'HEY MUM, MUM'S ON THE PHONE FOR YOU': SOME LEGAL ASPECTS OF FOSTER CARE

by

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I. *Introduction*[1]

There are two forms of substitute family parenthood — adoption and foster-care. Adoption is subject to stringent statutory guidelines and carefully regulated practice. Foster-care is governed only sporadically by legislation, and its practice is controlled haphazardly. There is a welter of legal literature on adoption: the rights and duties of all parties are clear. There is a dearth of legal writing on foster-care. The status of the parties is most enigmatic. And yet, it is generally conceded by social workers that foster parenthood is a much more difficult and delicate task than adoption.

Part of the difficulty lies in the fact that 'foster-care' means different things to different people. It is a protean term. So in the United States, the expression is often used to cover all forms of substitute family care, including institutionalization.[2] The term, 'foster family care', is then used to describe what we regard as 'foster care' *simpliciter*. But even in this country, foster-care takes many shapes. If it is meant to signify any relationship where a child is being looked after by someone other than one of its parents, it could be applicable to baby-sitters, and even grandparents, sisters and brothers who look after a younger child for a shorter or longer period. Certainly it would cover the many cases where, on the death of a parent, guardianship or custody (legal or *de facto*) is assumed by a relative. Rightly or wrongly, these various types of fostering are subject to very little control or proscription.[2a] Thus it is perfectly possible for a parent by will to appoint whomsoever he wishes as guardian, and, for the most part, this appointment will not be queried.[3]

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1 The title of this paper is a statement by a foster-child to her natural mother. See C. Gowans, 'On Being A Natural Parent' in *Proceedings of Australian Foster Care Conference,* (1979, *Children's Bureau of Australia*) at p. 25.

2 *Cf.* M. Wald, 'State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster-Care' [sic], and Termination of Parental Rights', (1976) 28 *Stanford Law R.* 623.

2a In England, private fostering is governed by *Foster Care Act* 1980, which contains provisions disqualifying certain persons from fostering. In Victoria, it seems that a foster-parent must be licensed if he or she is looking after children under 5 years on a regular basis. But the standards are minimal. See E. Meredith in 'Foster-Care in Australia' (*A.C.O.S.S.* 1973) at p. 58.

3 See later for a discussion of ways in which such an appointment may be challenged if it proves unsatisfactory (*i.e.* after the event).

It will be obvious to lawyers too that a full discussion of issues raised by *de facto* foster-care by relatives would lead one into nice questions of jurisdiction in the wake of the *Vitzdamm-Jones* case.[4] Without going into these issues, it may be worth pointing out another highly unsatisfactory feature of the law relating to foster-care, the multiplicity of courts that may have jurisdiction in a particular situation. The Family Court may deal only with disputes between parties of a marriage over children of that marriage, and occasionally third party applications after a previous adjudication.[5] The Children's Court (or other State court exercising juvenile jurisdiction) may make a child a ward of the State and thus set in motion the process of State placement. The Supreme Court of each State may exercise its paternal jurisdiction over its own wards. (Non-lawyers should note, incidentally, the fundamental distinction which is made by lawyers between 'wards of the State' and 'wards of the Court'[6] — terminology which is singularly unfortunate.) An adoption court[7] will have jurisdiction if the foster-parents seek to adopt. And other courts may well be involved in some of the situations to be discussed. In any reform of the law relating to foster-care, this multiplicity of jurisdiction must be re-examined.

II. *Definition*

Perhaps the best definition of foster-care is that of the influential, and extremely carefully drafted, Standards of Child Welfare League of America:[8]

> . . . 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 nor possible.[9]

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.[10]

