Foster care – its legal problems

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I DEFINITION

Perhaps the best definition of foster-care is that of the influential, and extremely carefully drafted, Standards of Child Welfare League of America:

> . . . The Child Welfare Service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable or possible.

But even within that narrower definition there are many different forms of foster-care. A task force of the Family Welfare Council of Victoria made this classification:

(1) Pseudo-adoption.
(2) Short-term clearly defined foster-care.
(3) Long-term clearly defined foster-care.
(4) Special fostering arrangements, for example, for a handicapped child.
(5) Emergency foster-care.

All the above forms of substitute care have this in common: that there are a number of parties with rights and interests of a varying kind, including the child himself.

The Parties to a Foster-Care Arrangement

In all foster-care arrangements there are at least three parties, one natural parent (presuming one to be alive), one foster-parent and one child. Often there are more. There may be both a father and a mother; although it seems that the majority of fostered children are ex-nuptial, the increased rights of the putative father under *Status of Children Acts* may require his interest to be taken into account when his child is fostered.

There may also be more than one child involved. It may be necessary to foster a whole family of children, and in this case the intra-family relationships cannot be ignored.

There will most usually be more than one foster-parent, since it would be most unusual for a single person to be granted foster-parenthood. (Unlike adoption, however, there is no legislative proscription of single foster-parenthood.) The interests of each foster-parent may not be necessarily identical, especially if they are a married couple whose marriage later breaks down.

There are also other persons peripherally interested, such as grandparents. Should they be accorded a recognized interest in the proposed fostering of their grandchild?

Apart from the above permutations, however, there are typically *five* interested parties in a foster-care placement. (1) *the natural parent* or parents; (2) *the child* or children; (3) *the foster-parents* or parents; (4) *the State*, in the form of the Department of Community Welfare Services (or some synonymous appellation); (5) except where the Department itself arranged and supervises the fostering, a *voluntary agency* which is charged with responsibility for the placement.

II THE TYPICAL CASE OF A VOLUNTARY PLACEMENT

(1) *The First Stage – The Decision to Place*

A typical case is an ex-nuptial child who is suspected of being neglected. This may come first to the notice of a voluntary agency. In that case, the agency may urge the mother to allow it to take the child into care. If the mother agrees this would be a 'voluntary placement'. In many cases, the element of voluntariness is somewhat slight. The mother may be persuaded by the agency by means of a threat to take neglect proceedings if she does not comply! The agency may now bypass the Department [of Community Services] and the Court and will be free to do what it thinks fit. The only safeguard is that the agency would have to be licensed to accept children in care. Foster-care may be one of the options available to the child at that agency.

Suitable foster-parents are sought by positive advertisement (there being no provision comparable to the proscription of advertisement for adoption).

The legal issues at this stage appear to be:

(a) How are the foster-parents chosen?
(b) Can disappointed applicants bring any action?
(c) Does the child or his parent have any legally protected interest in this choice?

(a) *The Choice of Foster Parents*

The choice of foster-parents is entirely a matter of agency discretion. There are no statutory or other provisions specifying suitability. Unlike adoption, an agency appointing foster-parents would seem to have *carte blanche*. Many social workers would welcome this, but it is doubtful whether it is justifiable. For foster-parenthood has far more potential difficulties than adoption. A *fortiori*, it justifies greater control. While it is true that adoption is a permanent arrangement, in practice many foster-care placements become long-term, if not permanent, arrangements. The probability of a foster-child being returned to his natural parent declines markedly after the first year in care.

Moreover, foster children are apt to be more difficult to handle than adoptees, who are less likely to have established previous attachments and have suffered the physical and emotional deprivations to which many foster-children have been subject.

Finally, foster-parenthood is an essentially ambivalent relationship. Foster-parents are asked to love and care for a child, but not to become emotionally attached to it. Is not this a contradiction? Goldstein, Solnit and Freud, the writers of the influential (perhaps too influential) work, *Beyond the Best Interests of the Child*, appear to think so, stating that the condition 'implies a warning against any deep emotional involvement with the child since under the given insecure circumstances this would be judged as excessive'. Accordingly, the child-foster-parent relationship has little likelihood of promoting their famous 'psychological' bonding which a child needs. Anna Freud has declared herself on other occasions to be an opponent of foster-care.

In favour of the present elasticity which lack of specific guidelines allows is the undoubted truth that foster-parents are hard to find (especially as the financial rewards are none) and that the multi-faceted nature of foster care demands individual persons for individual cases.

Nevertheless, it seems that social workers are not entirely without guidance. There are certain 'accepted' criteria, to deviate from which would invite professional contempt – a considerable deterrent to frolics of their own. Some of these criteria are very nebulous, such as 'emotional warmth', 'no marked behavioural problems', but others are capable of more precision. They may be divided as follows:

(i) Motives
(ii) The Family Condition
(iii) Child Caring Capacity
(iv) Capacity of Foster-Family to Work with the Agency and the Natural Parents.

