Introduction

Foster care was initially designed to be the temporary removal of children from their biological parents and placement in another family. Placement out of the home was deemed to serve two purposes. First, it enabled children to develop physically and emotionally in a stable and harmonious environment during those periods in which their natural parents were either unwilling or unable to provide such a home. Second, it provided biological parents with support services from the state and the opportunity to rehabilitate themselves to be able to resume the responsibility of their children. This foster care structure, however, has increasingly failed in practice to serve these two goals.

During the 1980s and 1990s, increasing numbers of children entered the foster care system as a result of the rise of societal problems. Substance abuse, particularly the use of crack cocaine, the AIDS epidemic, increased homelessness, poverty, lack of extended families and an increase in the number of teenage parents have all created a greater need for foster care.

This burgeoning foster care population has strained the foster care system. The result is that many children fail to receive services and care that are in their best interests. Theoretically, each child entering foster care should receive an assessment, appropriate treatment plan and careful and detailed monitoring of his case. The goal is to provide each child with a permanent family relationship within a timely period. Timely is gauged by each child's developmental needs. Unfortunately, the realities of foster care often fall far short of this ideal. Inadequate funding, training and under staffing, both in the courts and in child welfare agencies, leads to inadequate time and resources spent on each child's case. Thus, children find themselves lost in the system and in chronic limbo. Many suffer through multiple moves or simply remain with one set of foster parents for years without any permanent legal arrangement. Thus, what is often intended to be a *temporary* arrangement turns into extended care with new "psychological" families being created by the state.

Concerned that no one is truly advocating for their foster child, increasing numbers of foster parents across the country are becoming involved in the legal action affecting their foster child.
These foster parents become involved for different reasons. Some seek simply to provide more information to the judge about their foster child so that the judge can make a more informed and deliberate decision about what is in the child's best interest. Other foster parents seek to object to an imminent removal of their foster child from their home and/or attempt to achieve an adoption or permanent custody of their foster child. Still others want to discover information in a case to better monitor its status and provide better care for their foster child. Finally, some foster parents become legally involved in an effort to access public benefits for their foster child and/or foster family or to have visitation rights with a former foster child.

This article explores the rights of foster parents in the following contexts: (1) notice of hearings; (2) intervention; (3) discovery; (3) objecting to a social services plan of removal of the foster child from their home; (4) filing for permanent custody; (5) filing for termination of the parent-child legal relationship; (6) filing for adoption; (7) adoption assistance; and (8) visitation with a former foster child. While states differ about the extent of foster parents' rights in these different contexts, this article attempts to illustrate the current trends of how courts and legislatures across the country are interpreting the role of foster parents in dependency proceedings.

Notice and Opportunity to be Heard

In 1997 the Federal Government passed the most important piece of child welfare legislation since the Adoption Assistance and Child Welfare Act of 1980. The legislation known as "The Adoption and Safe Families Act of 1997" attempts to achieve permanence by freeing more foster children for adoption. It changes the focus of the child protection proceeding from family preservation and reunification to the child's health and safety. Moreover, the legislation contains important protections for foster parents.

Under the new federal legislation, foster parents must be given "notice of and an opportunity to be heard in, any review or hearing to be held with respect to the [foster] child."[1] However, this provision does not make a foster parent a party to such a review or hearing solely based on receiving notice and opportunity to be heard.[2] States needing to enact legislation to comply with this requirement and other substantive requirements have essentially two years to do so in order to receive federal funding under Title 4 of the Social Security Act.[3]

Foster parents, pursuant to this new federal legislation, can expect the agency having legal custody of their foster child to provide them notice of all hearings affecting their foster child's interests. This will enable foster parents to participate in or influence the legal proceeding and the ultimate issues that the trial court and/or an administrative body will consider at each hearing. Further, at a minimum, it should permit foster parents to testify and/or make a statement at every hearing about their concerns for their foster child's welfare. Whether the language of an "opportunity to be heard" also entails the right to present evidence outside of their own personal knowledge through calling additional witnesses remains unclear. To safeguard this right and to better ensure full participation at every hearing, foster parents must still seek leave to intervene formally as an interested party.

Intervention

When a dependency and neglect case is filed, the parties to the original action usually include the county department of social services ("the department"), the natural parents and the child (usually represented by the Guardian ad litem). In some cases, a live-in boyfriend or girlfriend of the birth parents is also made a party to the proceeding and is called a "special respondent." These parties have the right to receive notices of all court hearings, discover and access reports, motion the court with specific requests, call witnesses and cross-examine opposing parties' witnesses. Foster parents are not parties to the original proceeding and therefore do not have many of these rights.

Foster parents who want to become involved in the pending legal action must first become a "party" to the proceeding. The current trend is that state legislatures are increasingly enacting statutes allowing foster parents to intervene as a matter of right if certain threshold requirements are met. For example, the Colorado General Assembly in 1997 enacted legislation which provides that "foster parents who have had a child in their care for more than three months and who have information or knowledge concerning the care and protection of the child may intervene as a matter of right following adjudication with or without counsel."[4] Such statutes do not give any discretion to the trial court judge in deciding the matter so long as the statutory requirements have been met.

Other states provide for permissive intervention of foster parents and typically follow Rule 24(b) of their state rules of civil procedure.[5] In these jurisdictions, the trial court is given wide discretion whether to allow foster

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[1] 42 USCA § 675(5) (West 1997).

[2] Id.

[3] 42 USCA § 501.

[4] Colo. Rev. Stat. § 19-3-507(5) (1997); See also N.Y. Soc. Serv. Law § 383(3) (1997) ("foster parents having had continuous care of a child, for more than twelve months, through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the child. Such intervention may be made anonymously or in the true name of said foster parents.")

