CONSTITUTIONAL LAW—DUE PROCESS—LIBERTY INTEREST IN FOSTER FAMILIES REQUIRES CONSTITUTIONAL PROTECTION IN CHILD REMOVAL PROCEEDINGS—Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977)

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I. Introduction

Theoretically, the purpose of foster care is to provide a temporary family environment for children who have been either voluntarily or involuntarily separated from their own families. The courts have traditionally viewed the biological parent-child relationship as the paramount interest in child placement decisions. This approach has made them reluctant to recognize any rights in the foster parents which might interfere with the reunion of the child and his natural family.

Although not by design, foster care now consists mostly of long term placements, which often lead to the development of strong

1. See In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. REV. 446, 456 (1976) [hereinafter cited as In the Child's Best Interests]. Voluntary foster care occurs when the parents are unable or unwilling to give their children proper care due to physical, emotional, or economical conditions and offer to temporarily turn over custody of the child to an authorized agency of the state. Each state authorizes a variety of agencies to determine the placement of foster children. For purposes of this article, a general reference to “the state” will be used in place of the full name of the particular agency involved.

2. Child “neglect” proceedings are instituted by the state for the protection of the child who has not received adequate care from his or her natural parents. Statutes calling for court intervention on behalf of the children do so for a variety of reasons including “abandonment, physical abuse, inadequate parenting, sexual abuse, failure to provide medical care and immoral or unconventional conduct.” Wald, State Intervention on Behalf of “Neglected” Children: Standard for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights, 28 STAN. L. REV. 623, 629 (1976) (footnote omitted).


5. Katz, supra note 3, at 301. See Organization of Foster Families for Equality
emotional ties between the foster parent and the foster child. As a result, many courts now recognize that when close relationships have developed, the uprooting of the child from his foster home may have harmful effects on the child's well-being. This recognition is based on the notion that it is important to the child's development to become attached to a psychological parent and that under certain circumstances it may be best for the child if the foster parent fills that role. Consequently, an increasing number of courts now give a great deal of weight to the length of time a child has spent with a single foster family as they consider which type of placement will be in the best interests of the child.

In addition to having become an important element in placement decisions, the strength of the foster relationship and its effect on the foster child have given rise to the recognition that certain constitutional safeguards must be available to protect the foster family from an arbitrary and damaging separation. This note will analyze the rights that have been created in the foster family,

& Reform v. Dumpson, 418 F. Supp. 277, 279 n.6 (S.D.N.Y. 1976) [hereinafter cited as OFFER v. Dumpson]. In San Diego County, "[n]ot only were almost half the children in placement for 5 years or more, but for a great majority of the children the long-term plan consisted of continued foster care or no plan whatsoever." Comment, The Foster Parents Dilemma "Who Can I Turn to When Somebody Needs Me?," 11 SAN DIEGO L. REV. 376, 390 (1974) [hereinafter cited as The Foster Parents Dilemma]. Some reasons for the trend toward long-term placement include:
1) failure to rehabilitate natural parents to the point of caring for their own children; 2) inability to terminate parental rights preliminary to adoption; 3) lack of potential adoptive parents for black, Spanish-American, Indian and other minority group children, and the increasing number of these children adjudged un-cared for and therefore made wards of the state; 4) lack of potential adoptive parents for older or mentally retarded or physically disabled children, and the increasing number of these children abandoned to the care of the state; 5) overburdened caseloads of governmental child welfare agencies, causing a corresponding decrease in the resources and time available to find a qualified adoptive home for a foster child.


7. See, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 18 (1973) [hereinafter cited as GOLDSTEIN].

8. "The best interests rule implicitly recognizes that each child is unique and that, ideally, the court should give primary regard to the child's individual needs." In the Child's Best Interests, supra note 1, at 449. Where extraordinary circumstances are present the best interests of the child may be considered always superior to parental custody. See Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976).
focusing upon the procedural safeguards to which the foster family may be entitled in a proceeding for the removal of the foster child in light of the recent Supreme Court decision, *Smith v. Organization of Foster Families for Equality & Reform.*

II. *SMITH V. OFFER*

Three individual foster families and the Organization of Foster Families for Equality and Reform brought a class action for injunctive and declaratory relief against state and local government officials and the executive director of the Catholic Guardian Society who together were responsible for administering the foster care system. The action challenged New York Social Services Law § 383(2) which specifically authorizes discretionary agency removal of the child from her foster home; section 400 which provides the aggrieved foster parents with a post-removal "fair hearing"; and New York Code Rules and Regulations § 450.14 which

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10. The situations of the three families involved here are typical of the problems brought on by the long-term trend of foster care. In all three cases the children had lived with their respective foster families for a long time and deep emotional attachments had developed despite the ever-present threat of agency removal.


