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ARTICLES

POINT: Embracing Full Participation of Foster Parents in the System

By Shari Shink

The responsibility of foster parents to ensure the safety and well-being of their foster children does not end at the courthouse door. Foster parents, who have the most timely, relevant, and critical information, must be granted the right to participate fully in legal proceedings in order to achieve successful outcomes for the children in their care. To function properly, the system must embrace the full participation of foster parents—not shut them out.

In Santosky v. Kramer, 455 U.S. 745, 53–54 (1982), the U.S. Supreme Court recognized:

The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state . . . If anything, persons faced with the forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

While the Supreme Court’s recognition of the natural parents’ rights is so well grounded as to be basic, this “does not include the right to be the gatekeeper of ‘detrimental’ evidence.” In re A.M., No. 10CA0522 (Colo. App. 2010) Jones, J., dissenting. Thus, a natural parent’s interest in maintaining its familial structure does not preclude participation by other key stakeholders, including foster parents. Granting foster parents the right to intervene does not inherently weaken a natural parent’s rights or interests. Rather it provides additional information and insight into a child’s life at a critical time. When the process is transparent, and no one is hiding/excluding information, then the judge can do a better job of determining the best interests of the child.

Placement decisions, reunification, termination, and adoption are life-changing events for a child, and no one person, including a parent, holds the key to the best decision. Further, the notion that the recognition of one party’s constitutional rights necessarily requires the compromise of another’s is fundamentally flawed. Children have constitutional rights, too. So while it is crucial that we safeguard the rights of parents, we must not ignore those of their children.

Colorado Got It Right

In a recent Colorado Supreme Court decision (A.M. v. A.C., No. 11SC53 (Colo. Feb. 25, 2013), the court found that foster parents who properly intervened in a dependency action are afforded the same degree of participation as all other parties at a termination hearing. In addition, the court found that parents’ due process rights are not impacted by the full participation of foster parents.
parents in the termination hearing. “Indeed, as the immediate caregivers of the child, foster parents are often uniquely positioned to provide a juvenile court up-to-date status of the child and the child’s well-being.”

Due process is ultimately rooted in the concept of fundamental fairness. Because the specific components of fundamental fairness are situational in nature, foster parent participation must be viewed in the context of all protections afforded the parents.

Parents are entitled to notice. They have the right to an adjudicatory hearing in which they can contest the state’s authority to intercede in the familial relationship. In most states they have the following due process rights: They have the right to counsel; if indigent, they have the right to court-appointed counsel. They have the right to call witnesses and experts, and to cross-examine others’ witnesses. With rare exceptions, they have the right to participate in treatment planning and to seek rehabilitation and reunification with their children. In termination trials, they benefit from a heightened standard of proof. Thus, the parents’ rights to due process are protected without barring foster parents.

The Colorado Supreme Court applied the three-factor framework in Mathews v. Eldridge, 424 U.S. 319 (1976) which considers (1) the private interests at stake; (2) the risk of the erroneous deprivation of that interest; and (3) the government’s interest. In this case, the parents argued that (1) their interest in maintaining the parent-child relationship is paramount; (2) the cumulative effect of allowing foster parents and other intervenors alongside the guardian ad litem poses a substantial risk of erroneous terminations; and (3) the government’s interest in terminating their parental rights is minimal.

The court acknowledged that the private interest in the continuation of the parent-child relationship was commanding. However, as to the second factor, the court determined that the foster parents had valuable information to share about their foster children, and that limiting their role would actually diminish the accuracy of decisions by withholding admissible, highly relevant information from consideration merely because it comes from a foster parent. Such would heighten, not mitigate, the risk of an erroneous decision.

Turning to the third factor, the General Assembly of Colorado has declared that "the safety and protection of children" is a matter of “statewide concern” and the state has a significant interest in ensuring that proceedings are “accurate and just.” Because of its role in securing both the child’s welfare and a just outcome at the juvenile proceeding, the government’s interests are substantial. The court concluded that full participation by foster parent intervenors does not undermine the fundamental fairness of the termination hearing. It is important to note that even though this case addressed the foster parent’s right to intervene in the termination hearing, the reasoning applies to other parts of the process as well.

The Stakes Are High: Why We Should Care
We have a complicated child-welfare system. It is designed to protect children when they are
abused or neglected, and then return them if/when the parents are able to care for them in a reasonable manner. While our goal is noble, the reality is sobering. This system costs the United States $124 billion annually, yet it has the worst record in the industrialized world, losing five children every day to abuse-related deaths. Each year, there are 3.3 million documented reports of child abuse involving nearly 6 million children. Approximately 400,000 of these children end up in foster care. What do we know about the future of these children?