[5] See e.g., C.R.C.P. 24(b) ("Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.")

parents to intervene.[6] In making this determination, courts often look at the following factors: (1) whether the foster parents' participation will enhance the knowledge and judgment of the court in making a best interest determination; (2) whether intervention is necessary to elicit full and accurate information pertaining to the welfare of the child; (3) the reason foster parents are seeking to intervene; (4) whether foster parents have a recognizable liberty interest in the continuation of this new familial relationship[7]; and (5) whether the foster parents' interest is adequately represented by any of the litigants.

Once foster parents have intervened in a dependency action, the precise rights bestowed upon them are not entirely clear. It is expected, however, that party status entitles foster parents to receive notices of all hearings, have access to court reports, voice their concerns about the child's welfare directly to the court, file motions seeking additional services for their foster child and present testimony about the child's welfare. Foster parent intervenors are usually also in a position to object to their foster child's removal and/or seek custody of the child when the child has been in their long-term care. In essence, once intervention is obtained, foster parents are better able to monitor the status of the case, negotiate with other parties and influence the court on behalf of their foster child.

Discovery

As parties, foster parents should arguably have the right to discover relevant evidence about the dependency case and specifically about their foster child. Evidence may include
the department's notes detailing contacts and visits between the natural parents and the child and descriptions and observations of their relationship; notes relating to the parents' compliance, or lack thereof, with the court-ordered treatment plan; therapists' reports; and court ordered evaluations. These documents serve to better inform the foster parents about their foster child's specific needs and are necessary to prepare for possible litigation.

Foster parents seeking discovery from birth parents and/or the department of social services, either in the form of depositions, interrogatories or requests for production of documents often face objections on the basis of confidentiality. In such cases, foster parents will need to file a motion to compel discovery.

Many state statutes allow discovery of child abuse and neglect records and reports where good cause is demonstrated or where access is necessary to resolve an issue pending before the court. Colorado, for example, provides access to child abuse or neglect records and reports where a "court, upon its finding that access to such records may be necessary for determination of an issue before such court, but such access shall be limited to in camera inspection unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it."[8]

Foster parents seeking to discover relevant reports and records should assert that in order to provide quality care for their foster children, they must be privy to all information relating to the children's best interests. Caretakers cannot adequately attend to all of their foster child's physical and emotional needs without a clear understanding of the children's emotional and physical background. Further, to meaningfully participate in the judicial proceedings with full knowledge of the surrounding facts and circumstances and to avoid

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[6] See e.g., In re N.B., 599 So.2d 911 (La.Ct. App. 1992) (denying motion by foster parents to intervene was not abuse of discretion); D.Y.F.S., 410 A.2d 79 (N.J. Juv. and Dom. Rel. Ct. 1979) (foster parents were entitled to intervene); In re S. Children, 656 N.Y.S. 2d 308 (App. Div. 1997) (former foster parents were not entitled to intervene); In re Scearce, 345 S.E.2d 404 (N.C. Ct. App. 1986) (trial court did not abuse its discretion in allowing foster parents to intervene); In re Winkle, 1997 WL 148555 (Ohio Ct. App. 1997) (trial court has discretion whether to allow foster parents to intervene).

[7] See infra § VII.

[8] Colo. Rev. Stat. § 19-1-307(2)(f) (1998).

unwarranted surprise, foster parents need access to this information. Any concerns raised by the birth parents or the department of social services that the material, which if disclosed, would result in embarrassment or prejudice, can be cured by a court "gag" order preventing the information to be used or disclosed outside of the court proceeding.

There is a dearth of case law addressing foster parents' right of discovery in dependency proceedings. In those few reported cases, the trial court was given wide discretion in determining the scope of discovery.[9] In In re Marilyn H[10], for example, foster parents were permitted to inspect material in the agency's case records relating to (1) contacts and visitations between the natural mother and the child and the descriptions of their relationship; (2) the natural mother's planning for the future of the child, including her physical and financial ability to do so; and (3) the agency's efforts to strengthen and encourage the parental relationship. Inspection, however, of material relating to the natural mother's psychological and emotional status and her fitness as a mother was withheld.[11]

Whether foster parents can hire a private investigator to observe a natural parent in an effort to gather damaging information in preparation for litigation has not been fully litigated. In Matter of A.,[12] foster parents, at their own expense, hired a private investigator to observe the birth mother. In noting that "their action in doing so was neither illegal nor in violation of any duty owed to the (department)," the New Jersey appeals court stated that "we do not, in recognizing the (foster parents) efforts, wish to be understood, however, to have passed upon or approved all of the methods plaintiffs employed to achieve their goal, however admirable that ultimate goal may been been.[13] Before pursuing this intrusive course of action foster parents should consider all of the legal and ethical implications, including perhaps most importantly, on how the trial court is likely to view this action in deciding the ultimate issue of where the foster children will reside.

Objecting to Removal of Foster Child from Home

It is widely recognized that many foster children experience multiple moves while in foster care. This is typically referred to as "foster care drift." Moves occur for varying reasons: time-limited placements; change in venue when natural parents relocate to a different county; reunification efforts; animosity between a foster parent and caseworker; the caseworker's belief that the foster parents are becoming too attached to the child and this attachment intentionally or inadvertently undermines the relationship between the child and the natural parents; or due to racial matching efforts. Prior to the removal of a foster child, it is critical that foster parent intervenors who want to maintain a relationship with their foster child seek an immediate stay of the removal and request a forthwith hearing on the matter.