11. N.Y. Soc. Servs. Law § 383(2) (McKinney 1976) provides:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

12. N.Y. Soc. Servs. Law § 400 (McKinney 1976) provides:

> 1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer the commissioner or public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

> 2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

13. 18 N.Y.C.R.R. § 450.14 (1976) has been renumbered § 450.10 and now provides:

> Removal from foster family care.
provides for a pre-removal conference with a social services official. The plaintiffs claimed that the statutes violated both the equal protection and due process clauses of the fourteenth amendment because they authorize removal of foster children from their foster homes without a prior hearing for either the foster parent or the foster child. These procedures, the plaintiffs contended, deprived them of a specific liberty interest without due process: the

(a) Whenever a social services official of another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefore and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10-day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

14. The sufficiency of these provisions under the due process clause of the fourteenth amendment will be discussed in section IV infra.

15. The equal protection argument was not considered by the district court in its decision, and will not be discussed in this note.
right of family privacy which encompasses the right of the foster family to remain free from arbitrary state interference. They argued that "the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family." 17

Although the district court found debate of this concept interesting and important, it declined to decide the case on such a broad basis. 18 Instead, the court found that a right in the nature of a liberty interest existed in the foster child, who is entitled "to be heard before being 'condemned to suffer grievous loss.' " 19 The court reasoned that in this type of case "the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent." 20 On this basis, the district court held, in a 2-1 decision, that the New York statutes were constitutionally defective. The court stated that before a child can be removed from the foster home in which he has been living, he must be provided with a hearing in which all interested parties may present any relevant information before an administrative official who has the power to determine the child's future placement. 21 The court indicated, however, that a full trial-type hearing is not a constitutional requisite. 22

17. Id. at 281 (footnote omitted). The plaintiffs based their contentions on the concept of the foster family as a psychological entity, and on several decisions of the Supreme Court which they believed represented a "willingness to look behind legal formalities when inquiring into the existence of a fruitful family life." Id. (footnote omitted). These contentions will be discussed in greater depth in section III infra.
18. Id. at 282.
19. Id. (citing Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The court reached this conclusion by determining children to be "persons" within the meaning of the fourteenth amendment whose rights are entitled to protection from state abridgment. See Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School District, 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967).
20. 418 F. Supp. at 283.
21. Id. at 282. Judge Pollack, dissenting, contended that although it may be wise to afford the foster child the right to be heard, it has not been established that increased procedural protection is necessary to "impede judgments reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods." Id. at 291.
22. The opinion called for certain minimum procedural protections for any child who has been in a foster home for one year or more. These procedures demand an automatic pre-removal agency hearing at which the child or an adult representative of the child may participate. The court also indicated that the hearing should be before an uninvolved officer who has no prior knowledge of the case. The court also required the participation of all interested parties, including the foster parents, the natural parents, and the agency in addition to the introduction of any relevant evi-
On direct appeal, the Supreme Court rejected the district court's holding, finding that a liberty interest requiring stringent due process safeguards did not exist in the foster child.\textsuperscript{23} However, the majority did recognize the existence of a liberty interest in the foster family; the right to family privacy.\textsuperscript{24} In the Supreme Court's view, "biological relationships are not the exclusive determination of the existence of the family . . ." and "the importance of the familial relationship, to the individuals involved and to the society, stems from . . . the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship."\textsuperscript{25} The Court realized that the increased length of foster care often leads to the development of deep family attachments in the foster home that should be afforded protection from unjustified state interference. The extension of a liberty interest to the foster family implicitly accepts the conclusion of studies that emphasize the need to protect

dence which might have a bearing on the outcome of the case. \textit{Id.} at 286. Unless otherwise noted, any discussion of the rights of the foster children, foster parents, or foster family to a hearing or to the constitutional safeguards necessary to protect their interests, will be made in reference to the above procedures.

23. \textit{Smith v. OFFER}, 431 U.S. 816, 840-41 (1977). The Court determined that finding a liberty interest in the foster child does not activate due process protections without a further showing that the liberty interest is of such dimension as to require these protections.

24. The Supreme Court has increasingly recognized that the biological family has certain inherent rights which cannot be arbitrarily invaded by state action. The plaintiff's claim of a right to foster family privacy in the instant case was based on this notion. 418 F. Supp. at 279, 281. In \textit{Meyer v. Nebraska}, 262 U.S. 390, 399 (1923), the Court recognized that a person's liberty interest includes the right to establish a home and bring up children. Subsequently, the Court struck down an Oregon statute, finding that it unreasonably interfered with the rights of parents and guardians to direct the upbringing of the children under their control. \textit{Pierce v. Society of Sisters}, 268 U.S. 510, 534 (1925). The express inclusion of guardians in the class of persons protected in that case suggests that the Court might be willing to go beyond the biological parents in finding a liberty interest. The Court has found that there is a private realm of family life which the state cannot enter. \textit{Prince v. Massachusetts}, 321 U.S. 158, 166 (1944); \textit{see also Cleveland Board of Education v. LaFleur}, 414 U.S. 632, 639 (1974). This private realm specifically includes the care, custody, management, and companionship of one's children. \textit{May v. Anderson}, 345 U.S. 528, 533 (1953). In \textit{Stanley v. Illinois}, 405 U.S. 645, 653 (1972), the Court recognized a liberty interest in the father of an illegitimate child who demanded due process protections to prevent his child from automatically becoming a ward of the state. These cases indicate the extent of the Court's recognition of the fundamental importance of the family relationship and the rights of the parents to control the development of their children. To protect these rights the Court has acknowledged the existence of a liberty interest in the biological family which requires commensurate due process protections.