(b) *The Possibility of Legal Action by Disappointed Applicants*

While there is something to be said for this flexibility, it has its dangers. First, there may be a tendency to accept unsuitable ap-

plicants because of the difficulty of articulating a rejection. Secondly, if an applicant must be rejected, he may more easily be able to complain against the decision if it is not based on a failure to fulfil a specified requirement.

That a rejected applicant may have recourse to law is obvious to lawyers, but not readily appreciated by social workers, or their employers, who would be well advised to insure against such a possibility. The avenues that may be taken are several. First, the applicant may in appropriate cases choose to sue for defamation in a civil court. Then, there may be grounds for invoking the inherent jurisdiction of the Supreme Courts to review decisions made by quasi-judicial bodies.

Then it is not unlikely that the jurisdiction of the Ombudsman will cover the decisions of agencies, and especially Departmental decisions.

Finally, it may be possible for the rejected foster-parent to claim sufficient interest to have the child made a Ward of the Court. The Court exercising its supervisory jurisdiction over children might well be more ready to review the informal decision of an agency than that of a statutory body or a court.

(c) *The Interests of the Child and the Natural Parent*

The status and rights of the child both before and after a foster-care placement are very unclear. Unfortunately, there is no provision in any Australian State for a Children's Advocate, such as exists in Holland, West Germany and some other Continental jurisdictions, and in U.S.A. To this extent, the child is unprotected in most litigation affecting his welfare. There is, of course, a provision in the Family Law Act permitting the Family Court to order representation of a child, but this will affect few foster-children, and in any event is underused.

As a result, the child has no advocate for his point of view, and any decision to foster is taken paternalistically for his benefit. In contrast, in over twenty States of the U.S.A., there is an officer known as a Child Advocate, whose function is to review all cases of children in care. And in England, there is a mandate to local authorities dealing with children in care specifically to take into account the wishes of the child. It has been persuasively argued that to implement this requires provision of a guardian *ad litem* in all cases affecting their welfare.

The child as an individual is poorly catered for in Australia. Likewise, the natural parent is not well protected in decisions affecting the future of the child. The better agencies will seek to involve the parent in the decision-making process, and will seek to mediate between the natural parent and the foster-parents. There is, however, no legal obligation to do this, and the extent to which it is done is discretionary.

Unlike the natural parent who frees the child for adoption, the parent cannot compel or even encourage the placement in foster-parents of the same (or any) religious persuasion. Perhaps if there were more involvement of natural parents at the placement stage, there would be fewer traumatic 'tug-of-love' cases later on.

(2) *The Second Stage*

Arrangement during Placement

After the foster-parents have been chosen, they are usually required to undergo a period of training, during which the transitory nature of foster-care is emphasized. They are also told that the natural parents have a right to visit, and are generally encouraged to further this. In practice, however, only a small number of natural parents keep up visitation rights.

What is confusing to most foster-parents are the relative rights and duties of the parties involved. This is not surprising as the law itself is unclear.

Here are a few problems:

(a) Can the natural parent demand access?

(b) Who is liable for misdeeds of the child which result in damage?

(c) Who is liable if the child commits a criminal offence or breaches any court order to which he is subject? (Suppose, e.g., he is on probation.)

(d) May the natural parent demand return of the child at any time?

(e) Who is responsible for decisions affecting the child, i.e. which of the parental rights and duties have passed to the foster-parents, or the agency, or have remained in the natural parents?

Natural Parents' Rights to Visit

As the child has been voluntarily handed over, it could be argued that the natural parent has a right of access at all times, the foster-parents being mere caretakers during absence.

The law is silent, but the practical import of such an absolute right would be disastrous. In practice, this is a matter on which the agency would act as a mediator. Indeed, some agencies have a stated policy that, 'The children's parents agree to respect the privacy of the foster-family and plan their access visits to the convenience of all parties'.

The potential damage in access arrangements between divorced mother and father has been well recognized in legal literature. The potential must be just as great in this instance.

Who is Liable for Misdeeds of the Child?

It is generally believed that parents are vicariously liable for the torts of their child. This is incorrect, but they may occasionally be obliged by a criminal court to reimburse those damages done by their child.

However, a parent may be liable for his *own* negligence either towards the child or in respect of the child. Thus, if a parent permitted his four year old child to use a dangerous fire-cracker, he would be liable *to* the child if he injured himself and to others whom he injured.