According to Childhelp, a national non-profit organization dedicated to helping victims of child abuse and neglect,

- they are 59 percent more likely to be arrested as a juvenile;
- 30 percent will later abuse their own children, continuing the cycle;
- 25 percent are more likely to experience teen pregnancy;
- almost 50 percent of youth who emancipate from the system at 18 will be homeless or in jail within two years; and
- two-third of adults in treatment for drug abuse reported being abused as children.

All of us are affected by the successes and failures of our child-welfare system. It is our responsibility to prevent these foster children from becoming a grim statistic. Thus, each stakeholder in the system must rely on complete and accurate information and seek out resources and treatment to best serve the needs of children. Granting foster parents the right to intervene can only help those entrusted to decide the best interests of these children Under-resourced caseworkers juggling emergencies and guardians ad litem with excessive caseloads cannot alone provide the court with sufficient information. The participation of interested foster parents is critical to the successful resolution of these cases.

The system cannot both entrust foster parents with the physical, emotional, and social well-being of a child and yet fail to entrust them with providing reliable and critical information about the child. Surely the insight gained by caring for these children outside the courthouse is a powerful insight for what should be decided inside the courthouse.

Further, because (in some states) children do not have full participation rights in the court process, foster parent intervention takes on added importance. Children sometimes suffer grave harms and face numerous physical and emotional risks while in state custody. This sobering reality led the Tenth Circuit in Yvonne L., 959 F. 2d 883, 892 (10th Cir. 1992), to recognize that children have a constitutional right to be free from harm while in the state’s care. This right derives from the “special relationship” to protect the child. In Currier, 242 F.3d at905, 923 (10th Cir. 2001), the Tenth Circuit held that even without a special relationship, a state could be liable for affirmative acts that create or increase a child’s vulnerability to danger.

Children often face preventable danger from decisions that return them to birth families prematurely or place them in homes that are inappropriate. In the recent Colorado case of Shirk v. Forsmark, O’Donnell & Lytle (No. 10CA2141 (Colo. App. 2012), the court refused to
recognize a qualified immunity defense for injuries suffered by children for the “reckless, conscious, shocking” conduct that placed children at substantial risk. The case settled with a $6.75 million award to the three children harmed by the agency’s decisions.

Conclusion
To deny foster parents the right to participate fully irrationally impairs the trial court’s ability to gather all of the facts necessary to ensure the safety of children . . . the hallmark of the child-protection system. We cannot rely on assumptions regarding the care and placement of children in the state’s system. No one holds the monopoly on “caring,” knowing what is “best” for a child, or the “right” decisions. Only through a full and comprehensive evidentiary hearing, participated in by foster parents, can a judge make the best and most informed decision for a child.

The entire judicial system is reliant on the presumption that judges are capable of determining the admissibility of relevant evidence and the weight it deserves. If we are not going to promote and rely on alternative methods of conflict resolution, like mediation, we have no choice but to trust that the triers of fact know what they are doing. Further, it is misguided to think that the inclusion of foster parents in the judicial process will promote discord while their exclusion will boost consensus.

For more than a hundred years we have relied on foster parents to care for abused and neglected children when their parents could not. These foster parents are expected to provide both the ordinary care children need on a daily basis and the extraordinary care necessitated by the trauma they experience. In this role, foster parents are indispensable partners in the community that is the child-welfare system.

It is unrealistic to expect that the professionals in these cases will intimately know and effectively present information to which foster parents are uniquely privy. Only by engaging this community and valuing foster parents can we meet our obligations to our children, the intended beneficiaries of the child-protection system, while honoring the rights of parents.

**Keywords**: litigation, children’s rights, foster care, foster parents, full participation, child-welfare system

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COUNTERPOINT: For Children's Sake

By David J. Lansner

The harsh reality is that child-welfare cases are not about doing what is best for children. The deck is stacked, the dice are loaded, and the playing field we call the family or juvenile court is tilted—against you. If you are a child in foster care or a parent with a child in foster care, the last thing you need is for the foster parents to appear as a party to add to the weight preventing the reunification of your family.

The child and the court do not need foster parent intervention. One of the primary arguments for allowing foster parents to intervene in termination of parental rights hearings is that foster parents have a lot of information about the child, some of it exclusive, and the court should have that information. However, even if that claim is true, that is not sufficient reason for granting them party status.

- Their information is evidence that can—and should—be presented by the other parties calling foster parents as witnesses so that they can be subject to cross-examination.

- While foster parents may possess some information that no one else does (because of the restrictions on parental contact with their children and their children’s schools, doctors, etc., and because of agency indifference to obtaining the information), there has been no showing that the information that the foster parents possess exclusively is of any importance in the termination proceeding. Termination proceedings are based on the failure of the parents to be able to obtain reunification and provide permanency.

