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FOSTER PARENTS VERSUS AGENCIES: A CASE STUDY IN THE JUDICIAL APPLICATION OF "THE BEST INTERESTS OF THE CHILD" DOCTRINE

Sanford N. Katz*

IT is generally conceded that, in the area of child welfare, social service agencies have the expert knowledge and methods for making enlightened custodial dispositions. Consequently, courts rely on agency decisions and have come to utilize agencies as the intermediate placement for a child whose custody must be resolved. Child welfare agencies are given the authority to choose the custodian for a child on a temporary, permanent, or indefinite basis, and may, at times, be authorized to supervise the placement of the child.

In a certain sense, the court is surrendering its jurisdiction by its reliance on the welfare agencies, and this delegation of decision-making power may have far-reaching consequences. Whether welfare agencies use their power as wisely as courts assume depends largely on what we mean by "wisely" and on what agency is involved. In general, courts unfortunately have neither the time nor the facilities to supervise agency placements, and it is only when an individual has been rejected as a qualified custodian that courts have an opportunity to review agency practices.

A recurring problem which courts face is the need to resolve the conflict which arises when foster parents challenge the decision of agencies that have disqualified these persons from continuing their relationship with or adopting their foster child. This article will explore the role of courts in resolving these disputes and will suggest some criteria by which the courts may be guided in deciding such questions.

I. THE CASE OF LAURA

A. *Agency Participation*

The history of Laura, the five-and-a-half-year-old child whose custody was at issue in the New York case of *In the matter of Jewish Child Care Association*,¹ is similar to that of many other children

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1. 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (1959).

who are similarly involved in the struggle of foster parents to adopt children over the objections of placement agencies. When Laura was 13 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, eighteen years old and unwed, had been unable to care for the baby at birth and had placed her with the New York City Department of Welfare, which transferred the child's custody to the Jewish Child Care Association (hereinafter referred to as the Agency).

At placement, the Sanders were required to sign a document in which mutual promises were exchanged.² Among other things, the couple promised to accept Laura as a member of their family and, as foster parents, to give her affection and care. They promised to follow the Agency's regulations regarding the boarding arrangement, notification of and care during the child's illnesses, and changes in living conditions that would affect the child, such as

2. The following is an example of the kind of agreement entered into by the Agency and the Sanders:

In consideration of being accepted as foster parents by the Jewish Child Care Association [hereinafter referred to as 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 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 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.

Date _____
 Signature of Foster Mother _____
 Signature of Foster Father _____

Countersigned:

Agency Social Worker _____

modifications caused by vacations, job changes, and other events. They also agreed to cooperate with the Agency's plans for continuing a relationship with the child's natural mother. Should the couple be unable to continue as foster parents, they promised to work with the Agency in making an orderly transition to another placement. The Sanders acknowledged that they were accepting Laura for an indeterminate period and were aware that the "legal responsibility for the child" remained with the Agency.

During the first year after placement, the Sanders spoke with the Agency about adopting Laura. They were told that adoption was not possible and were asked to help the child understand who her natural mother was. The child had seen her natural mother once during the first year of placement. During the second year of foster care, the Sanders 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.³ Despite the signed statement, the Sanders persisted in their efforts to adopt Laura, unsuccessfully seeking approval from the child's natural mother, grandmother, and other relatives. When the Sanders re-

3. The legal enforceability of a statement of this kind or of the child placement agreement is open to question. In *Adoption of McDonald*, 43 Cal. 2d 447, 274 P.2d 860 (1954), foster parents signed an agreement with an adoption agency which included, among other provisions, a requirement that any request for the 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 Welfare] . . . 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 or 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 adoptions 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 the 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).

quested 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, had lived with the Sanders 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 Sanders' constant efforts to adopt Laura in contradiction of their statements, 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 demand the child's release from the Sanders' home. As seen from the perspective of the foster parents, the Agency's action was potentially beneficial for various reasons. It allowed the Sanders to bypass administrative remedies and to obtain an immediate judicial review of the Agency's decision denying their adoptive suitability. Considering their strained relations with the Agency, the Sanders' 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 child's welfare⁴ beyond the narrow issue of the legal right to custody,⁵ the fact that the Agency was the legal guardian of Laura did not place it in a significantly advantageous position vis-à-vis the Sanders.

B. *The Trial*

In the trial court proceedings to determine whether Laura's "best interests" would be served by a custodial change, much of the testimony was focused on the effect that 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 in which the trial judge and the attorneys engaged seemed to be based on the underlying assumption that the goal of the proceedings was to determine how Laura's needs could best be secured in light of the inability of the natural mother to raise the child.

The trial judge heard testimony from the foster parents, representatives of the Agency, the Department of Welfare, and a psy-

4. See, e.g., *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); *Berry v. Berry*, 219 Ala. 403, 122 So. 615 (1929); *Porter v. Chester*, 208 Ga. 309, 66 S.E.2d 729 (1951); *Heuvel v. Heuvel*, 254 Iowa 1391, 121 N.W.2d 216 (1963). Even the matter of child support may be explored. See *Howarth v. Northcott*, 152 Conn. 460, 208 A.2d 540 (1965). *Contra*, *Buchanan v. Buchanan*, 170 Va. 458, 197 S.E. 426 (1938); *Pugh v. Pugh*, 133 W. Va. 501, 56 S.E.2d 901 (1949). But some jurisdictions limit the court's inquiry on habeas corpus to the narrow issue of the legal right to custody. See, e.g., *May v. Anderson*, 345 U.S. 528 (1953) (Ohio).

5. See *New York Foundling Hosp. v. Gatti*, 203 U.S. 429 (1906); *Pukas v. Pukas*, 129 W. Va. 765, 42 S.E.2d 11 (1947).

chiatrist. The Agency acknowledged that the Sanders 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."⁶ In other words, the Agency did not claim that the foster parents were depriving the child of love, but rather argued 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 Sanders' 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 a 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."⁷ After the intermediate appellate court affirmed the decision of the trial court,⁸ the Sanders appealed to the New York Court of Appeals, which held in favor of the Agency in a split (4-3) opinion.⁹

6. 5 N.Y.2d 222, 227, 183 N.Y.S.2d 65, 68, 156 N.E.2d 700, 702 (1959).

7. *Jewish Child Care Ass'n v. Sanders*, 9 Misc. 2d 402, 172 N.Y.S.2d 630 (Sup. Ct. 1957), *aff'd*, 174 N.Y.S.2d 335 (App. Div. 1958), *aff'd*, 183 N.Y.S.2d 65, 156 N.E.2d 700, 704 (Ct. App. 1959).

8. *Ibid.* 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 an 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.

9. 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (1959).

C. *The Appeal*

In the New York Court of Appeals' report, 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 condition. The New York Court of Appeals first concentrated on the legal status of the claimants and then interpreted "the best interests of the child" in terms of the continuity of family loyalty and the law.