Several states provide for pre-removal hearings before the juvenile court to allow foster parents to present evidence as to why a move is arbitrary and not in the best interests of the child.[14] Other states, including Colorado, provide that prior to the change of placement, all parties must be notified (including foster parents

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[9] Doe v. State Dep't of Human Servs., 398 A.2d 562 (N.J. Super. Ct. App. Div. 1979); In re A., 649 A.2d 1310 (N.J. Super. Ct. App. Div. 1994).
[10] 420 N.Y.S. 2d 445 (Fam.Ct.1979).
[11] Id. at 448.
[12] 649 A.2d at 1312.
[13] Id.
[14] See e.g., Carrieri, Practice Commentaries, N.Y. Soc. Serv. Law § 400 (McKinney 1992); Matter of Department of Social Services, 653 N.Y.S.2d 633 (N.Y. App. Div. 1997); Okla. Stat. tit. 10, § 7208 (1997) (foster parent with whom the child has resided for more than one year may object to child's removal and absent certain extenuated circumstances the court shall stay removal and conduct a hearing within fifteen working days).

if they have intervened) and that if a party objects, a forthwith hearing should be held.[15] Still, other states permit foster parents to seek an administrative review of a child's removal from their care.[16]

From a practical standpoint, foster parents objecting to a child's removal should always seek a stay of the move pending a hearing. Once a child has been moved, courts will typically be more reluctant to return a child to the petitioning foster parents. This is due to a concern that the foster child may have "adjusted" to his or her new home and to move the child yet another time would be very disruptive.

At the removal hearing, foster parents should present evidence about why the removal would not be in the child's best interest or why the child-placing agency's decision to remove the child was arbitrary or inconsistent with the child's treatment and service plan. Additionally, presenting testimony about the child suffering significant trauma as a result of the move and being at risk of developing attachment disorders is usually necessary.

Permanent Custody

Foster parents seeking to secure a legal relationship with their foster children may attempt to file for permanent sole legal and physical custody. Pursuing this remedy may be particularly attractive in those jurisdictions where foster parents are precluded from filing for termination of the parent-child legal relationship and the agency and the Guardian ad litem are unwilling to file for termination. A permanent sole custody order allows foster parents to make the legal decisions affecting a child's life, including medical treatment decisions,[17] where the child attends school and the child's religious upbringing. It also permits foster parents to retain the right to physically care for the child in their home on a daily basis.

A permanent custody order, unlike an adoption, however may be unsettling for many foster parents. Because permanent sole legal custody does not completely sever a natural parents' legal rights, the natural parents may retain visitation rights and therefore be involved with the child in some capacity. Similarly, natural parents may at some future date file for a modification of custody based on a change of circumstances.

Only a handful of jurisdictions have considered whether foster parents have standing to seek permanent legal and physical custody in a child protection proceeding. No consensus has emerged from the appellate courts.

In In re D.C.,[18] the Colorado Court of Appeals determined that foster parents had standing to file for permanent custody pursuant to the Uniform Dissolution of Marriage Act ("UDMA") and have the matter certified to the pending dependency and neglect proceeding. However, the custody dispute must be conducted pursuant to the provisions of the Children's Code and not the UDMA. Accordingly, the trial court must decide the custody issue based upon both the best interests of the child and the public, which includes the state's interest in reunifying and preserving families.[19] Likewise, the North Carolina Court of Appeals held that the trial court had broad dispositional powers, including the power to award legal custody of a foster child to the foster family even though the decision was opposed by the department of social services and the

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[15] See e.g., C.R.S. § 19-3-213 (1998) ("prior to the change of placement of a child, the county department shall . . . notice (all) parties. If (a) party disagrees with the change in placement, he or she may seek an emergency hearing concerning the appropriate placement for a child. In an emergency, the county department may proceed to change the placement prior to any requested hearing.").

[16] See e.g., In re R.M., 681 N.E. 2d 652 (Ill. App. Ct. 1997); In re J.B., 681 A.2d 668 (N.J. Super. Ct. Ch. Div. 1996).

[17] A custody order is also usually sufficient to place the child on the foster parents' private insurance policy.

[18] 851 P.2d 291 (Colo.Ct. App. 1993).

[19] Id. at 293. See also L.A.G. v. Colorado, 912 P.2d 1385 (Colo. 1996).

birth father.[20]

The Pennsylvania Superior Court has determined that if foster parents' status changes to prospective adoptive parents, they then have standing to file for custody.[21] However, former foster parents who have not been designated or recognized as prospective adoptive parents have no standing to pursue an action for custody.[22] The court distinguished between the two on the basis that prospective adoptive parents, unlike foster parents, have an "expectation of permanent custody" and accordingly the removal of the child from the foster parents' care would result in a direct and substantial injury.[23]

In contrast, the New York Supreme Court has refused to grant standing to foster parents to institute custody proceedings against either the county department of social services or a birth parent. In In re Michael W.,[24] the New York court interpreted the state statute narrowly and
declined to allow foster parents who had continuous care of the foster child for more than 12 months to file for custody.

Termination of Parental Rights

Termination of the parent/child legal relationship is the most drastic remedy available in dependency and neglect cases. From the perspective of long-term foster parents, termination creates an opportunity for them to adopt the children in their care. In many situations and often in violation of state and federal law, dependency and neglect proceedings have gone on for years without any permanency being provided for foster children. In other situations, foster children have been severely traumatized by their natural parents' actions or omissions, but termination of parental rights is not pursued in order to try and reunite the natural parents at all costs. In an effort to bring stability and finality to these cases and be in a position to adopt their foster child, foster parents are increasingly attempting to initiate or join a termination action against the natural parents.