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4 *Vitzdamm-Jones and Vitzdamm-Jones* (1981) F.L.C. 91.012.
5 See *E. and E. (No. 2)* (1979) F.L.C. 90.645; *Vitzdamm-Jones,* supra.
6 *Infra.*
7 Jurisdiction in Adoption varies bewilderingly from State to State. See D. Hambly and J. N. Turner, *Cases and Materials on Australian Family Law* (1971) Chap. 13.
8 'Standards for Foster Family Care Service', *Child Welfare League of American Inc.,* New York (1959).
9 This definition was accepted by Brennan J. in *Smith* v. *Organization of Foster Families* 431 U.S. 816 (1977) and is well known in Australian social work practie. See, *e.g. Foster Care Manual of the Australian Association of Social Workers* (*A.C.O.S.S.,* undated, *circa* 1969).
10 'Prospect and Tasks in Foster Care' (Report of the Family Welfare Advisory Council of Victoria 1973). The different forms of foster-care are used in an excellent, comprehensive English report: 'Guide to Fostering Practice' (*D.H.S.S. H.M.S.O.* 1976).

It is apparent that these are not mutually exclusive. It is also unfortunate that even this useful attempt at terminological classification is still very fluid and would not be universally acceptable to Australian social workers. A good example of State variation is the differing conception of 'long-term foster-care' whose meaning for a Western Australian is different from that for a Victorian social worker. Moreover, the above classification does not take into account 'informal' foster-care, *i.e.* fostering not promoted or furthered by a governmental instrumentality or voluntary agency.

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.

Before leaving this rather protracted attempt at definition, one should note that even the hitherto clearly accepted contrast with adoption is becoming blurred. Thus, in a forward-looking article, Oxenberry suggests that adoption and foster-care are becoming merged.[11] This is shown, on the one hand, by recent proposals to allow adoptees access to their birth records, and, on the other hand, by the moves to allow quasi-automatic adoption by foster-parents of long standing. Some English decisions have accorded access to natural parents of adopted children.[12] And the suggestion has even been made that adoption as it is known today, that is as constituting a permanent severance with one family and entry into a new family, will soon become a thing of the past; it will be replaced by new 'open-ended' arrangements in which the natural ties will never be formally severed.[13]

The implications of this not unlikely development are great for both the social work and the legal professions. Certainly, it would seem to bespeak a more flexible service to be provided by agencies, who regrettably (certainly in Victoria) have tended to be specialist in either adopting *or* other substitute care. And it would require careful reassessment of adoption law, which in any event is overdue.

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 majority of fostered children are ex-nuptial,[14] 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.

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11 R. Oxenberry, 'Foster Care, Is It an Alternative to Adoption ?' in *Proceedings of the Second Australian Conference on Adoption,* Monash University, 1978, at p. 69.

12 See *Re J.* [1973] 2 All E.R. 410, *Re S.* [*1975*] 2 All E.R. 109. Contrast *Re L.* [1968] Q.W.N. 36.

13 This suggestion has been made by Miss Pat Harper, Policy Officer of the National Council for the Single Mother and her Child, at a class for my Family Law students at Monash University which she addressed in 1980.

14 See J. Rowe and L. Lambert, *Children Who Wait* (1973) at p. 28.

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,[15] 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-parent* 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.

The various rights and duties of the above five interested parties are unclear in Australian law. In this paper it is intended to make an exploratory examination of some occasions where these interests could clash and suggest tentative solutions to them. Much further research and consideration are necessary in this under-researched area.

III. *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 Welfare 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.

It is interesting that foster-care has waxed and waned in popularity over the past 100 years or so. It has been, and remains, more popular in some countries than others and more popular in some States within Australia than in others.[16] It is the commonest form of substitute care

15 See e.g. *Adoption of Children Act* 1965-1966 (N.S.W.), s. 19.

16 The same is true in U.S.A. where it appears that in New York 72% of children are privately fostered, as opposed to 50% in Nebraska and 99.7% in Utah. See *Wald, Supra* n. 2 and *Smith* case *Supra* n. 9. In England, the number is less than 50%. See J. Rowe and L. Lambert, *Children Who Wait* (1973).

in New South Wales. In Victoria,[16a] however, it has never been popular since *causes célèbres* of the nineteenth century turned the agencies against it. In consequence, Victoria substitute care has been characterized by large congregate homes.