That persons other than natural parents are liable is clear from the cases. Generally, there is a duty of care owed by all who act *in loco parentis*. The potential for liability is dramatically illustrated for those who supervise children in care by the famous House of Lords case, *Dorset Yacht v. Home Office*, where some Borstal boys went on the rampage and destroyed a number of yachts in a nearby harbour. It was held that the Home Office was vicariously liable for the negligence of their officers in failing to supervise the boys.

This raises some intriguing questions in the context of foster-care. In the absence of case law, it could be suggested:–

1. The foster-parent will be liable for lack of supervision which results in foreseeable damage. The fact that many foster-children come from grievously disturbed homes would suggest to a reasonable person that a foster-child is more likely to misbehave than a child brought up in the usual home environment. Accordingly, a greater degree of supervision would seem to be required. Where a particular propensity to do damage is known, the standard would be even higher.

Foster-parents need to be warned of the considerable potential for liability.

2. Whether the agency could be vicariously liable for the negligence of foster-parents is doubtful. (They might, however, be liable for an inappropriate *choice* of foster-parent, in which case their liability would be direct, not vicarious. This is yet another reason for a very rigorous standard of making placements and choosing applicants.) Normally, a body is liable vicariously only for the acts of its *employees*. Despite the fact that most foster parents are paid a certain sum by agencies, this would not make them employees, as these sums are not wages.

3. Nevertheless, the agency would be vicariously liable for the negligence of its social workers, and, certainly since *Hedley Byrne v. Heller* (if not before) this would include negligent advice as well as wrongful action or inaction.

Some agencies require natural parents to sign a release, which appears to impose on the *natural* parent an indemnity for any misdeeds for which the agency is responsible. It is doubtful whether such a document is binding. It may be void against public policy. Nor would it be hard to prove undue influence or duress (rendering a contract voidable). Indeed, it is difficult to justify this practice.

III THE 'RIGHT' OF THE NATURAL PARENT TO DEMAND RETURN

In theory, children who are voluntarily placed by natural parents may be reclaimed at any time. In this, of course, they differ from those who have been put into the guardianship of the State by a Court Order, although some of the issues raised here are equally applicable to State wards. It is usual to inform foster-parents of this right of the natural parents, so that they know of the risks. This is the aspect of foster-care which makes it a peculiarly tenuous kind of care. It is also the area in which there has been several controversial cases, including one in New South Wales which reached the headlines.

It does not seem possible, in Victoria at least, to do what may be done in England, viz. to pass a resolution vesting parental rights in the local authority. Nor does there appear to be any statutory period after which the natural parent may not unilaterally reclaim the child. (In England, there is such a period – six months.) Accordingly, the foster-parents are in a peculiarly vulnerable position. But in practice, there are a few counter-moves that may prevent a damaging reunion with the natural parents.

First, a skilful agency may be able to prevent it by the simple threat of taking neglect proceedings. If the threat fails, however, it may be very difficult to persuade a court that there has been such neglect, since the parents could hardly be said to be acting unreasonably when they permitted the child to be fostered. It may be possible to bring a case on one of the other grounds provided for (in Victoria) by the recently amended *Community Welfare Services Act* 1971, s.31.

If, however, the natural parent is not impressed by the threat, or indeed there are no grounds for it, there are several other possibilities, some of which might be fruitful even despite the agency's opposition.

(1) The foster-parent might apply to adopt the child.

(2) They might seek to make the child a ward of court.

(3) They might hold on to the child and invite the natural parents to take action.

(A writ of *habeas corpus* would be the most appropriate action of the natural parents.)

Now each of these drastic courses of action would normally signal a fundamental breakdown of the foster-care programme for the particular child, and it would surely be a rare case where the agency would encourage it. All three possibilities, however, would equally be open to the foster-parents, when the agency itself sought to terminate the foster-care, for instance by transferring the child to other foster-parents.

Nevertheless, there may be occasions, especially where emotions run high, when the foster-parents feel irresistibly moved to refuse to surrender a child.

(1) *Adoption or "Custodianship"*
Rightly or wrongly, the courts are reluctant to sanction adoption against the opposition of the natural parent. Australian courts, seem reluctant to dispense with the consent of parents, save in cases of gross misconduct on the part of natural parents. Perhaps social workers have been too cautious in advising long-term foster-parents to seek adoption. There is a justifiable fear that if such adoptions became common, foster-care would represent a back-door entrance for the many number of disappointed adoption applicants. And no doubt it is seen as a breach of faith by the foster-parents.

Nevertheless, this policy has had the sad consequence of leaving huge numbers of children in the limbo of foster-care, with no hope of ever being returned to their natural family. Many of these 'Children Who Wait' are likely to remain in foster-care until they reach adulthood.

Another possibility might be the raising of status of foster-parents to that of 'custodianship'. This is now been given statutory recognition by some States.