Courts across the country are split as to whether foster parents have standing to initiate and/or meaningfully participate in a termination of parental rights action. The majority of states have held that foster parents have standing to institute or intervene in independent termination proceedings.[25]

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[20] In re Scearce, 345 S.E.2d at 411. But see Oxednine v. Catawba County Dep't of Social Servs., 281 S.E.2d 370 (N.C. 1981) (where natural parents voluntarily released their parental rights and surrendered the child to the department for adoptive placement, foster parents did not have standing to file an action in district court seeking permanent custody).

[21] Mollander v. Chiodo, 675 A.2d 753 (Pa. Super. Ct. 1996); Mitch v. Bucks County Children and Youth Social Servs. Agency, 556 A.2d 419 (Pa. Super .Ct. 1989).

[22] Priester v. Fayette Cunty Children and Youth Servs., 512 A.2d 683 (Pa. Super. Ct. 1986).

[23] Mitch, 556 A.2d at 423.

[24] 120 A.D.2d 87 (N.Y. App. Div. 1986).

[25] N.A. v. J.H., 571 So.2d 1130 (Ala.Civ.App. 1990); In re C.J., 481 N.W.2d 861 (Minn. Ct. App. 1992); D.L.C. v. Nelson, 834 S.W.2d 760 (Mo. Ct. App. 1992) (foster parents may participate in a termination trial but may not present evidence alien to the termination issue); In Re Diana P., 424 A.2d.178 (N.H. 1980), cert. denied; In the Matter of A., 649 A.2d 1310 (N.J. App. Div. 1994); In re A.M., 406 A.2d 468 (N.J. Super. Ct. App. Div. 1979); Doe v. State Dept. Of Human Services, 398 A.2d 562 (N.J. 1979); D.Y.F.S. v. D.T., 410 A.2d 79 (N.J. Juv. and Dom. Rel. Ct., 1979); Greenville County Dep't. of Social Servs. v. Bowes, 437 S.E.2d 107 (S.C. 1993); Department of Social Servs. v. Pritchett 374 S.E.2d 500 (S.C. Ct. App. 1988), cert. denied 380 S.E.2d 430; Harris County Child Welfare Unit v. Caloudas 590 S.W.2d 596 (Tex. Civ. App. 1979); Rodarte v. Cox, 828 S.W.2d 65 (Tex. Ct. App. 1991); In re Jonathan G., 482 S.E. 2d 893 (W. Va. 1996) (foster parents are limited to presenting pertinent information at a termination hearing relating to the child with the level and type of participation left to the discretion of the trial court giving due consideration to the

Courts that have permitted foster parents to initiate or participate in a termination hearing have usually done so on the basis that such a ruling provides for a more complete presentation of all of the facts and circumstances of the case. By enabling foster parents to file a termination action and/or present testimony at a termination hearing, the trial court will be better suited to hear the concerns of all of the parties in the proceeding and what is truly in the child's best interest. In ruling on behalf of foster parent standing, the New Jersey appellate court stated nearly twenty years ago:

> New Jersey is committed to a liberal approach to the issue of standing and we see no reason why the standing of foster parents should be determined on a more restrictive basis. Moreover, where parents, natural and foster, do battle with custody of a child as the prize, neither alone may fully represent the best interests of the child. When facts indicate the existence of a bona fide dispute between competing sets of parents grounded in a potential for serious psychological and emotional harm to the very young, the best interests of the child demand a full exposure of the facts prior to any change in custody. That can only be accomplished by granting foster parents and natural parents adversary standing with all the rights which that status implies. Both parties can then present evidence and argument to the adjudicating tribunal, administrative or judicial, for resolution.[26]

A minority of jurisdictions, however, have ruled that foster parents have no standing to institute a termination proceeding or to proceed with one after the department has subsequently withdrawn its own petition seeking to cut off the rights of the natural parents.[27] In such states, foster parents must sit on the sidelines urging the agency and/or the Guardian ad litem to initiate the proceeding to terminate parental rights and then prosecute the proceeding. The basis for denying foster parent intervenors standing is usually due to the fact that intervenors have little or no legal interest at stake; any interest is adequately represented by other parties; and/or it better ensures that the case would not be shaped in such a way as to introduce an impermissible ingredient into the termination proceeding, namely a comparison of the relative fitness of foster and the natural parents.

Foster parents seeking to file and/or participate in a termination of parental rights proceeding should assert in their motion that they have a protected federal and state constitutional liberty interest in maintaining their relationship with their foster child which guarantees their standing to be heard in such a proceeding.[28]

Jurisdictions across the country have struggled with the issue of whether to recognize that a liberty interest rests with a foster parent.[29] The majority of courts that have addressed this issue including the U.S. Court of Appeals for the Fifth, Sixth, Seventh and Ninth Circuits have refused to find that foster parents have a constitutionally protected interest in their relationship with their foster children.[30] In contrast, a minority of

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length of time the child has been cared for by the foster parents and the relationship that has developed).

[26] Doe v. State Department of Human Services, 398 A.2d at 568.

[27] In re Baby Girl B, 618 A.2d 1 (Conn. 1992); In re. Juvenile Appeal, 449 A.2d 165 (Conn. 1982); In re V.F., 490 N.W.2d 87 (Iowa. Ct. App. 1992); Smith v. Wilson, 269 S.W.2d 255 (Ky. 1954); L.S.J v. E.B. 672 S.W.2d 937 (Ky. Ct. App. 1984).

[28] This argument, in fact, may be asserted at any juncture of the dependency proceeding where foster parents are requesting an opportunity to be heard and meaningfully participate in a hearing involving their foster child.