Nevertheless, the pendulum has swung in Victoria towards a greater acceptance of foster-care, notwithstanding its dangers and difficulties. Several Victorian agencies of long standing have recently begun to develop foster-care programmes, especially in country regions. The object is to assist children who would otherwise have been compelled to live in Melbourne, far away from their natural parents. All these agencies have skilled professional social work teams. Suitable foster-parents are sought by positive advertisement (there being no provision comparable to the proscription of advertisement for adoption).[17]

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 in adoption, where definite (albeit minimal) criteria are laid down,[18] 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.[19] The probability of a foster-child being returned to his natural parent declines markedly after the first year in care.[20]

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.

16a In 1975-6, of 6601 wards in Victoria, only 7.6% were in foster-care. See T. Carney, in *Law and the Citizen Lectures,* 1977, Monash University, Faculty of Law. For the history of Victorian foster-care, see *Survey of Child Care in Victoria* 1962-4, Government Printer (1964).

17 The general view in Victoria now seems to be that children naturally belong in families, not in institutions. See the excellent report of the Family Welfare Advisory Council, *supra* n. 10.

18 See *Adoption of Children Acts* of each State. In England, children who are fostered by local authorities are governed by Boarding-Out Regulations 1955, which provide that foster-parents must be any of:
(a) a husband or wife jointly; (b) a woman only; (c) a man who is a grandfather, uncle or elder brother of the child; (d) a man who was formerly acting jointly with his wife, but whose wife has since died. Regulation 2.

19 In Massachusetts, U.S.A. more than 80% of children in care never return home. Only 10% of these are adopted. See Wald, *op. cit.*

20 *Cf.* J. Rose and L. Lambert, *op. cit.*

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 ? 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'.[21] 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.[22]

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

i) Would encourage a careful examination of the motives of the applicants, to see if they are suspect. A good motive might be to repay the benefits of experiences as a fostered child. On the other hand, a motive such as to provide a companion for an existing child, and especially to bolster a shaky marriage, would be regarded as very unsatisfactory.

ii) Would require assessment of accommodation, income, the presence of other children in the family (regarded as preferable) and the mutuality of the desire to foster. Foster-care is sometimes accused of being biased in favour of middle class values, but surely the replacement of poverty by comfort is usually in the best interests of a child !

iii) Might be capable of a more rigorous, objective delineation. Thus it seems to be regarded as *desirable* that the foster-parents be no older than fifty and that there should be some correlation between the ages of the foster-parents and that of the child to be fostered. (With these the concrete provisions of the Adoption Acts may be contrasted.) There

21 J. Goldstein, A. Freund, A. J. Solmit, *Beyond the Best Interests of the Child* (1973) at p. 24.

22 A. Freud, *Safeguarding the Emotional Health of Our Children* (Child Welfare League of America, 1955). This hostility is exhibited in the minority concurring opinion in *Smith's* case, *supra*. And see Olive Stone, *Family Law*, at p. 251.

seems to be a preference for the foster-child to enter as the youngest member of the family. And it seems that married couples are favoured. Many agencies, especially those with a strong Christian 'base', are opposed in principle to fostering by so-called *de facto* couples, homosexual couples or single persons.

iv) Finally, agencies regard the extent to which applicants exhibit a willingness to co-operate with them and the natural parent as a most important factor. For it is universally acknowledged that continuous and intensive social work guidance is required throughout the duration of a foster placement.[23]

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 applicants because of the difficulty of articulating a rejection. The writer's brief observation of a placement meeting is that the committee assessing foster-parents tended to be charitable to weakness. 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 Court to review decisions made by quasi-judicial bodies. This jurisdiction is reinforced in Victoria by the *Administrative Law Act* 1978.

Then it is not unlikely that the jurisdiction of the Omsbudsman will cover the decisions of agencies, and especially Departmental decisions. In England, in addition to a country-wide Ombudsman (or Parliamentary Commissioner as he is officially known as, but never called), there are local ombudsmen. There have been cases where decisions of the local authorities, who in England have a general responsibility for children in care, have been reversed by him.[24]

Finally, it may be possible for the rejected foster-parent to claim sufficient interest to have the child made a Ward of Court. The Court exercising its supervisory jurisdiction over children might well be more

23 The above 'criteria' have been gleaned from a number of sources, both in literature and in private conversation. *Cf.* M. O. Dorgan, 'Initiating a Program of Foster Parent Education', 53 *Child Welfare* 588 (1974). In Victoria, the Family Care Unit of the Department of Community Welfare Services provides a comprehensive document, entitled 'Standards in Foster Care', specifying that 'it is a baseline that can be used in... answering the questions of equity and adequacy'.