To the majority of the Court of Appeals, the fact that the Sanders 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 "extreme love," "affection" and "possessiveness" and by acting more like natural than like foster parents, the Sanders, 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 in the case, namely the "vital fact . . . that Mr. and Mrs. Sanders are not, and presumably will never be, Laura's parents by adoption,"¹⁰ was the very issue the court was to decide.

The court stressed its concern for preserving the natural ties between Laura and her mother. "In 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."¹¹ 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, 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.¹²

Finally, in its concluding remarks, the court crystallized its main preferences 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.¹³

10. *Id.* at 229, 183 N.Y.S.2d at 70, 156 N.E.2d at 703.

11. *Id.* at 228, 183 N.Y.S.2d at 69, 156 N.E.2d at 703.

12. *Id.* at 229, 183 N.Y.S.2d at 70, 156 N.E.2d at 703.

13. *Id.* at 230, 183 N.Y.S.2d at 71, 156 N.E.2d at 704.

1. Family Loyalty

The parental right to custody, the doctrine referred to by the court as both "paramount" and "fundamental," holds that any biological parent is entitled to the custody of his child unless the parent is affirmatively shown to be unfit.¹⁴ Many courts have claimed that the right is based on principles of morality and natural affection.¹⁵ However, the common law history of the doctrine reveals that it may have been created for considerations of wealth rather than the dictates of a moral code. During the feudal period, custodial rights, which had commercial value, were subject to transfer and sale; a child was a financial asset to his father. During this early period, therefore, a custodial right was a property right.¹⁶ In time, as concern developed for the child's welfare and as the mother was legally considered a joint custodian together with the father, the emphasis shifted from the property theory of custody toward the personal status theory.¹⁷ That is, the natural parents, because of their relationship to the child, were presumed to be the custodians best fitted to serve the child's needs.

At first glance, the parental right to custody may seem to be a doctrine competing with "the best interests of the child" approach. Indeed, the parental right theory has been described as a secondary doctrine in child custody matters.¹⁸ Perhaps, however, it is more appropriate to say that the parental right doctrine is often treated as if it were an expression of "the best interests of the child." Most frequently courts, invoking the parental right doctrine when they prefer to award custody to the child's natural parents rather than other claimants, assume that the disposition best serves the child's

14. See, e.g., *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999 (1944); *McGuire v. McGuire*, 190 Kan. 524, 376 P.2d 908 (1962); *Stout v. Stout*, 166 Kan. 459, 201 P.2d 637 (1949); *Ex parte Barnes*, 54 Ore. 548, 104 Pac. 296 (1909). See also IOWA CODE § 633.559 (1963).

15. See, e.g., *Wilkinson v. Wilkinson*, 105 Cal. App. 2d 392, 233 P.2d 639 (Dist. Ct. App. 1951); *Acomb v. Billeiter*, 175 So. 2d 25 (La. Ct. App. 1965); *In the matter of Lewis*, 35 Misc. 2d 117, 230 N.Y.S.2d 481 (Surr. Ct. 1962); *Anonymous v. Anonymous*, 15 Misc. 2d 389, 181 N.Y.S.2d 311 (Sup. Ct. 1959); *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953).

16. See Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676-77 (1942); tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part II*, 16 STAN. L. REV. 900, 925 (1964).

17. For many purposes, however, the child is still treated as property; there has been a shift, but not a substitution.

18. Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 354-60 (1962); *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 152-53 (1963).

welfare.¹⁹ When custody is awarded to others, it is likely that courts will simply state that "the best interests of the child" demand such a disposition,²⁰ or that "the superior rights" of parents, or the presumption in their favor, must yield to "the best interests of the child."²¹ It seems safe to say that when courts invoke the parental right doctrine to award custody to the natural parents, they are merely articulating an archaic notion, based upon a preference for the continuity of blood ties or the preservation of kinship loyalty, in order to justify a decision. It is a significant aspect of *Child Care* that the majority was more concerned with the *symbol* of natural family loyalty than its *fact*. As indicated previously, Laura's natural mother had seen the child twice in four years, and Laura's loyalty to her would seem, at best, to be more imaginary than real.

2. Integrity of the Law

In his final remark in his opinion for the Court of Appeals, Chief Judge Conway came to grips with what appeared to be his primary concern. While the interests of Laura and her natural mother (but apparently not those of the foster parents) were of significant importance, another factor was involved. The integrity of the law, as manifested in the child placement contract and in the administrative decisions of a private agency, had been challenged. In order to maintain authority, 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."²²

The majority in *Child Care* was again concerned with symbols. Judge Conway seemed compelled to preserve the sanctity of legal doctrines and, indirectly, the reputation of a community institution. The Sanders had been a threat both to the integrity and the stability of the placement contract²³ and to the prestige of the Agency. To give Laura to her foster parents would have been to reward persons who had failed to fulfill their promises and who had undermined the Agency's decision. It seems that by protecting community institutions, the court shifted its focus from Laura's welfare to other

19. See, e.g., *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999 (1944); *Stout v. Stout*, 166 Kan. 459, 201 P.2d 637 (1949); *Bond v. Bond*, 167 So. 2d 388 (La. Ct. App. 1964); *Ex parte Barnes*, 54 Ore. 548, 104 Pac. 296 (1909).

20. See, e.g., *Kennedy v. State Dept. of Pensions & Security*, 277 Ala. 5, 166 So. 2d 736 (1964); *Forbes v. Haney*, 204 Va. 712, 133 S.E.2d 533 (1963).

21. See, e.g., *Bond v. Bond*, 167 So. 2d 388 (La. Ct. App. 1964); *Mouton v. St. Romain*, 245 La. 839, 161 So. 2d 737 (1964).

22. 5 N.Y.2d 222, 230, 183 N.Y.S.2d 65, 71, 156 N.E.2d 700, 704 (1959).

23. But see note 3 *supra*.

matters: the continuity of legal doctrine and the prestige of a social service agency.