(2) *Wardship of Court*
Any person with an interest in a child may apply to have the child made a ward. The Supreme Courts have a wide jurisdiction, ranging from sanctioning marriage to consenting to sterilization.

Wardship had almost fallen into desuetude in Australia, at least in Victoria.

This jurisdiction is extremely useful. And it would seem that in one respect it may be wider in Australia than in England. For in England it has been held that the wardship court will not interfere with the legitimate exercise of a discretion by a local authority, or by another court. The court will only interfere if there has been an abuse of the discretion, or a breach of natural justice.

It would seem that Australian courts are not so limited, and that any person with a legitimate interest in a child, who is aggrieved by a decision of any court or governmental agency (and a *fortiori* a voluntary agency) may invoke the wardship jurisdiction and ask the court in effect to re-open the matter. This conclusion is drawn from the important High Court decision in *Johnson v Director of Social Welfare*.

A great advantage of wardship proceedings is that the court may make flexible orders, perhaps indeed including an order for carefully regulated access by the natural parents.

Unfortunately, the procedure is likely to prove expensive.

(3) *Holding on to the Child*
If the foster-parents adamantly refuse to surrender the child, the natural parents may resort to *habeas corpus* proceedings. Again, the Supreme Court would have jurisdiction, and it would be within its power to order wardship.

In both these latter instances, the question arises, what is the likelihood of the foster-parents being successful? It might be argued that as they will have usually agreed with the agency to release the child, they will be bound to do so. The status of agreements of this nature, however, is very dubious. They are, of course, domestic arrangements, which generally, though not always, are incapable of being the subject of binding contracts. They may be void as against public policy, or more probably, voidable for duress or undue influence. But the most potent argument against their efficacy is that they must yield to the welfare of the child. If it is not in the best interest of a child to be returned to the natural parent, then no contract, especially by strangers, will be enforced compelling him so to be.

Accordingly, probably the most that the so-called contract can do is act as a deterrent against refusal to surrender. If the matter comes to court, the foster-parents will have *locus standi* as interested persons. What are the chances of success?

Each case depends on its own facts, of course. There are no precedents in child cases. It is, however, fair to say that they stand a greater chance of success than they did even fifteen years ago, when it was an axiom of judges that to deprive a natural parent of custody was unnatural, and should only be done where there was strong evidence of unfitness. Occasionally, a court would take a different view where there was a voluntary placement, as in *C. v. R.* where Starke J. in Supreme Court of Victoria awarded custody to the less educated foster-parents in preference to the academically bright but immature natural parents. The turning-point in attitudes can be seen to be the famous House of Lords case, *J. v. C.* There, English foster-parents were given custody of a ten year old boy whose Spanish parents had voluntarily given him up. The House of Lords stated that there was

no principle of law, or even *prima facie* rule, that the natural parents had a better claim to a child. The welfare of the child is paramount. The concept of the psychological parent, promoted by Goldstein *et al.*, undoubtedly has helped foster-parents. Nevertheless, modern cases still occur where a rather sub-standard natural parent appears to be favoured over a good foster-parent. Both *Thompson v. Thompson* and *Starke v. Bartsch* are examples, but each involved informal foster-care by relatives. The recent case *E and E*, illustrates the agonizing difficulties which judges have in these cases of tug-of-love.

It is however, tentatively suggested that where a foster-care placement has been formally made by an agency or government department, the courts may be more sympathetic to the foster-parents than in case where the placement is informal. But the Australian judges, especially Supreme Court judges, continue to pay more lip-service to *Storie v. Storie.*

THE RESPONSIBILITY FOR DECISIONS

The various parties involved in a foster-care placement have rather ill-defined responsibilities and rights.

It is regrettable that the law has done little to help the understanding of these rights and duties. First, it is by no means clear what is meant by the terms, 'guardianship', 'custody' and 'parental rights and duties'.

Secondly, there is no clear statement as to which of the rights and duties of a parent are regarded as surrendered, and, if so, whether they vest in the agency or are delegated to the foster-parents.

Very tentatively, it is suggested that, on a voluntary surrender, certain fundamental parental rights remain in the natural parents. These undoubtedly include the rights to consent to adoption and to marriage. It is disputable whether the rights to control religion and education remain with the natural parent. Physical custody (i.e. care and control) already vests in the agency, which has delegated it to the foster-parents. Consonant with this, the foster-parents must have a 'right' moderately to chastise the child and the right to control such important matters as the child's friendships, bedtimes and amount of pocket-money. Questions such as consent to medical treatment are disputable, although in practice, the natural parents usually abide by the contract which they sign to surrender these decisions to the agency. Whether the foster-parents have the right to change the child's surname is disputable, although in practice, it seems that many do.

In the absence of case law, it is difficult to be more categorical about these important points.