- Judges should not be determining the “best interest” of the child during a termination proceeding. Termination of children’s rights to their families can only be made based on unfitness, not on best interests.

- During proceedings when a judge is focused on a child’s best interest, how is a child’s best interest determined? Everyone has a personal view. Many (including this author) might argue that it is always in a child’s best interests to remain with his or her family, even if extensive services, such as live-in assistance, are necessary.

Constitutional Rights of Children

The statement that children also have constitutional rights does not support foster parent intervention. (Why do children’s “advocates” always cite the rights of children against the children’s families, not for them?) Children and parents have a constitutionally protected liberty interest right to their families. Santosky v. Kramer, 455 U.S. 745, 760–61 (1982). Children do not
have a constitutional right to remain in foster care or subsidized adoption (at public expense, no less), *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000), *cert. denied* 532 U.S. 1051 (2001), or permanency, or to be removed from their homes. *Deshaney v. Winnebago Cnty.*, 489 U.S. 189 (1989). Children also have a constitutional right to be protected from harm in foster care. *Doe v. DSS*, 649 F.2d 134 (2d Cir. 1981). Foster parents and foster children do not have a constitutional right to stay together.

**Why There Is Foster Care**

Foster care is not a place for *our* children. It is a place for Native Americans and immigrants, for Latinos and African Americans, for the unconventional and uncooperative and unsubmissive, for those who don’t speak English well. And especially, for the poor.

There have been studies that show that, except for the most extreme abuse or neglect, the very small minority of foster children, all of these foster children would have better outcomes if they stayed at home, even if their parents didn’t get the services they should be given. Joseph J. Doyle Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach* (Jan. 2011).

So why are all of these children in foster care? Foster care, despite its outrageous cost, is still cheaper for the government to provide than the decent housing, safe neighborhoods, good schools, and decent health care that would make home lives better. Foster care is big business that makes a lot of money for a lot of people. The United States has a history of taking away children in order to “improve” them. For example, in the nineteenth century with the orphan trains.

Children are often placed in foster care because courts don’t receive all the relevant information in cases, including exculpatory explanations, because parents’ attorneys are frequently overwhelmed with high caseloads and insufficient resources to hire investigators and expert witnesses or to even to hire an expert to review medical records. (Fortunately, the ABA Center on Children and the Law’s National Project to Improve Representation for Parents Involved in the Child Welfare System is helping to improve that representation.)

**The Tilted Playing Field**

The argument that granting foster parents the right to intervene does not inherently weaken a natural parent’s rights or interests is incorrect. Strengthening one side weakens the other. When foster parents appear as a party, the case moves from one concerning the unfitness of the parent and the rights of the child and the parent to be reunified, to a contest between the parent and the foster parent, a battle that is seriously skewed against a parent who has been accused of abusing or neglecting his or her child.

The state is already pushing for termination and adoption, potentially by the foster parent who is attempting to intervene. Allowing the foster parent to be a party makes the case two against one. Because lawyers, guardians *ad litem*, CASA, or whoever else “represents” the child may tend to side with the agency, it is more often three against one.
Parents in child-welfare cases are overwhelmingly poor. Foster parents tend to be better off financially, not least because the government pays foster parents, but not parents, to care for children. Because of their better economic situation, foster parents may be able to retain better counsel than parents can.

The parent has already been found to be inadequate, while the foster parent is certified by an official agency as being well qualified to care for the child. Parents are not even recognized as parents, and their importance is often discounted. They are referred to by the demeaning term of “biological parents,” implying that they are simply breeding machines. This further tilts the field by reducing the importance of parents.

The foster parent promises to provide “permanency,” while the parent has already failed to provide it (thanks to the state’s interference). (“Permanency” is almost always used to support termination of a child’s right to his or her parents, an action that interferes with permanency.) But because foster parents have no right to keep a foster child, there may be a quick end to the permanency. And adoption may not actually establish permanency either, as so many children adopted from foster care are thrown out by their adoptive parents, run away (either to the streets or back home to their parents), land in jail, or are returned to foster care. Dawn J. Post & Brian Zimmerman, The Revolving Doors of Family Court: Confronting Broken Adoptions, 40 Capital Univ. L. Rev. 437 (Spring 2012).

**Conclusion**

Our legal system skews hearings in favor of children remaining in foster care, which is not in their best interests, violates the constitutional rights of children and their parents, and results in bad outcomes for many children. Allowing foster parents, who have no constitutional rights, to be parties just skews the system even more, and hurts the children the most.