Child custody proceedings, more than other litigation, may be merely a cover for the real conflicts: a power struggle between individuals, institutions, or individuals and institutions, which culminates in a decision that indicates a preference for certain social values over others. It is sometimes said that, in child custody disputes between divorced parents, the child may act as a tool of the parents and the court as an arena in which the parents can display their mutual hostilities. In *Child Care*, one was not witnessing an intra-family conflict, but rather a struggle between community institutions: welfare agency and foster family. The important question before the court was not necessarily who should be awarded custody of Laura, although this inevitably was resolved, but whose decision-making power was to be recognized, the welfare agency's or the foster parents'. In *Child Care*, the Agency prevailed, and the decision therefore may be described as one which furthered the best interests of the *Agency*. Whether it was in the best interests of the child is hard to say. The psychiatrist and a dissenting judge thought it was not.²⁴

II. TOWARD CLARIFYING "THE BEST INTERESTS OF THE CHILD"

Assuming that the preservation of biological ties, the maintenance of the sanctity of contract law, and the protection of the prestige of a social service agency were the basis for the court's decision in *Child Care*, the question remains: were these considerations relevant to determining the custodial disposition that would further Laura's best interests? This question is difficult to answer unless one first defines for oneself "the best interests of the child," for the doctrine has no absolute definition. Nor is there uniformity in the results of the cases in which the doctrine has been applied. In general, all that can be said is that, as the doctrines of "bona fide purchaser" in the law of real property and "good faith" in negotiable instruments, so "the best interests of the child doctrine" is a mandate from the legislature, directing the judge to use his discre-

24. In his dissenting opinion, Judge Froessel anticipated the ultimate result of the case, multiple placements for Laura. He wrote:

If Laura is to be bandied about meanwhile from family to family until she is transferred to her mother, each such change will be extremely difficult for the child, as testified to without contradiction by the psychiatrist at the hearing. Why multiply the shocks? And if the mother never chooses to take Laura, and that does not appear to be unlikely from the record before us, the child could not find a better home than she now enjoys.

5 N.Y.2d at 235, 183 N.Y.S.2d at 75, 156 N.E.2d at 707.

tion in making a disposition.²⁵ Obviously, such an interpretation of the doctrine permits what has, in fact, taken place in *Child Care*: the use of value preferences dominant in the community and reflected in important community institutions.

Perhaps a reason for the constantly shifting bases of child custody opinions relating to establishing and reorganizing the parent-child relationship²⁶ is that courts feel there are few legal tests to which these decisions can be subjected. This conclusion may be unsound. Legal prescriptions existing in other areas, such as the standards relating to supervising the parent-child relationship, might be useful as guides. In this section, an effort will be made to formulate criteria for deciding custodial disputes and to provide a framework that might be helpful in narrowing and disciplining a court's scope of inquiry during both the information gathering and the evaluating stages of the decision. Furthermore, the proposed analytical scheme might provide judges a means by which they can express their preferences.

A. Purpose of the Parent-Child Relationship

Our cultural preferences may cause one to assume that a child is best reared in a family setting. The task in child placement is to find a family that will fulfill a child's needs. One way of determining these needs is to try to identify what the community expects the family, particularly parents, whether natural, adoptive, or foster, to provide for a child. Or, we may try to identify the goals of the parent-child relationship, regardless of what kind of parent is involved.²⁷ Answers are provided in reported cases, statutes, and pre-

25. See, e.g., CONN. GEN. STAT. REV. § 46-24 (1958) (the court can "make any order which it deems reasonable"); ILL. REV. STAT. ch. 40, § 19 (1956) (the court shall make a custodial disposition "as shall appear reasonable and proper"); MINN. STAT. § 518.17 (1947) (the court shall make a custodial disposition "as it deems just and proper"); NEB. REV. STAT. § 42.311 (1960 Rev.) (the court shall make a custodial disposition "as it shall deem just and proper"). See also Foster & Freed, *Child Custody, Part I*, 39 N.Y.U.L. REV. 423, 438 (1964).

26. The terms establishment and reorganization of the parent-child relationship refer to the substantive and procedural requisites for becoming a natural, adoptive, foster, neglected, and emancipated parent or child. The term "supervision" refers to governmental administration of established and reorganized parent-child relationships. This terminology is developed in GOLDSTEIN & J. KATZ, *op. cit. supra* note 2, at 1-5 (1965).

27. In much of the legal literature, a distinction, perhaps artificial and distracting, is made between foster care (giving rise to the foster parent-child relationship) and adoption. Foster care is regarded as temporary and adoption is considered permanent. See, e.g., *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 11 Cal. Rep. 707 (Dist. Ct. App. 1961); *Estate of McCardle*, 95 Colo. 250, 35 P.2d 850 (1934); *Schneider v. Schneider*, 25 N.J. Misc. 180, 52 A.2d 564 (Ch. 1947); *Griego v. Hogan*, 71 N.M. 280, 377 P.2d 953 (1963); *Taylor v. Taylor*, 58 Wash. 510, 364 P.2d 444 (1961). This distinction can be interpreted in a number of ways. For example, it may relate to the duration of the status. Or, it might be suggestive of the legal implications that flow

vailing middle class mores about parental responsibilities, but the discussion below will be restricted primarily to cases involving the state's supervision of the parent-child relationship. The pattern that emerges from these cases suggests a concern for promoting (1) order, integrity and family loyalty; (2) financial security; (3) health and education; and (4) morality and respect.

1. Order, Integrity and Family Loyalty

At birth a child is considered to be in the custody of his natural parents. Some have looked upon the family relationship that is established at this time as a trust which parents hold for the benefit of their child and the state.²⁸ In reality, however, due to the sheer necessities of the circumstances, parents assume control over and have immediate supervision of their infant to the exclusion of others. Except for certain compulsory governmental health measures during the first few weeks of their child's life, such as the silver nitrate treatment at birth and perhaps the PKU (phenylketonuria) test later, natural parents have the power to make decisions affecting their child's life.²⁹

from either status: foster care gives rise to ambiguous relationships while adoption creates fixed legal relationships similar to and sometimes identical with those between parents and their natural children. The following discussion may raise doubts about these assumptions. Also, it may lead one to question whether Mr. and Mrs. Sanders' status as foster parents should have been "the vital fact" for decision.

Foster parent refers to the status that arises when one not related, by either direct parental blood or through formal legal proceedings officially establishing an adoptive parent-child relationship, assumes the role generally regarded in the community as the one held by a parent. In traditional legal terminology, he would be one who stands in loco parentis. This doctrine, an illustration of a legal fiction, holds that people who act as if they were natural parents are legally held to the same standards as parents. To determine the status, courts tend to apply agency law notions, namely whether the parent "held himself out to the world" as a parent. For a full discussion and history of the doctrine, see *Schneider v. Schneider*, *supra*.

Foster status may arise in numerous ways, for instance, through direct or indirect formal judicial authority, by a formal or informal arrangement, or by voluntarily caring for a foundling. It also includes parents of a child placed in their custody prior to a final adoption decree and parents who hold themselves out as adoptive parents believing in the validity of an adoptive decree which is legally defective. Further illustrations include the situation that arises when a court awards guardianship and custody to persons other than the natural parents, or when a court awards a social welfare agency guardianship and custody of a child with the power to delegate (usually through an agreement that has the appearance of a legal contract) the parental role to persons chosen by the agency. This is what occurred in Laura's case. A not infrequent situation that may give rise to the foster-parent-child relationship is that in which one accepts into his home and treats as his own a child surrendered by his parents. This may occur by a formal or informal agreement or through abandonment. On the other hand, one is an adoptive parent only at the culmination of valid legal adoption proceedings.