[29] See e.g., Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (New York procedures including notice of potential move and the right to a fair hearing for foster parents satisfied due process concerns even if a liberty interest existed).

[30] Blacklund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985) Drummond v. Fulton County Dep't of Fam. and Children's Servs., 563 F. 2d 1200 (5th Cir. 1977)(en banc), cert.denied, 437 U.S. 910 (1978); Sherrard v.

courts including the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Eastern District of California and the District Court of Appeals of Florida have held that foster parents possess a liberty interest in the preservation of their foster families. [31]

Long-term foster parents attempting to free a child for adoption must not only challenge the birth parents and establish the statutory criteria for termination but must also demonstrate that there are no less restrictive alternatives to termination, including placement with a relative. Most states require the court to consider and rule out suitable relative placements prior to terminating parental rights. In such states, foster parents should consider presenting evidence relating to the following factors: (1) realatives' failure to come forward when the child was first removed; (2) relatives' ability to provide for and support the child; (3) suitability of the relatives' home; (4) relatives' success with their own children; (5) the relatives' desires to return the child to their birth parents; and (6) the close relationship between the child and the foster parents.[32]

Adoption

Once a child is freed for adoption, either through an involuntary or voluntary termination proceeding, foster parents commonly assert an interest in adopting the child. Most state statutes specifically contain language permitting foster parents to petition the court to adopt.[33]

Many state statutes require that the agency having legal custody of the child available for adoption consent to the adoption.[34] In some cases, however, the agency may refuse to grant their consent to the foster parents' adoption and may seek to place the child with a relative or another family for the ultimate purpose of adoption. Reasons for refusing consent may include one of the following:

(1) The state agency believes they have an obligation to place the child with an adoptive family who has been on their waiting list for a long period of time and has gone through the lengthy and complex adoption screening process;

(2) The caseworker has developed a personal grudge and animosity toward the foster parents;

(3) The caseworker determines that the foster parents cannot meet the child's needs on a long-term basis and accordingly, that it is not in the child's best interests to be adopted by the foster parents;

(4) The state agency does not want to sanction the adoption of an African-American, Hispanic or Native American foster child by a Caucasian family;[35]

Owens, 644 F.2d 542 (6th Cir. 1981); Kyees v. County Dep't of Welfare, 600 F.2nd 693 (7th Cir. 1979).

[31] Rivera v. Marcus, 696 F.2d 1016 (2nd Cir.1982); Brown v. County San Joaquin, 601 F.Supp. 653 (E.D. Cal. 1985); Berhow v. Crow, 423 So.2d 371 (Fla.Dist.Ct.App. 1982). For a more detailed discussion of whether foster parents possess a liberty interest, the following law review articles should be consulted. Matthew Asman, Note, The Rights of a Foster Parent Versus the Biological Parent Who Abandoned the Child: Where Do the Best Interests of the Child Lie?, 8 Conn. Prob. L.J. 93 (1993); Gilbert Holmes, The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev. 358 (1994); James F. Troester, Note, A Pre-Removal Hearing in Custody Decisions: Protecting the Foster Child, 4 Cooley L. Rev. 375 (1987).

[32] N.A. v. J.H., 571 So.2d at 1133; In the Matter of M.W.A., 1998 WL 251754 (Tenn. App. 1998).

[33] See e.g., Colo. Rev. Stat. § 19-5-202 (1998) ("any person twenty-one years of age or older, including a foster parent, may petition the court to decree an adoption"); 12 C.C.R. § 7.504.82A ("foster parents have a right to declare their intent to adopt or not to adopt").

[34] See e.g., Colo. Rev. Stat. § 19-5-207(1) (1998).

[35] Transracial adoption, the adoption of a child by a family of a different race or ethnic background, continues

(5) The foster parents live in the same county as the birth parents.

Notwithstanding the fact that many state statutes require the agency's consent, the majority of state courts have held that the trial court can dispense with the agency's consent and approve the adoption.[36] The rationale often provided for this decision is that the court, through its *parens patriae* power, is the ultimate protector of children and therefore must be responsible for all critical decisions affecting the children's welfare. In a decision affirming the trial court's authority to override the agency's decision not to approve a foster parent adoption, the Colorado Court of Appeals poignantly stated:

> The court is vested with the ultimate responsibility in the placement of a child for adoption . . . . In as much as the legislature has granted the court exclusive jurisdiction over adoption, has expressly authorized adoptive placement, and has given the court the final and sole responsibility of approving or disapproving adoptions, it would be totally inconsistent to conclude that the welfare department or licensed placement agencies are the sole entitles authorized to place a child for adoption following termination of parental rights.[37]

When challenging the department's decision, foster parents must prove that the department's consent is being withheld arbitrarily or unreasonably and it is in the child's best interests to be adopted by the foster parents. Evidence presented may relate to:

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to be controversial. Cases have arisen where the department has sought to remove a child freed (or soon to be freed) for adoption from a foster family in order to achieve racial resemblance. Moving a child strictly to achieve racial matching is unlawful and unconstitutional. See e.g., Colo. Rev. Stat. § 19-5-206(3) (1998) ("consideration given to the racial background of a child legally available for adoption shall not delay the placement of the child due to attempts to assure racial resemblance between the child and the adopting family"); See Drummond v. Fulton County Dep't. Of Family and Children's Services, 563 F.2d 1200 (5th Cir. 1966), cert. denied, 437 U.S. 910 (1978) ("the automatic use of race is barred"). However, race can be considered as one of a number of relevant factors for determining the best adoptive placement for a child. Relevant factors may include the child's attachment, the ability of the prospective adoptive parent to meet the child's needs, biological ties and the prospective adoptive family's ability to address the child's racial and cultural needs. See e.g., DeWees v. Stevenson, 779 F.Supp. 25 (E.D. Pa. 1991) (considering the racial attitudes of the prospective parents); Petition of R.M.G., 454 A.2d 776 (D.C. 1982) (parents began an affirmative action program including obtaining preschool black history and coloring books).