**Keywords**: litigation, children’s rights, foster care parents, intervention, child-welfare cases, constitutional rights, parental rights hearings

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**Tackling Foster Care Age-Out Issues**  
By Kimberly A. McFarlane

While every state has a well-established foster care system to serve vulnerable child populations, state responses to their “age-out” populations have been less well defined and uniform. What happens when a person between the ages of 17 and 21 “ages out” of foster care? What can child-welfare professionals do to secure necessary resources for them both before and after children age out? These critical questions were the subject of a recent ABA teleconference “What Lawyers, Judges, and Agencies Should Be Doing for Kids Aging out of Foster Care,” cosponsored by the American Bar Association Section of Litigation and the Center for Professional Development. The call can be heard and materials from the teleconference can be downloaded here.

But first, why should you care? Because overwhelmingly, today’s young adults are insufficiently prepared—economically, educationally, emotionally, and in maturity—to successfully and independently support themselves. It is for this reason that we do not ask or expect our young adults to do it alone: Today’s families increasingly support their “kids” well into adulthood with economic and in-kind contributions to education, housing, food, financial investments, health insurance, etc. The startling statistics show that parents support their children to the tune of approximately $38,000 (or $2,200 a year) until age 34, and provide an average of 367 hours of assistance each year. Nearly one in 5 men and one in 10 women between the ages of 25 and 34 still live with their parents. It is against this backdrop that we must examine our efforts to aid children exiting foster care.

Unlike the kids described above, for youth whose parents were the state, the buck literally stopped on their age-out date. As a result, one study by the University of Chicago shows that foster youth experience a significantly poorer quality of life as adults than do non-foster youth: They are less likely to have earned high school diplomas or GEDs and are less likely to go on to college than their non-foster youth counterparts. They are less likely to have secured regular employment, and once they do, they earn less than non-foster youth do. They are at increased risk of contact with the criminal-justice system and incarceration (the records of which further diminish employment—and earnings—prospects). Much of this can be traced to the rootlessness of institutional care, multiple placements, and the lack of a solid, reliable support network over time.

The statistics beg the question, what can be done? For starters, a hodgepodge legislative approach to addressing some of the challenges faced by aging-out foster youth has evolved over the years: In 1987, federal funding specifically for the aging-out population was first offered. In 1999, the Chaffee Act increased funding for housing, education, and Medicaid up until age 21. The 2010 Fostering Connections to Independence Act expanded access to funding and resources (also until age 21), and attempted to secure lasting contacts in the community on whom children could rely for parent-like support post-foster care. In 2014, access to medical coverage will be extended to age 26 through the Health Care Reform Act. But states can do more: Georgia, for
instance, went beyond Fostering Connections in requiring local social-services officials to identify, within the first 30 days of a placement, any persons in the community who have “demonstrated an ongoing commitment” to a child. However despite these federal and state efforts, foster children still lag far behind their non-foster care counterparts in economic stability. More can, and must, be done to serve this population into young adulthood.

**Adult Connections**

Permanency planning for children includes cultivating positive, stable, and lasting relationships that will extend, hopefully, beyond the foster care years. Former foster children have identified these types of relationships as playing an important role in their overall success, and statistics show that these relationships directly correlate with the extent to which children engage in services. Child-welfare professionals, therefore, should not overlook the importance of consulting with children to identify potential long-lasting community resources: Children are often able to provide the names of coaches, ministers, and teachers with whom they are comfortable, and then the relationship-building process can begin in earnest. California’s Assembly Bill 408 (Steinberg 2003) looks beyond traditional methods and compels alternative means of identification, such as using the Internet to track down possible resources. Advocates can and should reach out to less obvious sources of support, such as a sibling’s foster or adoptive parent, to get involved in the child’s planning.

**Identity and Other Documents**

Obtaining documentation needed for employment or training can sometimes pose a challenge for foster youth: Access to birth certificates or other identification is crucial. Despite the availability of services set aside specifically for foster children, the services sometimes remain inaccessible to youth lacking identity documents. Tactically, advocates can make use of permanency hearings, transition round tables, and the like to ask the agency to produce comprehensive records and necessary forms of identification for a child prior to their exiting foster care or their transition.

Another helpful law is 42 U.S.C.A. § 675 (5)(I), which mandates that foster youth over 16 years of age be provided with their credit report, as well as assistance in correcting credit errors or addressing credit issues. (This provision is the result of widespread complaints about foster youths’ vulnerability to identity theft, due to their records being available for inspection by untold numbers of persons responsible for some aspect of their care.) Likewise, 42 U.S.C.A. § 675 (5)(D) provides that upon turning 18, a copy of a foster child’s medical and educational records shall be provided to him.