28. See, e.g., *Gardner v. Hall*, 132 N.J. Eq. 64, 26 A.2d 799 (Ch. 1942); *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 Atl. 254 (Ct. Err. & App. 1925); *Elliot v. Elliot*, 235 N.C. 153, 69 S.E.2d 224 (1952).

29. Many states have statutory provisions regulating the silver nitrate test. See,

In legal terminology, a parent's control over and supervision of his child is called the "parental right to custody," and, if it can be included in the bundle of rights associated with marriage, establishing a home and rearing children, it can be claimed as a right that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"³⁰ and, therefore, constitutionally protected. The United States Supreme Court has employed substantive due process to protect the family, especially the husband-wife and parent-child relationships, from unwarranted governmental intrusion. This principle of protecting the freedom of the family is supported by cases beginning with *Meyer v. Nebraska*,³¹ in which the Court held invalid a state statute prohibiting the teaching of the German language to children who had not passed the eighth grade, and *Pierce v. Society of Sisters*,³² in which the Court ruled unconstitutional a law preventing the operation of private schools. *Meyer* and *Pierce* were considered to involve fundamental rights protected by the due process clause of the fourteenth amendment.

The principle that there is a realm of family life which the state cannot invade, save for some compelling reason such as protecting children from imminent danger, was reinforced by *Prince v. Commonwealth of Massachusetts*.³³ In that case, the United States Supreme Court held that Massachusetts child labor laws were not unreasonable restrictions on either a parent's right to rear children, especially with regard to teaching and practicing a particular faith, or a child's right to observe that faith. For the purpose of illustrating the extent to which the Court believes the parent-child relationship should be secure and free from unreasonable interference from the state, Mr. Justice Rutledge's words are relevant:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions [*Pierce v. Society of Sisters* and *Meyer v. Nebraska*] have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . Acting to guard the general interest in youth's well being, the state as

e.g., CONN. GEN. STAT. REV. § 19.92 (1958); FLA. STAT. § 383.05 (1965); ILL. REV. STAT. ch. 91, § 108 (1963). Minnesota specifically waives the test if parents object to it. MINN. STAT. § 144.12(8) (1965 Supp.). New York has enacted a statutory provision requiring the administering of the PKU test. See N.Y. PUB. HEALTH LAW § 2500-a.

30. *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

31. 262 U.S. 390 (1923).

32. 268 U.S. 510 (1925).

33. 321 U.S. 158 (1944).

parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. . . . The catalogue need not be lengthened. It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.³⁴

Although it was the privacy of the husband-wife relationship that had been invaded by the State of Connecticut's restriction on the use of birth control devices in *Griswold v. Connecticut*,³⁵ that case has ramifications for the parent-child relationship. In *Griswold*, Mr. Justice Douglas extracted from the Bill of Rights a penumbral right of marital and familial privacy. Mr. Justice Goldberg's interpretation of the ninth amendment gave additional support to precedent affirming the goal of integrity and security in the family. The significance of his remarks about the husband-wife relationship for that of the parent-child should be apparent.

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.³⁶

That the parent-child relationship should be secure, stable, orderly and free from unreasonable interference by the state or others is further emphasized in cases which establish the right of a parent to procedural due process and other procedural advantages when the custody of his child is being litigated. The due process clause of the fourteenth amendment requires a court to notify a natural parent and to give him an opportunity to participate in a proceeding designed to determine his child's custody. Some courts have analogized parents' rights in their children to "property rights"

34. *Id.* at 166-67.

35. 381 U.S. 479 (1965).

36. *Id.* at 495-96 (concurring opinion). See also *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

within the protection of the due process clause;³⁷ others have maintained that these rights are protected by the guarantee of liberty.³⁸

In addition to procedural due process, there is a procedural preference given to natural parents in that the burden of proving a natural parent's unfitness is placed on the individual who desires to gain custody of a child over the natural parent's objection.³⁹ The decision of the United States Supreme Court in *Armstrong v. Manzo*⁴⁰ illustrates the extent to which the Court will go to protect a natural parent's right to his child. In that case, the issue was whether an adoption decree was valid when secured by the child's natural mother and her second husband without notification to the first husband, the child's natural father. Although the natural father had subsequently obtained a hearing on his motion to vacate the decree because of the lack of notice and had presented evidence at that hearing in an attempt to establish the necessity of his consent to the adoption, the Court held that the decree was invalid. The failure of the adoption court to provide the natural father an opportunity to contest the adoption was more than a routine denial of procedural due process, because the court's action permanently deprived "a legitimate parent of all that parenthood implies."⁴¹ The natural father's absence in the adoption proceedings gave the adoptive applicant (second husband) an undue advantage since he did not have to carry the burden of proving his own qualifications and the natural father's unfitness. In the subsequent hearing on the motion to vacate the decree, this crucial allocation of the burden of proof was reversed, for the natural father, since he was the moving party in that hearing, was required to demonstrate affirmatively his fitness to have custody of the child. The Court, realizing the decisiveness of the location of the burden of proof, was unwilling to deprive the natural father of his procedural preference in the adoption proceeding.

Another, perhaps indirect, indication of a community policy favoring the integrity of the parent-child relationship is that the law discourages and may even prohibit the unconditional voluntary termination of the parent-child relationship, regardless of the type

37. See, e.g., *Brooks v. De Witt*, 178 S.W.2d 718 (Tex. Civ. App. 1944).

38. See, e.g., *Stubbs v. Hammon*, 135 N.W.2d 540 (Iowa 1965).

39. Professor tenBroek convincingly demonstrates that the burden of proof in favor of parental fitness applies mainly to members of the middle classes, but is substantially relaxed as to the poor. In cases involving the poor, "parental fitness" is examined rather than presumed. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614, 676 (1965).

40. 380 U.S. 545 (1965).

41. *Id.* at 550.

of parental status. Criminal sanctions attach to parents who fail to fulfill the incidents of the right to custody: companionship, financial support and health care.⁴² It is doubtful whether any state permits the voluntary legal termination of the parent-child relationship unless there is a satisfactory placement available for the child or unless there is reason to believe that denying the termination petition will be detrimental to the child's welfare.⁴³ Thus, natural parents probably would not be allowed to terminate the full range of their duties, whether the child be healthy or handicapped, in the absence of a showing that the action would serve the child's welfare.⁴⁴

In the adoptive parent-child relationship, the goal of order and integrity is also maintained. Once the adoptive status is legally established, the adoptive parent's duty and right to control and supervise his adopted child, even to the exclusion of the child's natural family, is preserved in the same way as the custodial right of the natural parent.⁴⁵ Courts are reluctant to set aside an adoption decree, or to terminate or annul an adoption. Some courts have taken the position that, absent express statutory authority clearly establishing grounds sufficient for terminating the adoption, adoptive parents cannot be relieved of their parental obligations.⁴⁶ Jurisdictions having statutory provisions allowing termination or annulment in certain circumstances, such as a child's misconduct, his physical or mental illness unknown at the time of adoption, or when the best interests of the child demand termination, tend to apply these provisions narrowly.⁴⁷ Thus, adoptive parents may not divest themselves of their custodial duties merely because they are dissatisfied with their child, regret their decision about adoption, or

42. These are usually found in child neglect statutes. See, e.g., ALASKA STAT. § 11.35.010 (1962); ARIZ. REV. STAT. ANN. § 13-801 (1956); COLO. REV. STAT. § 22-2-1 (1963); IND. ANN. STAT. § 10-815 (1956); MD. ANN. CODE art. 27, § 88(b) (1957); MASS. GEN. LAWS ANN. ch. 273, § 1 (1957 Supp. 1965); OHIO REV. CODE ANN. § 2151.99(B) (1963); WIS. STAT. § 947.15 (1961).