25. 431 U.S. at 843-44 (citations omitted).
positive psychological relationships created by child placements in foster care.\textsuperscript{26} Those psychoanalytic studies have established "the need of every child for unbroken continuity of affectionate and stimulating relationships with an adult."\textsuperscript{27}

Although the Supreme Court recognized the existence of a liberty interest in the foster family, the majority reasoned that the foster parent’s contract with the state, which grants the agency discretion to terminate the foster care relationship, limits that interest.\textsuperscript{28} The Court also found that when the child is removed from the foster home and returned to the natural parents, the liberty interest in the foster family must be severely curtailed by the competing and dominant interest of the natural parents.\textsuperscript{29} The Court concluded that the magnitude of the appellee’s "liberty interest" was insufficient to support the holding of the district court because the New York removal procedures were more than adequate to protect any such interest.\textsuperscript{30}

The Supreme Court’s reasons for limiting the magnitude of the liberty interest were not entirely persuasive. Although provisions in the placement agreements grant the agency the discretion to terminate the foster care arrangements, courts are increasingly willing to limit the scope of agency discretion when the welfare of the child would suffer as a result of a removal decision.\textsuperscript{31} In addition, the Supreme Court’s observation that the interest of the natural parents is predominant does not bear directly on the problem, since most removals are made to place the child in another foster home.\textsuperscript{32} As the district court pointed out, granting the foster family increased protection by providing a full hearing is not “intended in any way to impede the right of biological parents to regain custody of their children.”\textsuperscript{33} The district court went on to explain that by

\textsuperscript{26} See, e.g., \textit{Goldstein, supra} note 7. This study has emerged as one of the leading authorities in the area of child placement and is frequently cited in recent judicial decisions.

\textsuperscript{27} \textit{Goldstein, supra} note 7, at 6.

\textsuperscript{28} 431 U.S. at 845-46.

\textsuperscript{29} Id.

\textsuperscript{30} Id. The basis for the holding of the Supreme Court is discussed in greater depth \textit{infra} notes 84-99 and accompanying text.

\textsuperscript{31} When the parental rights doctrine was dominant, the contractual rights were strongly upheld; however, as the rights of foster parents have increased, the importance of such contracts has diminished. Bodenheimer, \textit{New Trends and Requirements in Adoption Law and Proposals for Legislative Change}, 49 S. Cal. L. Rev. 10, 35-41 (1975).

\textsuperscript{32} 431 U.S. at 829 n.23.

\textsuperscript{33} 418 F. Supp. at 283. One court has suggested that the courts must treat any
providing for such constitutional safeguards, the agency has the benefit of an “organized forum” within which information may be more efficiently and effectively gathered, thereby promoting a decision that will serve the interests of the child.\textsuperscript{34} The willingness of the Supreme Court to recognize the existence of a liberty interest in the foster family may in the long run prove more significant than the limitations it placed on that interest, since lower courts may not give such great weight to limiting circumstances in future cases.

\section*{III. Finding Specific Liberty Interests within the Foster Family}

The Supreme Court’s opinion recognized only the liberty interest in the foster family generally. It specifically rejected the district court’s finding of a liberty interest in the foster child and did not directly discuss the rights of foster parents. Rights of the foster parents and foster children have, however, been specifically recognized in many jurisdictions. Recognition of these rights has allowed courts to afford the foster family important safeguards against an unjustified separation.

\subsection*{A. Rights of the Foster Parents}

The recognition of rights in the foster parent has been increasing in a number of states. One court has noted that:

\begin{quote}
[t]here is no sound reason to deny a person who has voluntarily assumed the obligations of parenthood over a child the same basic rights to due process a natural or legal parent possesses when the state intervenes to disrupt or destroy the family unit. “The policy of our law has always been to encourage family relationships, even those foster in character.”\textsuperscript{35}
\end{quote}