24 See *R.* v. *Local Commissioner for North and East England, ex. p. Bradford Council* [1979] 2 W.L.R. 1 discussed by N. D. Lowe in (1979) 96 *Adoption and Foster Care* 38.

ready to review the informal decision of an agency than that of a statutory body or a court. (Cases on the clash between wardship of court and the discretionary powers of authorities will be discussed *below*).

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.[24a]

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,[25] but this will affect few foster-children, and in any event is under-used. The importance of this provision is as a precedent. It seems anomalous to restrict separate representation to (a) a court *and* (b) a particular court[26] of the several which have jurisdiction over children.

As a result, the child has no advocate for his point of view, and any decision to foster is taken paternalistically for his benefit.[27] In contrast, in over twenty States of the U.S.A., there is an officer known as a Child Advocate, whose function it is to review all cases of children in care.[28] 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.[29] It has been persuasively argued that to implement this requires provision of a guardian *ad litem* in all cases affecting their welfare.[30]

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.

24a That this is a matter of serious concern to Americans is clear from the many commentaries on *Smith's* case *supra*. See *e.g.* 'Children in the Foster Family: What Constitutional Rights and Procedural Protections are Accorded', 15 *Houston L.R.*

25 *Family Law Act* 1975, s. 65.

26 In England, the Official Solicitor acts as guardian *ad litem* of children in wardship cases. His office is characterized by thoroughness. For a description see J. Eekelaar, *Family Law and Social Policy* 117 (1978).

27 It is arguable, however, that the criticism of State paternalism has been exaggerated. The new Victorian provisions of the *Community Welfare Services Act* 1979, seemingly based on the Norgard Report into Children in Care, appear to be founded on an optimistic attempt to keep families intact in the most hopeless situations.

28 See Mnookin, *infra,* n. 42.

29 *Children Act* 1975, s. 9.

30 Judge Jean Graham Hall, 'Wishes and Feelings: the Legal Background', (1979) 9 *Adoption and Fostering* 15.

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, it is hoped, subject to a period of training, at 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.[31]

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 ?

a) *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.[32] 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 for damage in access arrangements between divorced mother and father has been well recognized in legal literature.[33] The potential must be just as great in this instance. Without going as far as Goldstein, Freud and Solnit in their condemnation of access,[34] I would suggest that there might be occasions when it would be desirable to forbid any access to the natural parent.

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31 *Cf.* J. Rowe and L. Lambert, *op. cit.* at p. 43 (only 5% of foster children in an English sample saw their natural parents frequently).

32 In *In re W.* [1979] 3 W.L.R. 244, Bridge J. said that a natural parent has no inalienable right of access to a child.

33 Especially the writings of Susan Maidment. See S. R. Maidment, 'Access Conditions in Custody Orders', (1975) 2 *B.J.L.S.* 182.

34 *Op. cit. at pp.* 6-7.

b) *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*,[35] 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, I would contend:

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.[35a]

3. Nevertheless, the agency would be vicariously liable for the negligence of its social workers, and, certainly since *Hedley Byrne* v. *Heller*[36] (if not before) this would include negligent advice as well as wrongful action or inaction. In one famous American case a state agency was held to be liable *to* the foster-parents when the foster-mother was assaulted by a 16 year old foster-child. The agency had failed to inform the parents of his homicidal tendencies.[36a]

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35 [1970] 2 W.L.R. 1140. H.L.

35a This is also the view taken by S. N. Katz in an excellent discussion of foster-care in his book, *When Parents Fail* (1971), at p. 93.

36 [1947] A.C. 465.

36a *Johnson* v. *California* (1968) 73 Cal. 240, 447 P. 2d. 352.