43. The Model Adoption Act drafted by the U.S. Department of Health, Education, & Welfare provides for the voluntary termination of parental rights regardless of the availability of satisfactory placement. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 12-13 (1961).

44. This parallels the law of assignment: one may assign one's *rights*, but not one's *duties* (delegation of duties leaves one responsible unless there is a novation).

45. See *Odell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (Dist. Ct. App. 1947).

46. See, e.g., *Allen v. Allen*, 214 Ore. 664, 330 P.2d 151 (1958).

47. See, e.g., *Buttrey v. West*, 212 Ala. 321, 102 So. 456 (1924); *Pelt v. Tunks*, 153 Colo. 215, 385 P.2d 261 (1963); *Mulligaw v. Wingard*, 72 Ga. App. 539, 34 S.E.2d 305 (Ct. App. 1945) *trans. from* 198 Ga. 816, 33 S.E.2d 269; *Succession of Williams*, 224 La. 871, 71 So. 2d 229 (1954); *In re Pierro*, 173 Misc. 123, 17 N.Y.S.2d 233 (Surr. Ct. 1940).

think they made a bad deal.⁴⁸ This is true even if the adoptive child's natural parents wish to resume a legal relationship with him.⁴⁹ Adoption is said to create "a for better, for worse situation,"⁵⁰ and is therefore seemingly more protected than the marriage of the adoptive parents, which may be dissolved by divorce.

It is said that the parental right to custody does not attach to foster parents unless specifically decreed by a court; in other words, foster parents seem to have more duties than rights. This statement, however, may be misleading, for foster parents may 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 length of time. Courts are reluctant to interfere with this interest and, if they do interfere, the foster parent is generally entitled to notification and an opportunity to appear and defend his interest.⁵¹ A continuing foster relationship, if secure and orderly, is typically protected even against a natural parent's unreasonable intrusion.⁵² If a natural parent wishes to interfere with the foster parent relationship, he 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 served best by another custodial arrangement.⁵³

Under certain conditions, a foster parent may terminate his relationship with his 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.⁵⁴ Announcing a decision to terminate the relationship while continuing to live with the child is insufficient.⁵⁵ A foster parent may not choose to honor his right to enjoy companionship and fail in his duty to support.⁵⁶

48. See, e.g., *Parsons v. Parsons*, 101 Wis. 76, 77 N.W. 147 (1898); *In re Adoption of L* (Essex County Ct., P. Div.) 56 N.J. Super. 46, 151 A.2d 435 (1959).

49. See *In re Adoption of L*, *supra* note 48.

50. *In re Adoption of a Minor*, 214 N.E.2d 281 (Mass. 1966).

51. See *In re Adoption of Cheney*, 244 Iowa 1180, 59 N.W.2d 685 (1953).

52. See *Cummins v. Bird*, 230 Ky. 296, 19 S.W.2d 959 (1929).

53. See *State v. Knight*, 135 So. 2d 126 (La. App. 1961).

54. See, e.g., *Lewis v. United States*, 105 F. Supp. 73 (N.D. W. Va. 1952); *Leyerly v. United States*, 162 F.2d 79 (10th Cir. 1947); *Young v. Hipple*, 273 Pa. 439, 117 Atl. 185 (1922).

55. See *Capek v. Kropik*, 129 Ill. 509, 21 N.E. 836 (1889); *Schneider v. Schneider*, 25 N.J. Misc. 180, 52 A.2d 564 (Ch. 1947).

56. 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

Presumably, therefore, the policy discussed above of protecting and sanctioning an established and subsisting relationship is not applicable when a foster parent decides to terminate that relationship. The context in which questions are raised about the foster parent's power to terminate the foster parent-child relationship is usually a stepfather's refusal to continue to support his non-adopted stepchild after he has divorced the child's natural mother. Courts normally reason that the order which was present in the relationship has been disrupted by the divorce and that no purpose would be served by requiring the continuance of the duty to support, correlative to the right to custody, in the absence of a sustained relationship. New York, however, goes further than most jurisdictions in requiring a step-parent, after divorce or death of the spouse, to support the spouse's child if his failure to provide such support would place an economic burden on the state.⁵⁷

2. Financial Security

The statutory obligation which both natural and adoptive parents have to support their children probably rests more on the policy of preventing children from becoming economic burdens on the state than on any other notion.⁵⁸ The level of financial security

the role of spouse has the same responsibility as that of a stepfather for the mother and the needy children. . . .

An illustration of state welfare regulations pertaining to the "substitute parent" policy is found in Part III, Section V of the *Georgia Manual of Public Welfare Administration*, dealing with the eligibility conditions for the Aid to Families with Dependent Children Program (AFDC). Subdivision (5) of Section V(3) disqualifies needy dependent children from the program if they are found to have a "substitute father." The subdivision states:

(5) *Substitute Father*: A man living in common-law relationship with a woman is considered a substitute father of any child had by that woman, or any child that woman has had by another man. Further, a man living in common-law relationship with a woman is responsible for the support and care of his and her children, regardless of whether or not he is married to another woman. Regulations place the same responsibility on this man as if he were the legal husband. The rules for establishing deprivation are the same as those used in establishing it in a legal-father situation.

GEORGIA STATE DEP'T OF FAMILY AND CHILDREN'S SERVICES, DIV. OF SOCIAL ADMINISTRATION, *MANUAL OF PUBLIC WELFARE ADMINISTRATION* 7 (1964). See also Pacht, *Support of Dependents in the District of Columbia: Part I*, 9 *How. L.J.* 20, 36-38 (1963); tenBroek, *supra* note 39.

57. *Department of Welfare v. Siebel*, 6 N.Y.2d 536, 190 N.Y.S.2d 683 (1959), *appeal dismissed*, 361 U.S. 535 (1960), *construing* N.Y. CITY DOM. REL. CT. ACT § 101(5). In 1962 the New York Domestic Relations Act was repealed. Section 101(5) was reenacted in N.Y. FAMILY CT. ACT § 415 (1963). See also tenBroek, *supra* note 39. This is just one illustration of the "Dual System of Family Law." The New York rule establishes a different law for step-parents of poor children than applies to those step-parents in more comfortable positions. The reason may well be the fiscal consideration of saving tax money.