One leading authority has proposed that it is the “psychological” and not the “biological” parent who represents the important relationship in a child’s development.\textsuperscript{36} This proposition has received

\begin{footnotesize}
\begin{itemize}
\item 34. \textit{Id.} See note 22 supra.
\item 35. James v. McLinden, 341 F. Supp. 1233, 1235 (D. Conn. 1969) (quoting \textit{Banks v. United States}, 267 F.2d 535, 539 (2d Cir. 1959)).
\item 36. Such a relationship is the product of emotional attachment resulting “from
\end{itemize}
\end{footnotesize}
increasing support from the courts. In California, for instance, where the state had traditionally been given broad discretion and the foster parents limited rights, the courts have begun to treat the foster parents as de facto custodians, entitling them to "appear as parties to assert and protect their own interest in the companionship, care, custody and management of the child." It is now considered important to have the de facto parents present at the hearing to aid the court in reaching a proper decision, since "the views of such persons who have experienced close day-to-day contact with the child deserve consideration; moreover, an award of custody to such de facto parents is often among the alternate dispositions which the court must evaluate." In Pennsylvania, foster parents have been granted the right to petition for custody of their foster children in order to prevent removal of the children from the foster home. Foster parents have also been given the right to a pre-removal administrative hearing when agency removal of the foster children in their care is sought. In Connecticut, it has been held that the foster parents have no right to initiate a hearing prior to removal, under a statute that entitled certain parties to revoke

day to day attention to his needs for physical care, nourishment, comfort, affection, and stimulation." GOLDSTEIN, supra note 7, at 17. It is now often recognized that "a de facto custodial interest develops in a foster parent when the foster relationship continues over a period of time." Katz, supra note 3, at 286.


38. See The Foster Parents Dilemma, supra note 5, at 398-406.


42. This regulation affords the foster parents an informal pre-removal hearing with the executive director of the agency, at which both the agency and the foster parents are permitted to question all testimony and evidence presented. PA. DEP'T OF PUBLIC WELFARE, CHILDREN AND YOUTH MANUAL, tit. 4300, §§ 4360-4363, 5 Pa. Bull. No. 34, 2032-34 (August 9, 1975). Under this provision, the foster parents also have the right to a pre-removal appeal in accordance with the Administrative Agency Law, at which they are entitled to counsel. Id. These administrative hearings provide for the introduction of all relevant evidence and reasonable examination and cross-examination. PA. STAT. ANN. tit. 53, § 11305 (Purdon 1968); PA. STAT. ANN. tit. 71, § 1710.32 (Purdon 1962).
the commitment of minor children to the welfare commissioner. A strong dissent, however, would have allowed the foster parents to participate under the statute in question reasoning that recent decisions have "blurred the distinction between rights of natural parents and the rights of foster parents in this area." Some courts will now balance equally the foster parents' right to custody of the child with the rights of the natural parents.

Further evidence of the expansion of foster parents' rights can be found in their increasing ability to adopt children in their care. The difficulty of finding adoptive homes for certain children and the notion that many children eventually regard the foster family as their own have led some states to encourage foster parents to adopt their foster children in certain situations. The recognition of relative equality of rights between the foster and natural parents has resulted in situations in which the foster parents have been held entitled to custody of the child even over a natural parent who was not first judged to be unfit.

Despite the trend towards the recognition of some degree of

44. Id. at 1087 (Longo, J., dissenting). See Borsdorf v. Mills, 49 Ala. App. 658, 275 So. 2d 338 (1973). The court noted that "the bonds of love between parent and child are not dependent upon blood relation and instinct, but may be forged as strongly in the crucible of day to day living." Id. at 661-62, 275 So. 2d at 341. Pace v. Curtis, 496 S.W.2d 931 (Tex. Civ. App. 1973); In re One Minor Child, 254 A.2d 443 (Del. 1969); Fleming v. Hursh, 271 Minn. 337, 136 N.W.2d 109 (1965).
46. Bodenheimer, supra note 31, at 37-38. The author recommended that foster parents who have cared for a child for over eighteen months be given preference over other adoption applicants. Id. at 39. See N.Y. Soc. SERVo LAw § 383(3) (McKinney 1976), which gives adoption preference to the foster parents when they have had custody of the child for two years or more.
47. Ross v. Hoffman, 33 Md. App. 333, 341-42, 364 A.2d 596, 602 (1976), modified on other grounds, 372 A.2d 582 (1977). In this case, the long period of separation (nine years) outweighed the rights of the natural parents to custody. The court felt that the child was well cared for during this period and that the natural mother had substantially abandoned her role as physical parent and therefore ordered that custody of the child remain with the substitute parent despite the fact that the natural mother and her new husband appeared to be fit as parents. See In re Roy, 90 Misc. 2d 35, 393 N.Y.S.2d 515 (Fam. Ct. N.Y. County 1977); In re S., 74 Misc. 2d 935, 347 N.Y.S.2d 274 (Fam. Ct. N.Y. County 1973).
liberty interest in the foster parents, the interest may be "derivative, enjoyed only 'by virtue of the child's best interests being considered.'".

It is really the interest of the foster child that is at stake in custody decisions, and it is this interest that the courts usually seek to protect. The rights said to exist in the foster parents thus seem to serve mostly as a means by which the interest of the foster child can be protected. Whether the interest sought to be protected exists in the foster parent or child, it must be given adequate safeguards to protect the child's welfare.