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. (See Appendix A.) 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.

c) *Criminal Liability*

Paradoxically, it may be possible to make a parent pay compensation for an offence of the child through a criminal prosecution.[36b] This possibility is suggested by a spate of English cases in the early 1970s, which involved a previously little-used provision.

Under the English *Children and Young Persons Act* 1933, s. 55 (1), the court may order the parent or guardian to pay compensation to the victims of an offence. In *R.* v. *Croydon Justices*,[37] a very difficult child in the care of a local authority ultimately committed many offences. The magistrates ordered the local authority to pay. Lord Widgery C.J. pointed out that the authority was a 'guardian', which, for this purpose, meant more than a legal guardian. The local authority was held to have neglected its duties and had to pay the compensation. Lord Widgery, C.J., however, said that the power was to be used sparingly. This case was distinguished in *Somerset County Council* v. *Linscott*,[38] when the local authority placed three boys in a community home from which they absconded. The magistrates thought that the chief interest of the staff had been in the boys' rehabilitation 'to the detriment of members of public who had suffered from their depredations', and fined the local authority. But, on appeal, they were reversed. The Divisional Court said that the test was that of the reasonable parent in the circumstances. Thus a widow controlling six young children could hardly be expected to achieve the same standard of supervision which is possible in a single-child family with both parents alive. In this case there was no evidence of neglect conducing to the offences.

The Victorian legislation permits the court to impose a fine on a 'parent'. 'Parent', however, is defined to include 'guardian'.[38a]

If the English wide interpretation of 'guardian' in the above cases is followed, there might be liability on a voluntary agency which foolishly permits home releases or is otherwise negligent. But this does not mean that foster-children must be incarcerated or subject to highly unreasonable curfews. The interest of the public must be balanced against that of the children to lead normal lives.

36b See *Children's Court Act* 1973, s. 29 (Vic.) See F. McNiff, *Guide to Children's Court Practice in Victoria* (1979).

37 [1973] 1 All E.R. 476.

38 [1975] 1 All E.R. 326. See also *Lincoln Corporation* v. *Parker* [1974] 2 All E.R. 949 and *Leicestershire County Council* v. *Cross* [1976] 2 All E.R. 491, where two twins, Coca-Cola addicts, did a great deal of damage in the furtherance of their addiction.

38a *Children's Court Act* 1973, ss. 3, 29.

d) *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 a very recent one in New South Wales which reached the headlines.[39]

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.[40]) 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.[41]

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.[42]

1) The foster-parents 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

39 *Tulk* v. *McGuire* (1981) F.L.C. 91-098. This case reached the Supreme Court of N.S.W., which confirmed an Order of the Court of Appeal, allowing an appeal by the foster-parents against the decision of a single judge which returned a child to its natural mother in Adelaide.

40 *Child Care Act* 1980, s. 13. Even after this time, the parents do not have an absolute right to demand the return of the child. See *Lewisham London Borough Council* v. *Lewisham Justices* [1979] 2 W.L.R. 513. H.L. But see *Wheatley* v. *Waltham Forest Borough Council* [1979] 2 W.L.R. 543.

41 There is a good discussion of the policy behind this legislation in T. Carney, 'Law and Citizen Lectures' (Monash University, Faculty of Law, 1977).

42 Space forbids a discussion of a further issue, the foster-parents' rights against the *agency* which seeks to remove the child. The same processes would seem to be available as here discussed. *Cf.* S. N. Katz, *op. cit.* 96 for an illustration of this problem.

child, and it would surely be a rare case where the agency could 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, where the foster-parents feel irresistibly moved to refuse to surrender a child.

1) *Adoption*

Rightly or wrongly, the courts are reluctant to sanction adoption against the opposition of the natural parent. The Adoption Acts require generally the consent of the parent, but provide for cases where the consent may be dispensed with. Since the House of Lords case, *Re W.*,[43] English courts have to consider this question primarily in the light of what a reasonable parent would decide. Fault of the parent is not required for the *general* ground.[44] Australian courts, however, 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. Surely, consideration should be given to the enactment of a provision akin to that of the English *Children Act* 1975, whereby after five years foster-parents would have a right to apply to adopt without the consent of the natural parents.[44a]

Another possibility might be the raising of status of foster-parents to that of 'custodianship'.[45] But there are signs that this nebulous concept is losing favour in England, as no-one knows quite what it means.

