Child Care, where the appeals court was removed physically and perhaps emotionally from local pressures, the appeals court in Alexander was located in the same community as the disputing parties—the Department, the foster parents, and the foster child.

The facts in Alexander represent the usual situation in cases where foster parents seek to adopt children placed in their care. However, because of the wide publicity given the case, it would not be fair to say that the court's disposition was truly representative. Nevertheless, it is possible to appraise the factors which probably influenced the decisionmaking process in both the court and the Department.

There are several aspects of the Department's handling of the case that violate basic precepts of child placement. Most importantly, the Department failed to implement the principle of continuity of care by immediately placing Michael in a permanent situation.51 The Department knew when Michael was

49. Tampa Times, May 1, 1967.
50. For a discussion of the effects of mass media on child custody decisions, see S. Katz, Community Decision-makers and the Promotion of Values in the Adoption of Children, 38 THE SOCIAL SERVICE REVIEW 26, 37–39 (1964).
51. "Adoptive home placement is an important approach in providing maternal care as early as possible. The need for a permanent home early in the child’s life cannot be overemphasized. The trend toward adoptive placements in the early weeks of life is increasing and has many advantages both for the infant and for the adoptive parents." S. PROVENCE & R. LIPTON, INFANTS IN INSTITUTIONS 164 (1962).
committed to it that the natural mother had given up all claims to the infant. Indeed, the court committed the infant to the Department for adoption. Nevertheless, instead of immediately seeking an adoptive couple for Michael, the Department placed him with the Alexanders, a couple chosen by foster care rather than adoption standards, and who were clearly informed that the arrangement was only temporary. It is difficult to understand why the Department chose this course of action, since none of the factors which would normally justify an interim placement prior to adoption—a child hard to place by virtue of its age or race, illness, legal complications, and so on—was present in this case. Unfortunately, it is not uncommon for child welfare agencies to take this course of action and compound the error by allowing the temporary arrangement to continue indefinitely.

As was also the case in Child Care, the Department in Alexander used foster parents as boarding parents and was oblivious to the fact that emotional ties must inevitably develop between a child and its foster parents after years of living together. In each case the attachment should have been predictable. The Sandersons were a young childless couple eager to adopt a child; Mrs. Alexander was a woman known to have strong maternal needs. By resurrecting the Placement Agreement, the agencies in both cases sought to regain control over the situation and to give "law" precedence over normal human responses.

The result in Alexander is, or should be, more typical than that in Child Care. Theoretically, the court's role in child custody cases is that of parens patriae. As such, the court has a responsibility to make an independent examination of the facts to determine the best interests of the child. The courts in Child Care abdicated this responsibility and rested their decision on the Agency's findings. The courts in Alexander, on the other hand (if one disregards the possibility of publicity affecting their decisions), attempted at least to make an independent inquiry, and did not use the existence of the Placement Agreement as an

52. See A. Freud, Cindy, in Goldstein & Katz, supra note 22, at 1051–53.
excuse for failing to do so, as the courts in *Child Care* seem to have done. If the courts in *Child Care* and *Alexander* had affirmatively sought to promote the best interests of Laura and Michael, they would have balanced a fundamental principle of child development—continuity of care—against the alleged limitations as adoptive parents of the Sanderses—emotional over-involvement—and the Alexanders—age and financial insecurity. Whether consideration of this principle would have altered the results in these cases is difficult to say, but a proper inquiry would at least have been made, and the responsibility of the courts to the children fulfilled.53

**Conclusion**

The cases of *In re Jewish Child Care Association* and *In re Alexander* illustrate the seemingly inevitable trend toward long-term placements. In both cases the placements were intended to be temporary, although in *Alexander* the child was available for adoption when the Department gained guardianship and custody. In both cases, by allowing the foster parents to establish strong emotional ties with the foster children, the agencies required the foster parents to assume roles that were almost inherently contradictory. The Sanderses and the Alexanders were expected to be substitute parents, providing everything that natural parents should provide, but to do so without themselves forming emotional attachments.

Both cases also illustrate another inconsistent attitude taken by agencies toward foster parents. On the one hand, agencies ask that foster couples care for a neglected child as they would their own. On the other hand, agencies attempt to maintain ultimate control over the foster parent-child relationship, basing

53. "Too often the courts have permitted themselves to become actors in a ceremony of official approval for whatever is being done or left undone for neglected children. Without sufficient or qualified staff to discover the needs of and the possibilities for children placed with foster agencies, the voluminous files loom larger than the child. The court is not made aware of the separation of siblings, the failure to work with the parents, and the failure to institute legal action on behalf of the child to free him for adoption and is given only a brief statement on why the child should be continued in placement. The lack of appropriate service by the social agencies, thus sanctioned and subsidized by court action, condemns countless children to emotionally arid lives." J. Polier, The Role of Law and The Role of Psychiatry 119 (1968).
their authority on the fact that a court has committed a child to them. They emphasize that once a court has entrusted a child to their care, they are legally responsible for the child and answerable to the court. In practice, however, when a court grants the guardianship and custody of a child to an agency, the court neither oversees the process and standards by which the agency chooses foster parents, nor does it thoroughly or frequently review foster care placements.

Foster parents, however, are not as totally devoid of power as agencies sometimes assume. Not only does physical custody of a child give the foster parents certain legal advantages, but the doctrine of *in loco parentis* gives them something of a legal identity. A foster parent may be limited by a placement contract, but these contracts do not necessarily set the actual legal dimensions of his authority.

If foster care is used exclusively as a short-term living arrangement for a neglected child whose ultimate reunion with its natural parents is intended, it provides an agency, conscientiously seeking to promote the child’s best interests, with an additional placement alternative to be used where natural care is temporarily undesirable and adoption inappropriate. When, however, foster care is used to provide a temporary home for a child eligible for adoption, it loses its unique properties and in fact often operates to defeat the child’s best interests by breaking the continuity of care.