B. The Liberty Interest in the Child

There have been few cases in which courts have specifically stated that a liberty interest exists in the foster child. As a result of the district court decision in the instant case, which found such an interest, other courts have also begun to recognize its existence. One court concluded that, "both the foster parents having a close familial relationship during the first years of this child's life and the child himself have a protectable interest under the Fourteenth Amendment which cannot be denied them without due process of law." However, the number of decisions taking such a positive view of the rights of the foster child has remained limited.

Although the courts are reluctant to expressly find a liberty interest in the foster child which is of sufficient magnitude to be considered a fundamental right, they reach essentially the same result by applying the "best interests of the child" test as they attempt to resolve child custody disputes. In 1925, the New York Court of Appeals recognized that the best interests of the child should be the primary consideration in child custody decisions. This test has grown to be the "guiding factor" in virtually all cus-


50. See notes 19-21 supra and accompanying text.

51. OFFER v. Dumpson has been cited in several recent decisions for the proposition that there is a liberty interest in the child deserving of due process protections. See, e.g., cases cited in note 52 infra.


today disputes. Its continued use in various forms suggests that the courts implicitly recognize certain rights in the child that may be in the nature of a liberty interest of constitutional magnitude.\(^\text{55}\) It has often been claimed, for example, that the child has a right to a stable environment,\(^\text{56}\) and that the best interests are not served by uprooting the child,\(^\text{57}\) even where the removal is only temporary.\(^\text{58}\) This gives rise to a legally protected right in the child to continue in the custody of his foster parents when he has remained in a foster home for a significant period of time and a strong substitute relationship has developed.\(^\text{59}\) One court has gone so far as to claim that a foster child may have a "Constitutional right to freedom from the . . . [natural parent's] claim."\(^\text{60}\)

Some courts have recognized that the foster child has a right to a pre-removal hearing to ensure that his best interests are being protected. One court noted that when the removal of infants from their foster parents is threatened, the right to a hearing to determine the best interests is for the benefit of the innocent child and cannot be forfeited by the foster parents.\(^\text{61}\) It is clear that "[w]hether or not there exists a due process right in the foster parents which demands a review of agency decisions, the best interests of the child would be better served by having all interested parties heard on the matter."\(^\text{62}\) The American Civil Liberties Union has echoed


\(^{56}\) In re J., 57 App. Div. 2d 568, 568, 393 N.Y.S.2d 449, 450 (1977). The court held that it was not in the best interests of the child to remove him from his foster home, when that was the only home he had ever known.


\(^{58}\) Cennami v. Dep't of Public Welfare, 77 Mass. Adv. Sh. 687, 694-95, 363 N.E.2d 539, 544 (1977). The court held that where an existing parental relationship had existed for almost the entire two year life of the child, the interests of the child demanded that a hearing be afforded. Id. at 699, 363 N.E.2d at 545.


\(^{60}\) In re Roy, 90 Misc. 2d 35, 39, 393 N.Y.S.2d 515, 518 (Fam. Ct. N.Y. County 1977). In this case an action was brought by the Social Services Agency under the permanent neglect statute to free the child so that the foster parents could adopt him.


\(^{62}\) The Foster Parents Dilemma, supra note 5, at 406.
this view in arguing for the rights of the foster family to be free from arbitrary state termination. The ACLU claims that the foster parents and the foster child have a right to a hearing before they can be deprived of the "psychological parent"-child relationship that has been created.63 In the opinion of one authority, "court[s] cannot do 'complete justice' unless the child is recognized as a necessary, indeed, indispensable party to the proceeding."64

In addition to the case law, there has also been statutory recognition of the need to protect the child's best interests. New York Social Services Law § 392,65 which is at issue in the instant case,

64. Goldstein, supra note 7, at 65. The district court recognized the necessity of having the interests of the child articulated at the hearing in order to have a proper determination. OFFER v. Dumpson, 418 F. Supp. 277, 285-86 (S.D.N.Y. 1976).
65. N.Y. Soc. Serv. Law § 392 (McKinney Supp. 1976-77) provides in pertinent part:

2. Where a child has remained in foster care for a continuous period of eighteen months a petition to review the foster care status of such child together with a copy, if any, of the placement instrument:
   (a) shall be filed in the family court by the authorized agency charged with the care and custody or the guardianship and custody of such child;
   (b) may be filed by another authorized agency having the supervision of such foster care;
   (c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months:

4. Notice of the hearing, including statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:
   (a) the authorized agency charged with the care and custody or the guardianship and custody of such child, if such authorized agency is not the petitioner;
   (b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;
   (c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;
   (d) the child's parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;
   (e) a person to whom a parent entrusted the care of the child, where such person transferred the care of the child to an authorized agency;
   (f) such other persons as the court may, in its discretion, direct.