These are large issues, which require much greater consideration. At any rate, considering the great oversupply of potential adopters, and the generally accredited success rate of adoption, it is suggested that caution should be abandoned and that the courts should strongly encourage adoption by foster-parents of long-standing. To deny this in many cases is surely to yield to a sentimental attachment to the blood tie.

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43 [1971] A.C. 682.

44 For a full discussion of the ground sunder the Australian Adoption Acts, see J. N. Turner, *Adoption* in 'Law and the Citizen Lectures' (Monash University, Faculty of Law, 1977).

44a *Children Act* 1975, s. 29. *Cf.* J. Rose *et al.*, 'The Influence of Section 103' 23 [1981] *Adoption and Fostering.*

45 *Children Act* 1975, s. 33. For a criticism of 'custodianship', see M. D. A. Freeman, (1979), 9 *Family Law* No. 5, who is unhappy about the protection given to foster-parents.

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 (*cf.* the Lord Chancellor in 'Iolanthe') to consenting to sterilization.

Wardship had almost fallen into desuetude in Australia, at least in Victoria. Recently, it has begun to enjoy a renaissance in England, perhaps because it is so all-embracing, and also because it can be invoked speedily. In England, it is now within the jurisdiction of the Family Division of the High Court, whose judges might be expected to have special expertise over children. In Australia, however, most unfortunately, the court with the most obvious qualification for handling wardship cases is expressly disqualified from doing so,[46] for constitutional reasons. As a result, the jurisdiction remains in the Supreme Courts of each State, some of whose judges know next to nothing about family dynamics or child welfare.

Nevertheless, the 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.[47] 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.*[48]

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 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

46 *Family Law Act* 1975, s. 8. *Fountain* v. *Alexander* (1982) F.L.C. 91-218.

47 See *In re M.* [1967] 1 Ch. 328; *In re W.* [1979] 3 W.L.R. 244. For a case in which the court did interfere, see *In re H.* [1978] Fam. 78, where Ormrod L.J. well discusses the potential for conflict between jurisdictions.

48 (1976) 135 C.L.R. 92, reversing *Director of Social Welfare* v. *J.* [1976] V.R. 89, where the Supreme Court of Victoria took a more limited view of the Court's role in wardship.

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.[49] Occasionally, a court would take a different view where there was a voluntary placement, as in *C.* v. *R.*[50] 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.*[51] 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*[52] and *Starke* v. *Bartsch*[53] are examples, but each involved informal foster-care by relatives. The recent case, *E and E*,[54] 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 cases

49 See *Storie* v. *Storie* (1979) 80 C.L.R. 597.
50 [1967] V.R. 220.
51 [1969] A.C. 668. F. Bates considers that this case represents an appreciable departure from previous approaches. See F. Bates, 'Redefining the Parent/Child Relationship — A Blueprint' (1977) 12 U.W.A.L.R. 518.
52 (1980) F.L.C. 90-185. Supreme Court of New South Wales.
53 (1979) F.L.C. 90-724. Supreme Court of South Australia. Contrast *Kirkland* v. *Kirkland* (1979) F.L.C. 90-660 Supreme Court of New South Wales, and *Roberts* v. *Prorok and Director-General of Social Welfare* (1977) unreported, kindly supplied to the writer by Mrs Joan Dwyer, Chairman, Equal Opportunity Board, Victoria.
54 *E. and E. (No. 2)* (1979) F.L.C. 90-645.

where the placement is informal.[55] But the Australian judges, especially State Supreme Court judges, continue to pay more lip-service to *Storie* v. *Storie*.[56]

e) *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'.[57]

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.

Conclusion

Unfortunately, to make this paper of manageable length, I have concentrated on voluntary placement by agencies and have omitted a full discussion of the special problems of informal foster-care *per se* on the one hand and the foster-care of State Wards, under the auspices of the Director of Community Welfare Services.