Foster parents interested in adopting a child of a different culture or ethnic background should be prepared to present an expert citing extensive empirical research documenting that minority children adopted by Caucasian parents are equally well adjusted in terms of their self-esteem, educational achievement, family satisfaction and behavior. See Simon, Alstein and Melli, The Case for Transracial Adoption (1994); Barth, Berry, Yoshikai, Goodfield and Carson, Predicting Adoption Disruptions, 33 Soc. Work 227 (1988) (no disruption between transracial and race-similar adoptions); W. Fiegelman and A. Silverman, Chosen Children: New Patterns of Adoptive Relationships (1983) (finding transracial adoption has no negative impact on adjustment); L. Grow and D. Shapiro, Black Children, White Parents: A Study of Transracial Adoption (1974) (finding positive conclusions about transracial adoptees' adjustment); McRoy, Zurcher, Lauderdale and Anderson, Self Esteem and Racial Identity in Transracial and Interracial Adoptees, 27 Soc. Work 52 (1982) (finding self-esteem not negatively affected by transracial placement).

[36] See e.g., In re M.D.C.M., 522 P.2d 1234 (Colo. Ct. App. 1974); In re Infant Boy John Doe, 444 P.2d 800 (Wash. 1968). Cf.. In re Melissa C., 516 A.2d 946 (Me. 1986); Chester County Children and Youth Servs. v. Cunningham, 656 A.2d 1346 (Pa. 1995) (Supreme Court equally divided over whether foster parents had standing to seek adoption of their foster children absent consent of child welfare agency).

[37] In the Interest of M.D.C.M., 522 P.2d 1234 (Colo.App. 1974).

(1) The child's attachment to the prospective adoptive foster family;

(2) The foster family's past and future ability to meet the child's needs;

(3) The personal biases, if any, of the agency caseworker;

(4) The child's adjustment to the foster parents' home, school and community;

(5) The prospective adoptive parents' parenting strengths; and if applicable;

(6) The disadvantages of the agency's choice of the adoptive placement.

Adoption Assistance

Foster parents who adopt their foster child may be eligible to receive an adoption subsidy. In 1980, the Federal Government enacted the Adoption Assistance and Child Welfare Act to provide incentives to states to create an adoption assistance program for families adopting special needs children.[38] This program was initiated in response to the growing number of children with special needs who languished in foster care because families or single persons with low or moderate incomes were unable to incur the high costs of providing permanent care. Rather than having these children remain in long-term foster care, the Child Welfare Act attempted to encourage adoptions by providing money directly to adoptive families. Subsequent to its passage, all states enacted legislation creating state administered subsidy programs.[39]

Specific eligibility requirements exist to qualify a child for a federal adoption subsidy. First the child must have "special needs."[40] Special needs include children who are difficult to place due to their age; physical, mental or emotional handicaps; or membership in a minority or sibling group.[41] Second, the child must meet the financial and categorical criteria of the Aid to Families with Dependent Children (renamed Temporary Aid to Needy Families (TANF) in 1997) or the Supplemental Security Income program.[42] Third, the state must have determined that the child cannot or should not be returned home to his or her birth parents.[43] Fourth, the state must have made reasonable efforts to place the child for adoption without a subsidy unless the best interests of the child would not be served by such efforts.[44] Finally, the adoptive family must have

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[38] 42 U.S.C. §§ 620 et seq.

[39] See e.g., Colo.Rev. Stat. § 26-7-101 et seq; 12 C.C.R. 7.507.5 et seq.

[40] 42 U.S.C. § 673(a)(2)(C).

[41] 42 U.S.C. § 673(2)(A). In addition, some states may have adopted a broader definition of "special needs." See e.g., 12 C.C.R. § 7.403.22 (Colorado's definition of special needs also includes hereditary facts that have been documenteed by a physician or psychologist, high risk infants or "other conditions that act as a serious barrier to the child's adoption").

[42] 42 U.S.C. § 673 (a)(2)(A) - (B).

[43] 42 U.S.C. § 673(C)(1).

[44] 42 U.S.C. § 673 (c)(2)(B). The requirement that the state agency utilize all reasonable efforts to place a child for adoption before consideration of a subsidy is often misapplied. A search should only be used if it would not be contrary to the child's best interests. Thus, in situations where a child has significant emotional ties with long-term foster parents seeking to adopt that child, a search for other families should not be conducted, as it would likely be detrimental to the child's welfare. Similarly, if a child is deemed to have a significant handicap and a family is willing and able to adopt with a subsidy, the state agency is not warranted in conducting an exhaustive and time-consuming search for a non-subsidized placement. The statute merely requires a "reasonable" search. Seriously delaying the adoption pending an extensive search would be contrary to the legislative intent and the child's interests. See e.g., Human Development Services, U.S. Dep't. of Health and Human Servs., Policy Announcement, ACYF-PIQ-92-02 (June 25, 1992).

the capability of providing for the nonfinancial needs of the child.

In determining eligibility, the financial circumstances of the prospective adoptive parents are not relevant and should not be considered.[45] Means testing of the prospective adoptive parents is strictly forbidden.