6. The court may, in its discretion, dispense with the attendance of the child at the hearing or may, with the consent of the parties, dispense with the hearing and make a determination based upon papers and affidavits submitted to the court.
represents a legislative attempt to protect the best interests of the child in foster care. It provides explicitly that any disposition must be made in the best interest of the child.\(^66\) Other jurisdictions have also enacted statutes which recognize the need to protect the child’s interests in custody determinations involving foster care.\(^67\) Michigan’s statute sets out in detail the factors to be considered in determining the child’s best interest in such situations.\(^68\) Despite

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7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

(a) directing that foster care of the child be continued;

(b) directing that the child be placed in the custody of a family or other person designated by the court.

An order of disposition entered pursuant to this subdivision shall include the court’s findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or an opinion in lieu thereof, the order of disposition may incorporate such findings and conclusions, or opinions, by reference.

Analysis of the sufficiency of this procedure in the instant case may be found at notes 76-79, 95-99 infra and accompanying text.

66. "[T]he 'best interests of the child' criteria [as provided for in section 392] is not merely a descriptive statutory phrase, but an expression of that which must be given overriding concern." In re L., 77 Misc. 2d 363, 367, 353 N.Y.S.2d 317, 324 (Fam. Ct. N.Y. County 1974).


    Sec. 3 "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
    (a) The love, affection and other emotional ties existing between the competing parties and the child.
    (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
    (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
    (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
    (e) The permanence, as a family unit, of the existing or proposed custodial home.
    (f) The moral fitness of the competing parties.
    (g) The mental and physical health of the competing parties.
    (h) The home, school and community record of the child.
    (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
    (j) Any other factor considered by the court to be relevant to a particular child custody dispute.

increasing recognition of the importance of adhering to the "best interests of the child" standard, the majority of states have not yet enacted laws which so thoroughly attempt to protect the interest of the child. However, statutory provisions which have been adopted make it clear that the interests of the child are of paramount importance. They support the conclusion that there is a liberty interest in the child which must be accorded due process safeguards.

IV. SUFFICIENCY OF THE NEW YORK REMOVAL PROCEDURES

In the instant case, the district court, in striking down the New York procedures, stressed the need for a pre-removal hearing.69 The court reasoned that "[a] hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. . . . This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents."70 The pre-removal conference provided for by section 450.1471 was held to be inadequate as a data-gathering device because the foster parents are not permitted to present evidence or witnesses, the public official involved is not necessarily a neutral observer of the situation, and the foster child is not permitted to participate.72 The court viewed the post-removal hearing provided for by Social Services Law § 40073 as inadequate.74 It was "at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after that separation has already taken place."75

The court also found New York Social Services Law § 392, which provides for a pre-removal judicial hearing at the request of the foster parents,76 to be defective, in that: 1) The statute offers no

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69. See note 19 supra and accompanying text.
71. See note 13 supra.
72. 418 F. Supp. at 283.
73. See note 12 supra.
75. 418 F. Supp. at 284.
76. See note 65 supra.
benefits to a child who has been in foster care for less than eighteen months;\textsuperscript{77} 2) the family court does not have the power under the statute to order the child to remain in a specified foster home;\textsuperscript{78} and 3) there is no provision for invoking this section if removal is not brought to the attention of the court by the foster parents. In supporting this finding the court reasoned that the right to a hearing for the benefit of the child should not be made to "depend upon the initiative of third persons," because of the over-riding importance of protecting the foster child.\textsuperscript{79}

The district court also noted a recent New York City procedure,\textsuperscript{80} which at the request of the foster parents provides for "a pre-removal 'independent review' conducted 'in accordance with the concepts of due process.' "\textsuperscript{81} The court found even this procedure inadequate to afford foster children the full protection necessary in that it is only available upon request of the foster parents, it does not apply in instances where the child is to be returned to his natural parents, and it does not allow the child and the biological parent to participate, all of which limits the effectiveness of the hearing.\textsuperscript{82}

\textsuperscript{77} 418 F. Supp. at 284. The district court called for protection whenever a child is in foster care for one year or more. \textit{Id.} at 282.

\textsuperscript{78} \textit{Id.} at 284. The court based this finding on the opinion in \textit{In re W.}, 77 Misc. 2d 374, 376, 355 N.Y.S.2d 245, 248 (Fam. Ct. N.Y. County 1974) (where it was determined that in a § 392 proceeding, the foster parents cannot receive a temporary disposition in their favor). \textit{But see} Smith v. \textit{OFFER}, 431 U.S. 816, 832 n.32 (1977) (the Supreme Court indicated that the family court did in fact order the child to remain in the same foster home).

\textsuperscript{79} 418 F. Supp. at 285.

\textsuperscript{80} Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows:

(1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination, (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R. Section 450.14.


\textsuperscript{81} \textit{418 F. Supp.} at 285. This procedure offers a pre-removal hearing only in New York City; no such hearing is provided throughout the rest of the state. \textit{Id.} at 232 n.13.