**Using the Law Strategically**

Knowing the applicable local law and using it to a child’s advantage is also critical. Sometimes timing is everything. For example, in Georgia, a child who achieves permanency by his or her 16th birthday is at something of a financial disadvantage due to local funding laws that favor persons under 16 years of age. However, advocates may circumvent this issue by waiting until one day after the child’s 16th birthday to achieve their permanency.
Also, objecting to “reasonable efforts” findings can be an effective tool whenever the agency’s efforts seem insufficient. Advocates should object to a finding of reasonable efforts whenever the plan seems inadequate to meet a client’s permanency, transitional, or independent living needs. Georgia requires a finding on the record that sufficient permanency efforts have been made. Without a reasonable efforts finding, the state cannot obtain federal foster care reimbursement for that child’s placement. This tactic may be especially useful in seeking to counter a goal change to APPLA [Another Permanent Planned Living Arrangement], which goal is now disfavored for the disadvantages it brings to the foster child who remains unconnected — legally—to a significant adult in the community.

**Transitional Planning**

Transitional planning is distinct and separate from permanency planning. Transitional planning is a major component of a child’s preparation for adulthood, and it addresses housing, health, education, and employment. Transitional planning can be used in conjunction with Independent Living Planning (ILP).

Federal law, under 42 U.S.C.A. § 675(1)(G), requires a case plan to include a plan for educational stability. This provision seeks to improve a child’s school performance by requiring the agency to assess, for each foster care placement, the appropriateness of a proposed educational setting and proximity of that placement to the foster home. It also requires that the state child-welfare agency coordinate with appropriate local agencies to ensure that, whenever possible, a child remains in the same school where he or she was in attendance prior to being placed into foster care. If it is not possible to remain in the same school (say, because doing so would not be in the child’s best interest), then the law requires not only prompt enrollment in a new school, but also prompt transfer of school records. This law is especially important because foster children are less likely to earn diplomas than non-foster youth. Any educational help goes a long way.

Georgia provides an example of a useful statute designed to improve permanency planning. It requires a Written Transitional Living Plan (WTLP) within 90 days of discharge, but it requires that the process of identifying the plan’s features begin as soon as possible. Recognizing that 90 days is insufficient to complete an investigation and design individual planning, Georgia requires its child-welfare agencies to begin identifying children eligible for independent living as early as 14 years of age. Also, every six months, Georgia reaches out to persons “demonstrating an ongoing commitment” to the child, and includes them in their transitional roundtables, to help plan for the child.

A critical component of transitional planning is the ability to retain services actually obtained. Children’s attorneys should counsel their clients carefully on the need to follow through or possibly lose these services.

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Addressing Health and Disability Issues During Transitional Planning

Foster youth often suffer from chronic conditions and emotional issues, and are also less likely to have health insurance after exiting foster care. Young women are also at increased risk of pregnancy (and therefore in need of prenatal care), and these issues were in part responsible for the optional program to extend Medicaid to 21, under 42 U.S.C. §1396a(a)(10)(A)(ii)(XVII).

In furtherance of this commitment, although many states opted into this program, as of January 2014 the federal government will mandate that all states extend coverage to exiting fostering children up to the age of 26, under the Patient Protection and Affordable Care Act (PPACA). See 42 U.S.C. §1396a(a)(6)(a)(3)(IX) (2014). To benefit from this provision, a child must have been in foster care on his or her 18th birthday and have been enrolled in Medicaid at the time.

Under the PPACA, a state must submit an extensive Title IV-B Child Welfare Plan. (See 42 U.S.C. §622(b)(15).) This statute requires that states consult the local child-welfare agency, the local agency that administers Medicaid, pediatricians, and former recipients of child-welfare services. This gathering of perspectives is intended to improve mental health care, dental care, and transitional services for foster youth with special medical needs.

In addition, children with mental or physical disabilities may be eligible for additional assistance. For example, those under the age of 21 receiving payment under the adoption assistance program or Kinship Guardianship Assistance Payment Program may receive an extension of support until age 21.

Finally, explore whether your state has opted, under the Fostering Connections Act, to extend foster care beyond age 18. Note that youth participation is conditioned upon enrollment in school, pursuit of higher education, or seeking of employment. However, children whose chronic physical or mental health condition prohibits participation in transitional activities are exempted from many programmatic requirements.

Other available services include Special Education Transitional Planning, which is used to ensure that a child’s Individualized Education Program contains transition services necessary to assist the child in achieving their postsecondary educational goals. See 20 U.S.C. §1401(34), §1414(d)(1)(A)(VIII); the Early Periodic Screening, Diagnosis and Treatment program, §§1396a(a)(10), 1396a(a)(43), 1396d(a)(4)(B), & 1396d(r) (which finances necessary pediatric services to improve the health of low-income children); and Supplemental Security Income, 42 U.S.C. § 1381.