Multiple benefits are available under the state adoption assistance programs. In Colorado, for example, these benefits can include monthly cash benefits (amount cannot exceed the maximum foster care payment that the state made during the period the child was in foster care), Medicaid, non-recurring adoption expenses (legal and adoption expenses), eye glasses, medication, speech, occupational and physical therapies, special medical equipment, psychological exams and outpatient therapy, transportation, and in some cases, daycare. Services that are not reimbursable under the program include orthodontia done solely for cosmetic reasons, day treatment, residential child care facilities, psychiatric hospitalization, tutoring, school tuition and respite care.[46]

All adoption assistance agreements are negotiated between the department and the prospective adoptive parents. In some situations, the Guardian ad litem may decide to participate in the negotiation process. In negotiating the agreement, there are several important considerations. First, the state agency has an interest in protecting its budget in order to meet the special needs of all handicapped children to the best of its abilities. This state interest may well conflict with meeting all of the needs of one particular child.[47] Second, an agreement should be negotiated only after the child has been thoroughly evaluated for all possible handicapping conditions. Evaluations that should be considered include developmental assessments, education assessments, psychological testing, physical examinations and genetic testing. Moreover, because a child may be classified as special needs as a result of her birth parents' behavior or condition (i.e., prenatal drug and alcohol use, mental illness or a genetic trait or disease), it is extremely important to gather as much information as possible about the birth parents and the child's ancestors and relatives. Finally, any agreed upon maintenance subsidy should build in the cost of inflation. This is due to the fact that a non-indexed maintenance subsidy will be worth considerably less several years into the future than its current worth.

Once the parties reach an agreement, the terms must be reduced to writing and signed by all parties prior to the finalization of the adoption. The agreement should include detailed language outlining the child's needs and the specific services that will be provided. If the child is to receive daycare services, for example, specific language should be included in the agreement outlining appropriate providers, the number of days per week, the number of hours per day and the duration. By providing such detailed language, the agreement can be better enforced in court if the state agency later refuses to comply with its terms and conditions. Finally, the document should specify when the benefits will commence and terminate, what effect the death of the adoptive parents will have on the stipulated terms, the circumstances under which the benefits can be increased or decreased, the adoptive parents' hearing and appeal rights, and that the benefits will continue if the adoptive parents move across state lines.

In certain limited situations, an adoptive parent may request and be granted an adoption subsidy after the finalization of an adoption. Assistance is available post-adoption when there are "extenuating circumstances."[48] Such situations include, but are not limited, to:

(1) Relevant facts, regarding the child, the biological family or child's background which are known and not presented to the adoptive parents prior to the legalization of the adoption;

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[45] 45 C.F.R. §1356.40(d).

[46] 12 C.C.R § § 7.507.71, 7.507.72, 7.507.73, 7.507.52 and 7.606.21.

[47] See generally, In re Martorana, 619 So.2d 1121 (La.Ct.App. 1993).

[48] Human Development Services, U.S. Dept. Of Health and Human Servs. Policy Interpretation Question, ACYF-PIQ-88-06 (December 2, 1988) and ACF-PIQ-92-02 (June 25, 1992).

(2) Denial of assistance based upon a means test of the adoptive family;

(3) Erroneous determination that a child was ineligible for adoption assistance; or

(4) Failure to advise adoptive parents of the availability of adoption assistance.

If any of these circumstances are present, foster parents should attempt to provide documentation to the state agency supporting the extenuating circumstances. Such documentation may include the child's medical records at the time of the adoption and/or a verified statement from the adoptive parents indicating that the state agency failed to disclose the availability of the subsidy.

If the subsidy is thereafter awarded, it is unclear whether the subsidy would be retroactive to the date the adoption was finalized. The federal interpretation is that for those children adopted prior to October 1, 1986, retroactive assistance is available dating back to the time of the granting of the final decree of adoption. For those children adopted after October 1, 1986, the payments may begin as far back as when the child was placed in the adoptive home.[49] Notwithstanding this interpretation, a federal district court case indicates in dicta that the Eleventh Amendment to the U.S. Constitution would bar retroactive payments dating back to the time of the finalization of the adoption.[50]

Decisions of the department denying, reducing or terminating an adoption subsidy are appealable.[51] Upon providing notice requesting an appeal, a department administrative law judge will often hear the matter in accordance with the respective state administrative procedures act.[52]

Visitation

Foster children who are removed from long-term foster parents and placed with their birth parents, relatives or in another foster home may still benefit from continued association and contact with their former foster parents. Having shared life experiences and developed attachments with former foster parents, children allowed to visit with these individuals often gain a myriad of benefits including knowing that they are not being abandoned or forgotten. Whether foster parents have standing to pursue visitation rights with their former foster children has only recently been litigated in a limited number of jurisdictions.

Indiana and West Virginia Appellate courts have both ruled in former foster parents' favor. In In re R.D.,[53] the Indiana Court of Appeals held that foster parents of former foster children of 17 and 19 months respectively had a legally cognizable right to seek visitation and directed the lower court to hold a best interest hearing on the issue of visitation. Similarly, in In re Jonathan G.,[54] the West Virginia Supreme Court of Appeals held that foster parents who had care and custody of an abused child for more than two years had standing to seek visitation. There, the Court stated:

> Based on the principle of a child's right to continued association . . . we hold that a child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the

[49] Human Development Services, U.S. Dept. Of Health and Human Servs. Policy Interpretation Question, ACF-PIQ-92-02 (June 25, 1992).
[50] Ferdinard v. Dep't. For Children and Their Families 768 F. Supp. 401 (D.R.I. 1991).
[51] 42 U.S.C. §§ 673(a)(1) and 675(3). See e.g. C.R.S. § 26-7-107; 12 C.C.R. § 7.507.8.
[52] See e.g., Colo. Rev. Stat. § 24-4-101 et seq.
[53] 692 N.E.2d 929 (Ind. Ct. App. 1998).
[54] 482 S.E.2d at 912.

best interests of the child.[55]

The Court of Appeals of New Mexico, however, was very divided over whether a court should have equitable powers to fashion an order that a former foster parent have continued contact with a foster child. In Adoption of Francisco v. Vest,[56] a three panel appellate court could not agree whether a former foster parent could be granted visitation rights to a foster child that was adopted by a different family.