It will be apparent that the law relating to foster-care is in a most incomplete and unsatisfactory state. Hardly any aspect of it can be

55 *E. and E. supra, per* Asche J. (dissenting). 'The approach ... has been to give greater emphasis to the welfare of the child ... and less ... to *prima facie* rules such as that a parent is to be preferred to a stranger.'

56 See, *e.g. Powell* v. *Anderson* (1977) F.L.C. 90-235.
For a general comment, see F. Bates, 'Disputes Over Children Between Natural Parents and Foster Parents' (1978) 9 *Manitoba L.J.* I.
And see *Lloyd* v. *Lloyd* (1980) F.L.C. 90-816 Supreme Court of New South Wales.

57 There is no unanimity on what these comprise, but an excellent analysis is that J. Eekelaar, 'What Are Parental Rights?' (1973) 89 *L.Q.R.* 210. An interesting attempt to distinguish the various types of guardianship and its distinctions with custody was made by Needham J. in *Lawson* v. *Yeldman* [1980] 2 N.S.W.L.R. 458.

said to be carefully regulated. The potential for conflict is very great.

Yet foster-care is playing an increasingly important role in child welfare. It is likely to grow in strength, and this is rightly so, for it has many advantages over other forms of substitute care.

The demands of all parties will need to be balanced carefully if a satisfactory solution to their legal problems is to be found.[58]

58 Although I have concentrated on voluntary placements in this article, it is obvious that even greater legal problems arise when foster-care is arranged as a result of a court order vesting guardianship in the Director of Community Welfare Services. I am grateful to Mr Colin Strover, Director of Regional Services, Community Welfare Services (Victoria) for having supplied me with his views on a draft of this article, and pointing out some further issues involving State wards. It is clear from his writings that the law is proving most unsatisfactory for those working in the Family Substitute Care Unit of the Department.

APPENDIX

(A document to be signed by natural parents in surrendering their child to a certain Victorian agency.)

To: [The Organization,]

In consideration of your having agreed to arrange the care of the child/children named in the Schedule hereinafter referred to at my request and subject to your Rules and Regulations and to such other terms and conditions as I may have agreed to in connection with such agreement for the care of the said child/children. I/We.. . . . . of .. .. in the State of Victoria .. . .father/mother/guardian of the child/children referred to in the Schedule *DO HEREBY CONSENT* to your arrangements for the said child/children to be taken care of by and to reside with or to spend holidays with any person hospital home or institution for such times and periods as the Director and Secretary or his deputy may in his sole discretion from time to time decide upon *AND I/WE HEREBY JOINTLY AND SEVERALLY RELEASE DISCHARGE AND INDEMNIFY*
The Organization its members employees and agents from and in respect of all claims demands actions suits costs and legal proceedings whatsoever brought or instituted at any time hereafter by me/us the said child/children or any of them and which arise in respect of any injury damage or loss whatsoever suffered by or caused as a result of the said child/children or any of them whilst in your custody control or care or whilst in the custody control or care of any other person hospital home or institution or while proceeding from and to the Organization from any such person hospital home or institution or whilst travelling or being conveyed from any place or places while in the custody control or care of any person hospital home or institution *AND I/WE AGREE TO BE LIABLE FOR AND TO PAY* to you on demand any costs damages or other moneys which you may be required to pay or discharge as a result of any injury damage or loss whatsoever suffered by or caused as a result of the said child/children or any of them whilst in your custody control or care or in the custody control or care of any other person hospital home or institution or whilst travelling aforesaid. *I/WE AGREE* that this release indemnity and guarantee shall not be revoked by us while the said child/children are in your custody control or care or in the custody control or care of any other person hospital home or institution and shall not be affected by the giving of time or any other indulgence granted by you to me/us or to any other person and that in the event of my/our deaths it shall be binding on my/our estates and legal representatives.

THE SCHEDULE HEREINBEFORE REFERRED TO
Particulars of Children for whom care is to be provided

NAME OF CHILD	*DATE OF BIRTH*	*PLACE OF BIRTH*	*RELIGION*	*HAS THE CHILD BEEN BAPTISED*