The Importance of Supplemental Security Income

Disabled youth face increased barriers compared with their peers, and are often unable to work. With this in mind, once screened and identified by their state, disabled youth participating in extended foster care may pursue post-foster care stability by seeking out permanent, affordable and supportive housing. Both Supplemental Security Income (SSI) and Social Security also
allow for the pursuit of education/training or employment, without forfeiting program eligibility. These options can be explored on a case-by-case basis.

If your state is in need of legislation to address the SSI needs of disabled foster youth, California had success in this area with Assembly Bill 1633 (2006), requiring their local social services districts to (1) manage SSI benefits in the youth’s best interest, (2) assist youth in receiving direct payment or finding a payee, (3) inform youth of the process of maintaining eligibility as adults, and most significantly 4) develop uniform best practice guidelines to follow. As a result of the success of Assembly Bill 1633, the following year California followed up with Assembly Bill 1331 (2007), which requires counties to screen youth for SSI eligibility between the ages of 16.5 and 17.5. Not only does the bill capture more SSI-eligible youth, it identifies them well before the expiration of the 90-day application period while the youth are still in care. Finally, if screened eligible, the county is required to apply for SSI on the child’s behalf.

**Independent Living Programs for Extended Foster Care Stays**

States that have not opted into extended foster care may implement the Title IV-E Reimbursement Placement Setting, 42 U.S.C.A. § 672 (c)(2). This new provision addresses youth between the ages of 18 and 21 by amending the definition of “child-care institution” to include “a supervised setting in which the individual is living independently . . . .” This amendment makes it possible for states to expand certain placement options and may significantly influence a child’s desire to opt into the program. With this provision, states may design dorms or apartments, or even authorize direct payment to the youth. Two programs in particular may be of interest to aging-out youth: Supervised Independent Living Placement (SILP) and Transitional Housing Placement + Foster Care (THP + FC). Youth seek out these placements because of the level of autonomy and independence offered.

Because these new placements offer a degree of autonomy and independence, participants in California’s SILP are subject to readiness assessments and placement approval by a child welfare employee prior to placement. In an effort to set the youth up for successful independent living, based on the outcome of the assessment, a child undergoes a Health and Safety Inspection. Following the inspection the youth receives a rate of $776 per month. If the youth is also a parent, additional funds are provided to help care for the child or children.

**Foster Care Reentry**

“Fostering Connections” states also may allow youth to reenter foster care under the Federal Fostering Connections Act. Eligibility for reentry includes meeting IV-E criteria for federal financial participation. Youth may satisfy the criteria by expressing an intention to meet the requirements. States may even construct provisions allowing multiple foster care reentries, depending on circumstances. A valid placement order at the time a youth turns 18 is required as a prerequisite; after that, if the youth wishes to re-enter care, the youth must sign a Voluntary Placement Agreement on his or her own behalf. Often, the signing of the voluntary agreement alone (before a case is re-calendared) is enough to get the agency started in re-providing services to a youth.
These same services are available to many youth adjudicated as delinquent, as well: Those living in licensed group homes or foster homes, or placed with relatives or guardians, are eligible. These youth, who often come from similar backgrounds to foster youth and who experience the same chronic emotional disabilities as nondelinquent foster youth, are often in need of monitoring by probation following their rehabilitation. In order to participate, the state’s child welfare agency or another public state agency must take responsibility for the child’s placement in care. Unfortunately, after completing their rehabilitation goals, the youth often resent continued supervision.

California offers three potential paths to adjudicated delinquent youths who wish to return to care after 18 (Cal. Welf. & Inst. Code §§450 & 607.2): (a) maintain the youth in extended foster care under delinquency jurisdiction; (b) return the former foster youth to dependency from their delinquency case, or (c) transfer the youth into “transition jurisdiction,” which allows the youth to undergo supervision by probation without subsequent consequences. Through transfer jurisdiction, youth are not only able to determine whether to be supervised by probation or child welfare, but also able to determine which court provides supervision.

Conclusion
Former foster youth and foster care agencies have spoken, and their overwhelming concerns and messages are being addressed. Many states are answering the call to provide increasingly broad safety nets for this needy population. For those attorneys representing foster youth or former foster youth in states without established provisions for foster youth between the ages of 17 and 21 and beyond, consider lobbying for some of the legislation described in this article and in the teleconference’s materials, and seeking out the local remedies that may be available to you.

For more information on understanding the dilemmas faced by former foster youth and potential remedies, visit the ABA Section of Litigation’s Children’s Rights Litigation Committee’s Programs & Materials page.