One judge would have permitted the trial court to exercise equitable power to award visitation rights to a person who has acted in a custodial or parental role including a former foster parent. The basis for that opinion was that "it is important for the children's court to maintain maximum flexibility in fashioning a decree that is in the child's best interests so that the child may maintain contact with other persons who have filled a parental role in his or her life."[57] Another judge, concurring in the result, wrote that the trial court has no authority to order such visitation. The rationale for that decision was that such court-ordered visitation will be too disruptive for the child, will improperly infringe on parental rights of the adoptive parents and/or will discourage people from becoming adoptive parents.[58]

However, at least one court has refused to recognize that former foster parents were entitled to visitation. In In re Welfare of C.J.,[59] the Minnesota Court of Appeals construed their state statute as preventing foster parents from petitioning for visitation rights with a former foster child.

This issue of a former foster child's right to maintain a relationship with a long-term foster family will, no doubt, be litigated in additional jurisdictions across the country. It is expected that courts will continue to struggle with fashioning a remedy which protects both the important and irreplaceable bonds existing between children and their former foster parents and the new caretaker's responsibilities in determining whom the child should associate and interact.

Foster Parents' Rights Legislation

State legislatures throughout the country are increasingly responding to pressures brought by foster parent groups to afford them greater rights in child protection proceedings. In the past three years at least three states, Illinois, Oklahoma and Tennessee, have enacted "Foster Parents' Rights" statutes.[60] These statutes, while slightly different, collectively provide foster parents the following rights: (1) intervention; (2) disclosure of information relevant to the care of their foster child; (3) input concerning the child's plan including communication with other professionals who work with the foster child; (4) notice of a change in their child's placement; (5) notice of all court hearings and the right to attend hearings; (6) consideration as a placement option when a foster child who was formerly placed with them reenters foster care; (7) consideration as the possible first choice permanent parent for a child when the foster parents have cared for the child for 12 months and the child becomes free for adoption or permanent foster care.

As states begin to enact legislation to comply with the Adoption and Safe Families Act of 1997, consideration

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[55] Id. In determining this issue, the lower court was directed to give signficant weight to the length of time that the child had been with the foster parents. Id., note 41.
[56] 866 P.2d 1175 (N.M. Ct. App. 1993).
[57] 866 P.2d at 1181.
[58] Id. at 1187-1200. A third judge did not think the court needed to determine the scope of the trial court's equitable power to grant visitation in adoption proceedings because the trial court's findings of fact did not support an award of visitation to the former foster parent.
[59] 481 N.W. 2d 861 (Minn. Ct. App. 1992).
[60] Ill. Rev. Stat. ch. 20, para. 520/1-15 (1995); Okla. Stat. tit. 10, § 7206.1 (1997); Tenn. Code Ann. § 37-2-415 (1998).

should simultaneously be given to articulating the extent of foster parents' legal rights. Without such protections, many foster parents will continue to leave the ranks in alarming numbers due to a feeling of powerlessness and the perception that they do not have a meaningful opportunity to be heard. The value and importance of foster parents' participation in the judicial process was so noted by the West Virginia Supreme Court of Appeals when it stated:

> [I]t is difficult not to be sympathetic to the Stems' [foster parents] effort to participate, not only because they had Jonathan G. with them for so long, providing him with love, constancy, and care in his earliest years; but also because the significant issues relating to a child's life and fate must not be decided in some artificial procedural vacuum, and the Stems, after the passage of so much time, probably were more knowledgeable than anyone as to this child's needs. What makes balancing their right to participate, and the extent of such participation, against the natural rights of the biological parents, as well as the statutory objective of reunifying Jonathan G. with them, so difficult is that both sets of parents, foster and biological, obviously loved and wanted this child. As a result of this love, and their strong commitment to this child, the two sets of parents became adversaries during these proceedings. *As an aside, we must comment that scenarios such as the one before us would discourage most people from ever embarking on the noble work of foster care. Since the Stems were a constant in Jonathan G.'s life for such a long period of time and during his formative years, it would seem to go against not only all principles of fairness and equity, but also against all values of human relationship and compassion to deny them the right to be heard as to Jonathan G.'s best interests during these proceedings*.[61]

Similarly, Justice Montemuro in writing for a divided Pennsylvania Supreme Court stated that the high court should not "slam the courthouse door at the behest of a human service agency which has, without the necessity of justifying its action to anyone, determined unilaterally where the best interests of the child lie . . . [Foster parents] should not be foreclosed from the opportunity to demonstrate to the court their continued worthiness and suitability to care for these children.[62]

This more liberal approach in giving foster parents a full opportunity to be heard and having their concerns listened to and valued should be heeded by legislatures and courts alike. Permitting a more inclusive process will only serve to provide the court with more information from which it can decide the ultimate course of a foster child's life.

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[61] In re Jonathon G., 482 S.E. 2d at 905 (emphasis added).
[62] Chester, 656 A.2d at 1351.