\textsuperscript{82} \textit{418 F. Supp.} at 285.
The district court concluded that the New York statutes, "as presently operated, unduly infringe the constitutional rights of foster children," but did not specifically describe standards that would be constitutionally sufficient. However, the court did indicate that minimum standards should require: 1) That an automatic hearing be held before the removal of any child who has been in foster care for more than one year; 2) that the hearing be before some neutral officer who has the authority to order continued placement of the child with their foster parents; 3) that all parties, including the agency, the natural parents, the foster parents, and the child or the representative appointed to protect his interest be represented; and 4) that all parties be permitted to introduce any relevant evidence. The court concluded that the present New York procedures did not satisfy these minimum requirements and were therefore insufficient to adequately protect the interests involved.

On appeal, the Supreme Court measured the sufficiency of the New York procedures by ostensibly using the test it had recently set forth in Matthews v. Eldridge. There the Court sought to balance the private interest affected, the risk of erroneous deprivation of such an interest, and the probable value of additional safeguards against the fiscal and administrative burdens of providing the additional safeguards. Using this test, the Court found that the district court's proposal for automatic agency review of child placement in every case where removal is sought was unnecessary. In the Court's view if the foster parents do not care enough to request a hearing as provided, the emotional attachments are not significant enough to be worth protecting.

83. Id. at 286.  
84. 424 U.S. 319, 335 (1976). In this case an action was brought challenging the validity of administrative procedures for the termination of social security disability benefits. The Court held that a prior evidentiary hearing was not required and that the termination procedures fully complied with due process.  
85. "[T]he possible length of wrongful deprivation ... is an important factor in assessing the impact of official action on the private interests." Fusari v. Steinberg, 419 U.S. 379, 389 (1975).  
87. 431 U.S. 848-51.  
88. The Supreme Court noted that since the institution of the New York City procedure, which provides for a pre-removal agency hearing at the request of the foster parents, there had been approximately 5,600 transfers but only 26 foster parents requested hearings. Id. at 851.
Court therefore reasoned that the administrative burden on the state to provide for automatic review would be too great. 89

It is unrealistic to assume that because the foster parent does not request a hearing, no significant emotional attachments exist in the foster family. This view ignores the possibility that the child might substantially benefit from an unrequested hearing. It is certainly possible that a significant number of foster parents may be unaware of their right to a hearing. In addition, it has been established that if an interest is worthy of substantial protections, then administrative burdens alone are not reason enough to deny due process protections. 90

The Supreme Court found that the child and biological parents are not necessary parties to the hearing, and further pointed out that there is nothing in the procedures that would prevent them from taking part in the proceeding if it became apparent that their presence would be valuable. 91 This observation is accurate, but it is likely that the child's best interests would be better served by requiring their participation. This would increase the chances of gathering all relevant data necessary to an accurate and constructive determination.

The Supreme Court also rejected the district court's contention that the New York City rule 92 is inadequate in that it does not apply to the removal of a child who is to be returned to his natural parents. The Court asserted that different interests must be balanced in this situation, and that the foster parents' rights must be severely limited where they compete against the rights of the natural parents. 93 However, this reasoning fails to recognize the benefits that a full hearing would provide regardless of whether or not the child is to be returned to his natural parents. 94

Finally, the Supreme Court attacked the district court's findings as to section 392, 95 determining that: 1) The eighteen month minimum period before which review is possible is not inadequate in that the district court's proposal for a twelve month limit had not been established as being a more accurate indication of the time in

89. Id.
90. See note 86 supra.
91. 431 U.S. at 851-52.
92. See note 80 supra.
93. 431 U.S. at 853.
94. See note 33 supra and accompanying text. A full hearing should increase the chances of a proper determination. The effect of such a hearing should not be detrimental to the interests of the natural parents unless their conduct warrants such action in promoting the best interests of the child.
95. See note 65 supra.
which emotional bonds have formed;\textsuperscript{96} 2) New York judicial interpretation of the statute permits an order requiring the child to be left in the same foster home, contrary to the district court’s assertion;\textsuperscript{97} 3) the procedure need not provide automatic review in every case.\textsuperscript{98} The Court concluded that since the section 392 remedy was constitutionally sufficient to protect

whatever liberty interest might exist in the continued existence of the foster family when the State seeks to transfer the child to another foster home, \textit{a fortiori} the procedure is adequate to protect the lesser interest of the foster family in remaining together at the expense of the disruption of the natural family.\textsuperscript{99}

It is curious that the Court reached its holding without fixing the magnitude of the liberty interest in the foster family. The amount of protection necessary to comply with due process should depend on the nature and strength of that interest.\textsuperscript{100} Therefore the logical approach would have been to precisely classify the interest involved before attempting to determine what process is due. The Court’s approach is especially difficult to justify in light of the majority’s express recognition that a liberty interest does exist in the foster family.\textsuperscript{101}

Although the Court stated that it was applying the \textit{Matthews} test,\textsuperscript{102} it did not actually follow it. If the Court had applied the test strictly, it would have concluded that the nature of the interest involved is so important, and the possible harm that could result from the use of inadequate procedures to protect that interest so great,\textsuperscript{103} that the administrative burdens of providing for automatic hearings should not be permitted to outweigh the benefit to the child, the foster family, and society.\textsuperscript{104} This reluctance on the part

\textsuperscript{96} The Supreme Court saw no justification for the district court to substitute its view for that of the New York Legislature. Any line drawn is likely to be somewhat arbitrary, giving protection to families where no bonds have formed while failing to protect relationships in other families that have developed quickly. 431 U.S. at 854.