Keywords: litigation, children’s rights, foster youth, age out, transitional planning, Fostering Connections Act, Supplemental Security Income, Independent Living Programs

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Imagine the following scenario. You get a call from your spouse to come home immediately because a county social-service worker and police officer are standing outside of your home, demanding to come inside and speak to your three-year-old son. You arrive home a short time later and are told that social services received an anonymous report three days earlier stating that your son is being abused, and they suspect the abuse is by one of his parents. Social services has since discovered who made the anonymous report but refuses to tell you who the person is because such information is confidential. You deny that any abuse has occurred.

The social worker demands entry into your home to interview and take photos of your son. The social worker also states that your son must reside outside of your home with family or friends while the investigation continues. You initially refuse to permit the social worker into your home and you protest the removal of your son from your home. The social worker then states that if you do not cooperate, he will have no choice but to take your child and place him in foster care while the investigation continues. Based on this threat, you reluctantly agree. Your sister could care for your son on a temporary basis. The social worker then interviews your child outside of your presence, and your child denies ever being abused. The social worker also inspects and takes photographs of your child’s body, but sees no suspicious bruises or injuries. Nonetheless, you are told that your son must stay with your sister for a few weeks, perhaps longer, until the investigation is complete. Furthermore, you are advised that you may not have any contact with your son until the investigation is complete because you could taint the investigation.

In the period that follows, you are never afforded a hearing before a neutral judge, magistrate, or master, and whenever you call social services to obtain the status of the investigation, you are merely told that they are still investigating. After a month of being separated from your son, you finally decide that you have had enough and you go to an attorney. You want to know if social services’ actions are legal and if your family’s rights have been violated.

Procedural Due Process under the Fourteenth Amendment
The right to procedural due process is implicated where a constitutionally protected liberty or property interest is concerned. *Bd. of Regents of St. Colleges v. Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705 (1972). The crux of procedural due process is the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972).

The U.S. Supreme Court has repeatedly held that parents have a fundamental right to make decisions as to the companionship, care, custody, and management of their children, which right is a protected liberty interest under the Due Process Clause of the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S.Ct. 2054, 2060 (2000). As a result, there can be no doubt that the Fourteenth Amendment is implicated whenever the government seeks to
separate a parent from his or her child, and due-process principles generally require the right to notice and a hearing before children are separated from their parents. *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997). The separation does not have to be carried out with force for due process to be implicated; instead, duress or coercion will be sufficient, such as where a social-services worker threatens to place the children in foster care if the children are not “voluntarily” placed outside of the home with family or friends. *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d. Cir. 1997); *Dupuy v. Samuels*, 462 F.Supp.2d 859 (N.D. Ill. 2005), aff’d, 465 F.3d 757 (7th Cir. 2006).

However, where there is reasonable suspicion to believe that a child is in “imminent danger” of serious harm, a pre-deprivation hearing is not required. *Hollingsworth*, 110 F.3d at 739. In such a case, several courts have determined that a post-deprivation hearing must be afforded within 72 hours, even if such a hearing has not been requested by the family. *Patterson v. Armstrong County Children and Youth Servs.*, 141 F.Supp.2d 512, 531-39 (W.D. Pa. 2001). Some courts have permitted slightly longer or required slightly shorter periods depending on the circumstances. *Berman v. Young*, 291 F.3d 976, 985 (7th Cir. 2002) (concluding that 72-day delay was “rather outrageous” but finding no damages); *Jordan v. Jackson*, 15 F.3d 333, 351 (4th Cir. 1994) (concluding that 65-hour delay was constitutionally permissible but was “near, if not at, the outer limit of permissible delay”); *Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983) (approving a 12-day delay, but nothing that hearing would have occurred earlier if parents did not request additional time to prepare). In any event, where a child is seized based on the existence of imminent danger, due process is not negated, it is merely delayed, *Suboh v. D.A.’s Off. of Suffolk*, 298 F.3d 81, 92 (1st Cir. 2002), and the maximum permissible delay in providing a post-deprivation hearing “should ordinarily be measured in hours and days, as opposed to weeks.” *Brown v. Daniels*, 128 Fed. Appx. 910, 915 (3d. Cir. 2005) (unpublished).

In the scenario above, there has likely been a violation of the parents’ procedural due-process rights. The child was coercively removed without a pre-deprivation hearing despite the fact that there was no evidence that the child was in any imminent danger. Even if the child could have been in imminent danger, which is doubtful given the three-day delay between the anonymous report and the removal of the child, the child was separated from the child’s parents for a month without the family being afforded a state-initiated post-deprivation hearing. Such facts could provide ample grounds for bringing a civil-rights action under 42 U.S.C. § 1983.