58. See *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890); *Crain v. Mallone*, 130 Ky. 125, 113 S.W.2d 67 (1908); *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360 (1881); *State v. Thornton*, 232 Mo. 298, 134 S.W. 519 (1911); *Geary v. Geary*, 102 Neb. 511, 167

demand of parents is one that would enable a child to be housed, fed, clothed, educated, and given medical care in a manner which satisfies minimum but acceptable community standards. Providing a child with bare subsistence is insufficient. Also, since support duties are a public responsibility to which both criminal and civil sanctions attach, these duties cannot be avoided except in extraordinary circumstances, such as destitution;⁵⁹ merely renouncing or improperly delegating the duty is without force.⁶⁰ When natural or adoptive parents make no provisions for support, those who do provide for the child may seek restitution from the parents.⁶¹

The fact that a person has only a foster relationship with his child will ordinarily not relieve him of his support duty. Courts and statutes, enforcing a foster parent's support duty, speak of the doctrine of *in loco parentis* and in effect state that persons acting like natural parents assume support duties as if they were natural parents.⁶² Foster parents, therefore, may also be required to reimburse those who undertake to support their children.⁶³ The support responsibilities of foster parents may be imposed by contract. In a formal child placement, in which the agency contracts with foster parents to provide a child with care and daily necessities, it can be said that the agency transfers its duty of support to the foster parents, although the agency probably continues to have subsidiary liability. Foster parents would be subject to civil liability if they failed to fulfill their obligations.

N.W. 778 (1918); *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (1939). See also *Jones, The Problem of Family Support: Criminal Sanctions for the Enforcement of Support*, 38 N.C.L. REV. 1, 13 (1959); *Pacht, supra* note 56, at 21.

59. See, e.g., *Watts v. Steele*, 19 Ala. 656, 54 Am. Dec. 207 (1851); *In re Estate of Weisskopfs*, 39 Ill. App. 2d 380, 188 N.E.2d 726 (1963); *Fruen v. Fruen*, 228 Minn. 391, 37 N.W.2d 417 (1949); *Libby v. Arnold*, 161 N.Y.S.2d 798 (N.Y. City Dom. Rel. Ct. 1957).

60. See, e.g., *Rogers v. Rogers*, 93 Kan. 114, 143 Pac. 410 (1914); *Huffman v. Hatcher*, 178 Ky. 8, 198 S.W. 236 (1917); *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922).

61. See, e.g., *Commonwealth v. Kirk*, 212 Ky. 646, 279 S.W. 1091 (1926); *Greenman v. Gillerman's Estate*, 188 Mich. 74, 154 N.W. 82 (1915); *Worthington v. Worthington*, 212 Mo. App. 216, 253 S.W. 443 (1923). See also *Jones, supra* note 58, at 12, 13.

62. *In re Harris*, 16 Ariz. 1, 140 Pac. 825 (1914); *Howard v. Randolph*, 134 Ga. 691, 68 S.E. 586 (1910); *Faber v. Industrial Comm.*, 352 Ill. 115, 185 N.E. 255 (1933); *Foreman v. Henry*, 87 Okla. 272, 210 Pac. 1026 (1922); *Rosky v. Schmitz*, 110 Wash. 547, 188 Pac. 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); *Brummitt v. Com*, 357 S.W.2d 37 (Ky. Ct. App. 1962); *Britt v. Allred*, 199 Miss. 786, 25 So. 2d 711 (1946); *Austin v. Austin*, 147 Neb. 109, 22 N.W.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).

63. See *Rudd v. Fineberg's Trustee*, 277 Ky. 505, 126 S.W.2d 1102 (1939).

3. Health and Education

Natural and adoptive parents have a duty to establish an affectionate relationship with their children and to nurture and protect their physical and emotional well-being. Also, they are expected to provide their children with guidance and to offer them the opportunity for educational development. Courts use the *in loco parentis* doctrine to impose these same responsibilities on foster parents.

One context in which courts are asked to enforce health responsibilities is where a parent has failed to provide his child with the necessities of health care. For instance, the parent, natural, adoptive or foster, may be required to compensate a physician who has provided professional services for a child without the knowledge of the parent.⁶⁴ A more immediate expression of a community policy protecting children's health is found in instances of child neglect. The state may spell out the scope of parental responsibilities by establishing health standards⁶⁵ when a child is in immediate danger of death because of parental failure to consent to a surgical operation or blood transfusion, or when a child has been starved or mistreated, to mention only a few extreme examples. This prescription of health standards is indicative of what the state will *not* tolerate: parents who severely deprive their children of physical safety, emotional security, or comfort. Discovery of violations of these standards may lead to criminal prosecution, temporary or permanent loss of custody, or state supervision of custody.

Just as there is no clear statement of what constitutes the maximum or ideal of good health, neither is there any judicial or statutory expression of the extent to which parents must enlighten their children.⁶⁶ The educational duty which rests on the parents begins with the birth of the child, and the duty is essentially, although not entirely, uncontrolled. There is almost no state supervision of the duty to educate until a child reaches five or six, although govern-

64. See, e.g., *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953).

65. See, e.g., *Mitchell v. State*, 39 Ga. App. 100, 146 S.E. 333 (1929); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (1952); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952); *Stehr v. State*, 92 Neb. 755, 139 N.W. 676 (1913); *In re Carstairs*, 115 N.Y.S.2d 314 (N.Y. City Dom. Rel. Ct. 1952); *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903).

66. A recent Ohio case held that parents have a duty to educate their children in areas grossly neglected in the schools, such as sex education. The court reversed the conviction of a mother for contributing to the delinquency of her minor daughter by instructing her in the use of birth preventive measures, ruling that the conviction violated the mother's constitutionally guaranteed right of free speech. See *State v. McLaughlin*, 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965).

mental control could be assumed prior to those ages if the child were "neglected" by not having received rudimentary education. When their children reach the age of five or six, parents are expected to enroll them in educational institutions under state regulation, to refrain from interfering with school attendance, and, in fact, to encourage their children's attendance until they reach a specific age (usually sixteen). State compulsory education acts contain criminal sanctions which apply to parents who fail to fulfill their responsibilities. Whether parents must provide their children with educational opportunities beyond statutory compulsory education is an open question, depending perhaps on the economic and social situation of the parents. Recent trends in appellate case law suggest that parents may in fact be required to support their children in college.⁶⁷