\textsuperscript{97} \textit{Id.} \textit{See} note 78 \textit{supra}.

\textsuperscript{98} \textit{See} note 89 \textit{supra} and accompanying text.

\textsuperscript{99} 431 U.S. at 855.

\textsuperscript{100} “[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.” Cafeteria & Restaurant Workers Union Local 473 \textit{v.} McElroy, 367 U.S. 886, 895 (1961).

\textsuperscript{101} \textit{See} note 25 \textit{supra} and accompanying text.

\textsuperscript{102} \textit{See} notes 84-88 \textit{supra} and accompanying text.

\textsuperscript{103} OFFER \textit{v.} Dumpson, 418 F. Supp. 277, 284 n.16 (S.D.N.Y. 1976).

\textsuperscript{104} Society has an important stake in seeing that children grow up in an envi-
of the Court to strike down the New York provisions despite rec-
ognition of the existence of a liberty interest may be explained by
the Court's admitted hesitancy to go too far when dealing "with
issues of unusual delicacy, in an area where professional judgments
regarding desirable procedures are constantly and rapidly chang-
ing."105 This position leaves the lower courts with the responsibil-
ity for determining the sufficiency of the removal procedures in
their respective states.

V. SUMMARY

Under our present foster care system, long-term placements of
foster children with a single foster family are commonplace. This
situation has inevitably led to the creation of strong emotional at-
tachments within the foster family. Because of these attachments,
great psychological harm could come to the child if he is forcibly
separated from his foster family. It is clear that there must be some
protection for the child and possibly the foster parents to prevent
an arbitrary and destructive separation.

To provide protection for the child when his custody or place-
ment is in question, the "best interests of the child" test was de-
veloped by the courts and subsequently adopted by various legis-
latures. This test implicitly recognizes that a child has a right to be
protected from being forced to grow up in an environment which
may be dangerous to his welfare. The child must be permitted to
remain in a stable environment where strong family ties exist, re-
gardless of whether the family is biological, adoptive, or foster in
nature. In recent years, the courts have recognized and expanded
the rights of the child to ensure that the best interests of the child
will be served. In so doing, they have created a liberty interest in
the child of substantial weight, that demands appropriate constitu-
tional protections.

Courts have also recognized that a liberty interest exists in the
foster parents, even though in reality they are usually acting to
protect the interests of the child. Providing for such an interest in
the foster parents may be a useful way to ensure that the foster
child's best interests are being promoted. Regardless of whether
the liberty interest is viewed as existing in the foster parent, foster

105. 431 U.S. at 855.
child, foster family, or any combination of the three, it is clear that the interest increases with the length of time a child spends in a single foster home. The interest may also be stronger in situations where the removal precedes a transfer to another foster home as opposed to a return to his natural or adoptive parents. Whatever the circumstances, this interest should never be regarded as insignificant or unworthy of basic protections. Rather, it should be given overriding concern in determining what should be done with the child.

In upholding the validity of the New York statutes the Supreme Court must have realized that such procedures afforded a great deal of protection to the foster family in removal situations when compared with protections available in other jurisdictions. To strike down such a statutory scheme would have forced the Court to define the minimum standards necessary to protect the interests in the foster family. The Court’s reluctance to forward such a definition leaves the issue open to interpretation by the lower courts. It is probable that the near future will bring increased litigation in jurisdictions which are not as progressive as New York in this area of the law.

VI. Conclusion

A liberty interest must be recognized in the foster family which is of such magnitude as to require that certain procedural safeguards be satisfied before a foster child may be removed from the family. First, and most importantly, the removal hearing should require the presence of all parties who may have information relevant to the disposition. In addition, cross-examination of the parties should be provided for so that all relevant information may become available to the fact-finder who must make the ultimate determination. The increased administrative burdens cannot be viewed as too great, in light of the nature of the interest involved. The interests of the child should be the overriding concern because of the potential harm that may be caused by a misinformed determination. It is only when all relevant information is gathered and analyzed that the child can be adequately protected. Due to the extreme importance of the child’s interest, these minimum procedures should be required in all circumstances, except when the state must act summarily in emergency situations.106

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106. This exception was recognized by the district court as a necessary means of protecting the child where his welfare is immediately threatened. 418 F. Supp. at 286.