4. *Morality and Respect*

Closely associated with the parental duty to nurture health and education is the parent's responsibility to teach his child respect and to provide him with a moral environment in which he may develop sound character. This responsibility imposes on a parent, whether natural, adoptive or foster, an obligation to train his child in differentiating "right" from "wrong," and to develop his child's conscience. It also requires a parent to teach by example, that is, to conduct himself in a manner that his child may emulate. Furthermore, although this duty is rarely articulated, the parent is expected to instill in his child respect for the parent as an individual and an authority figure, and, as the child matures, to implant in him respect for other persons and authorities in society. To assist in the development of respect for authority, courts give parents wide latitude in the exercise of their disciplinary powers. An underlying reason for this latitude is the thought that one way in which children learn to

67. Courts are presently split as to whether a college education is a necessity for which the father must provide. One Ohio court has held that a college education is not included among the "necessaries" which a parent is "legally required" to furnish a child. *Ford v. Ford*, 109 Ohio App. 495, 167 N.E.2d 787 (1959). But another Ohio court, in the same year, held that whether a college education is a necessary is a relative matter and "considering the progress of society and our nation's need for citizens educated in the humanities and sciences, a college education is a necessary where the minor's ability and prospects justify it." *Calogeras v. Calogeras*, 163 N.E.2d 713, 720 (Ohio Juv. Ct. 1960). It has been stated that the most important factors in determining a father's liability for the expenses of a child's education are the father's ability to pay and the child's capacity for further education. *Pincus v. Pincus*, 197 A.2d 854 (D.C. Ct. App. 1964); *Hoffman v. Hoffman*, 210 A.2d 549 (D.C. Ct. App. 1965). See also *Commonwealth v. Rice*, 206 Pa. Super. 393, 213 A.2d 179 (1965); *O'Brien v. Springer*, 202 Misc. 210, 107 N.Y.S.2d 631 (Sup. Ct. 1951); *Commonwealth v. Decker*, 204 Pa. Super. 156, 203 A.2d 343 (1964).

adjust to the mandates of society is through the proper use of discipline.

The moral conduct expected of parents is rarely defined in terms of specific religious dogma since, as individuals, parents are not required to follow the dictates of a particular religion, although the tenets of the dominant Judeo-Christian culture may influence the standards of parental conduct. The moral conduct necessary to fulfill parental responsibilities usually encompasses notions of "common decency, cleanliness of mind and body, honesty, truthfulness, and proper respect for established ideals and institutions."⁶⁸ A parent is free to choose the method by which his child will be inculcated with a sense of morality, and he need not utilize religious training for this purpose. In fact, courts have consistently stated that parents have no duty to give their children any religious training. Parents are, therefore, as free to ignore religion in their home as they are to rear their children in a particular faith.⁶⁹

B. *Relevance of the Goals of the Parent-Child Relationship to Child Custody Disputes*

It is interesting to observe the reluctance of courts to set anything but minimum and often only vague standards when enforcing parental duties. Yet when courts are faced with the problem of establishing a new parent-child relationship, they seem to feel that the factors which are decisive in that context are radically different from those relevant in the administration of an existing relationship. Thus, in invoking "the best interests of the child" doctrine when choosing a custodian, courts might ignore the community expectations of parenthood which have been discussed above and make a disposition entirely inconsistent with our notions of parental responsibilities.

Examples of the courts' lack of specificity in enforcing parental duties are found in cases involving a child's financial security, where courts rarely say anything more than that the child must be provided with a decent standard of living, whatever that may be. It is also unclear whether the standard of the child's education should

68. See *L v. N*, 326 S.W.2d 751, 755 (Mo. 1959).

69. Courts have generally stated that it is outside the province of the law to regulate religious activities in the home. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Lynch v. Uhlenhopp*, 248 Iowa 68, 78 N.W.2d 491 (1956); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 137 A.2d 618 (Ch. 1958); *Paolella v. Phillips*, 27 N.Y. Misc. 763, 209 N.Y.S.2d 165 (Sup. Ct. 1960); *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936); *Hackett v. Hackett*, 78 Ohio L. Abs. 485, 150 N.E.2d 431 (Ct. App. 1958).

be set at a minimum level or at the highest potentialities of the child.⁷⁰ Questions about the extent of parental responsibilities are unanswered in other areas. For instance, what are the standards for furthering a child's physical and emotional well-being beyond requiring a parent to protect his child from immediate dangers? Must the parent take positive steps to ensure optimum good health? Should the standard for physical health be set at seeking high athletic attainment? As to the emotional health of the child, should the standard be the ability to be stimulated, to form positive relationships with others, or to participate effectively in group activities? Does a parent's responsibility to further a child's respect for others include promoting equal respect for persons of all races and religions and in all levels of the social strata? The lack of answers to these questions may be attributable to the courts' failure to consider them seriously.

Courts tend to be more specific when faced with questions of morality and religion, but their decisions are most frequently phrased in negative terms. In order to teach a child social responsibility, special ethical training is not necessary, nor need the spiritual aspects of life be encouraged by attending religious services.⁷¹ Organized religions are not necessarily preferred over other ethical systems, including atheistic systems,⁷² and one religious faith is not preferred over others,⁷³ although there seems to be a certain reluctance to favor individuals with unusual or unpopular views over those who follow Judeo-Christian beliefs. These decisions best illustrate the dichotomy which may exist between the goals of parenthood and the application of "the best interests of the child" doctrine to the initial selection of custodians. Parents in an existing relationship are permitted considerable discretion in the regulating of their child's moral development. However, in custodial dispositions, the courts may look to the religious, philosophical and political qualifications of the applicants and construe "the best interests of the child" so as to discriminate against persons adhering to certain, perhaps unorthodox, ideologies.

In a recent and now celebrated Iowa case, *Painter v. Bannister*,⁷⁴ Mr. Painter, the natural father of a seven-year-old boy, brought a writ of habeas corpus against Mr. and Mrs. Bannister, the child's maternal grandparents, to regain custody of the child. After the

70. See note 67 *supra*.

71. See, e.g., *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

72. See, e.g., *Cory v. Cory*, 70 Cal. App. 2d 563, 161 P.2d 385 (Dist. Ct. App. 1945).

73. See, e.g., *Angel v. Angel*, 74 Ohio L. Abs. 531, 2 Ohio Op. 2d 136, 140 N.E.2d 86 (C.P. 1956).

74. 140 N.W.2d 152 (Iowa 1966), *petition for cert. filed*, 35 U.S.L. Week 3082 (U.S. Sept. 3, 1966) (No. 518).

child's natural mother had died in 1963, his father had arranged for the grandparents to care for him in their home. A year later, the father remarried and asked the grandparents to return the child. They refused, and the father brought the present action. In 1965, the trial court granted the writ and awarded Mr. Painter custody of his son, but stayed execution of the judgment until the matter could be determined on appeal. In February 1966, the Iowa Supreme Court reversed the decision of the lower court, stating that the best interests of the child would be promoted by allowing the grandparents to retain custody.

The factors which the Iowa Supreme Court viewed as material in choosing the grandparents' home and way of life over the natural father's make it apparent that in child custody cases courts clearly move beyond the goals of parenthood discussed earlier. Because of their discretionary powers, the courts may in fact frustrate these goals. Note the Iowa court's language in describing and comparing the characteristics of the Painters and the Bannisters:

We are not confronted with a situation where one of the contesting parties is not a fit or proper person. . . . As stated by the psychiatrist who examined Mr. Painter at the request of Bannisters' attorneys: "It is evident that there exists a large difference in ways of life and value systems between the Bannisters and Mr. Painter, but in this case, there is no evidence that psychiatric instability is involved. Rather, these divergent life patterns seem to represent alternative normal adaptations."

It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so. However, the philosophies are important as they relate to Mark and his particular needs.

The Bannister home provides Mark with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable.

. . . .

The house in which Mr. Painter and his present wife live . . . "is a very old and beat up and lovely home" The large yard on a hill in the business district . . . is of uncut weeds and wild oats. The house "is not painted on the outside because I do not want it painted."

. . . .

Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism

and "has been very much influenced by it." Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church . . . on an irregular schedule. [The court also noted that Mr. Painter is a political liberal.]

These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here. They do serve however to support our conclusion as to the kind of life Mark would be exposed to in the Painter household. We believe it would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating.

Were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child.⁷⁵

These excerpts indicate that "the best interests of the child" doctrine permits a court to camouflage its own values, provincial community values, or the interests of dominant local institutions. Absent guidelines, there is no method for evaluating the application of the doctrine. Review, then, becomes as unpredictable as the decision of the trial court because an abuse of discretion cannot be subjected to any discernible standards. Presently, appellate review of child custody cases serves either to reaffirm the values previously expressed by the lower court or, more rarely, to substitute the preferences of the appellate court for those of the lower court.

C. Summary

The main purpose of this discussion was to illustrate what one might call the minimum goals of parenthood. These goals, found in cases involving the supervision of the parent-child relationship, may be helpful in determining factors relevant for the purpose of choosing custodians. To summarize, the following appear to be the basic goals of the parent-child relationship: to maintain an orderly, stable and loyal relationship so that the government will not be required to intervene in that relationship; to provide a financial base which will enable a child to mature into a healthy adult and to acquire the skills necessary to participate in and contribute to the economic processes of society; to nurture the child's physical and emotional safety, health and comfort; to provide a child with guidance and the opportunity for educational development; to teach a child respect

75. *Id.* at 154, 155, 156.

for his parents, other authorities and human beings; and to train a child in social responsibilities.

III. CONCLUSIONS AND RECOMMENDATIONS

The judicial role in child custody matters should be creative. The court should conduct an inquiry, independent of the agency's, to find the specific family unit best fitted for the child. This inquiry necessitates studying closely the familial patterns actually established. But this examination should not be exclusive. The court should widen the scope of inquiry beyond the immediate claimants. It should investigate alternative placements if it is not fully satisfied either with the qualifications of the persons claiming custody or with the immediate plans for the child. Further, courts should require concrete plans for a child rather than be forced into deciding a custody case on the basis of agency assumptions which may be unrealistic or influenced by factors that have no connection with the welfare of the child. According to this concept of the information gathering stage of the judicial process, the trial court's approach in *Child Care* was not adequate. The court's failure to question the Agency's assumptions and plans for the child was serious. If it had directed a re-examination of the Agency's plans to place Laura with "neutral parents," it might have discovered that "neutrality" or a non-human environment is foreign to child placement policies.⁷⁶ In fact, a "neutral environment" could not have been found.⁷⁷

76. In commenting on the *Child Care* case, Miss Lydia Rapoport has written: We do know nothing can flourish in a neutral environment, least of all a human being. Whatever arguments and current re-evaluations there may be of the work of Spitz and Bowlby, they have convincingly demonstrated that "neutrality" or a non-human environment produces non-human beings and even physical atrophy. We do know, with a fair degree of certainty, that the greatest damage to healthy psychological development is instability—and the kinds of impediments that interfere with the process of identity formation. We also know that long-term separation (after the capacity for the development of object relationships—at whatever age various experts may decide this is) causes damage. Perhaps one cannot talk of permanent damage because of the malleability of the human organism. However, I am convinced that the scarring process is permanent. All this, the child care agencies know very well. It would be impossible for foster parents to create a climate of neutrality and still carry out their parental obligations and role. It struck me that the child care agency, for whatever reasons, was confused regarding its central obligation: that of the well being of the child. Rapoport, "Safeguarding the Child's Best Interests: A Discussion" (unpublished paper presented at the American Orthopsychiatric Association Meeting in San Francisco on April 13, 1966).

77. The ironic sequel to *Child Care* was that the "neutral environment" suggested by the Agency was not the ultimate placement for Laura; she experienced multiple placements (almost predicted by Judge Froessel in his dissenting opinion, see note 24 *supra*). Within two years after the New York Court of Appeals' decision was rendered, Laura had been in two settings. The child was first placed with her natural mother and then in her maternal grandmother's home. See GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 1033-34 (1965).

There should be some limitations, however, on the judicial role. Abuse of judicial discretion, such as the arbitrary determination found in *Child Care*, should be checked. It is suggested that the use of judicial discretion be restricted by clarifying "the best interests of the child" doctrine in terms of the specific community goals of the parent-child relationship discussed above. That is, when choosing a custodian for a child, the following questions should form the basis for the court's investigation and decision:

- (1) What disposition will provide the child with a stable, orderly, and loyal parent-child relationship, thus lessening the likelihood that the state will have to interfere with the relationship in the future?
- (2) What disposition will furnish the child with the economic base necessary for him to become a useful and productive member of society?
- (3) What disposition will provide the child with an environment that will foster physical and emotional health?
- (4) What disposition will furnish the child with an environment that will encourage educational goals?
- (5) What disposition will provide the child with an environment that will promote equal respect for all human beings and will give him an opportunity to mature into a morally stable and responsible adult?

The purpose of framing "the best interests of the child" doctrine in terms of these general questions is to direct the scope of inquiry to particular operative factors serving community goals. Furthermore, the questions may furnish a checklist for organizing the amorphous data that is produced in child custody disputes.

Once the scope of judicial inquiry is narrowed, the next task is an evidentiary one. Courts should draw on the knowledge of various disciplines. Information gathered from fields such as psychiatry, psychology, sociology, social work, theology, and education may demonstrate the extent to which certain characteristics of the child and the claimants are important in achieving the objectives of the parent-child relationship. The behavioral sciences also can aid in answering perhaps more fundamental questions, namely, the effect of parental personalities and behavior on a child, the extent to which environment outside the family affects the child, and the impact on the child of both his maturation and his socialization. The result of such an approach will hopefully be that the child is the true beneficiary of a custodial dispute, not the parents and not the agencies.