**Seizure under the Fourth Amendment**

The Fourth Amendment guarantees individuals the fundamental right “to be secure in their persons . . . against unreasonable searches and seizures . . .” by government officials. Several courts have held that the removal of children from their home is a seizure implicating the Fourth Amendment. *Kovacic v. Cuyahoga County Dept. of Children and Fam.*, 809 F.Supp.2d 754, 771–75 (N.D. Oh. 2011), rev’d in part and aff’d in part, 606 F.3d 301 (6th Cir. 2010); *Siliven v. Indiana Dept. of Child Servs.*, 635 F.3d 921 (11th Cir. 2011); *Hernandez v. Foster*, 657 F.3d 463 (7th Cir. 2011); *O’Donnell v. Brown*, 335 F.Supp.2d 787 (W.D. Mich. 2004); *Gedrich v. Fairfax*

Ordinarily, to comport with the Fourth Amendment, consent, a warrant or a court order, or probable cause to believe that serious abuse is occurring is required before a child may be seized by social services. Id. However, some courts have applied the “special needs” doctrine to child-abuse investigations, pursuant to which children may be placed in protective custody based on a lesser standard of reasonableness. Doe v. Bagan, 41 F.3d 571, 575, n. 3 (10th Cir. 1994); Wildauer v. Frederick County, 993 F.2d 369, 372–73 (4th Cir. 1993). In any event, an exception to the probable-cause requirement exists where there are exigent circumstances, which refers to situations where “real, immediate and serious consequences would certainly occur were a police officer (or social worker) to postpone action to get a warrant.” Kovacic, 809 F. Supp.2d at 774. Some courts have treated the concept of “imminent danger” under the Fourth Amendment identically to the concept of “exigent circumstances” under the Fourth Amendment. Good v. Dauphin County Social Servs. for Children and Youth, 891 F.2d 1087, 1093–94 (3d. Cir. 1989).

In our scenario above, a court might find that the seizure of the child violated the Fourth Amendment because the social worker did not have a court order or warrant, and there may not have been any exigent circumstances, especially given the three-day delay between receiving the anonymous complaint and acting upon it.

First Amendment Right to Familial Association
The First Amendment also provides a possible cause of action. Courts have recognized that the First Amendment protects the fundamental right to intimate association, which includes the familial association between parents and children. Doe v. Fayette County Children and Youth Servs., No. 8-823, 2010 WL 4854070, *18–19 (W.D. Pa. Nov. 22, 2010); Behm v. Luzerne County Children and Youth, 172 F.Supp.2d 575, 585 (M.D. Pa. 2001). Where government action substantially interferes with fundamental rights, such as the right to family relationships, it is subject to strict scrutiny, which means that the government must have a compelling reason for its action and its means to achieve its goal must be as narrowly tailored as possible. Id. Although the government certainly has a compelling interest in protecting children who are in danger, the seizure of a child from his or her parents, or the banning of all communication between them, is not always the most narrowly tailored means to achieve its goal. Id.

In our fact pattern above, unless social services had a reason to believe that the child was in danger, it did not have a compelling reason to separate the child from his parents. Moreover, unless separation was the most narrowly tailored means of achieving its goal of protecting the child from abuse, the First Amendment may have been violated.

Substantive Due Process under the Fourteenth Amendment
Outside of the child-seizure context, substantive due process can also be used as a sort of “catchall” for constitutional violations, and it applies when the actions of a government official are “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” Roberts v. Mentzer, No. 09-3251, 2010 WL 2113405 at *4 (3d. Cir. May 27, 2010).
Whether conduct “shocks the conscience” depends on the particular facts of the case and the period of time in which the child-welfare worker had to contemplate his or her actions. Doe v. Fayette County Children and Youth Servs., 2010 WL 4854070 at *9–18. One example of conscience-shocking behavior is where child-welfare workers remove children from their home and falsely advise the children that their mother had abandoned them. Behm, 172 F.Supp.2d at 584–85. Some courts hold that substantive due process may not be called upon when a specific constitutional provision (such as the First or Fourth Amendments) protects the right allegedly infringed upon. Hernandez ex rel. Hernandez v. Foster, 657 F.3d 463, 474 (7th Cir. 2011).

Nonetheless, there appears to be an independent right to familial integrity under the Fourteenth Amendment, which is limited by the compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents. Evans ex rel. Evans v. Richardson, No. 08-C-5593, 2010 WL 1194272 at *5–6 (N.D. Ill. Mar. 19, 2010) (citing, Croft, 103 F.3d at 1125–26). However, a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse. Id. Therefore, if a child is separated from his or her parents based on insufficient evidence, the family’s right to familial integrity and, therefore, the right to substantive due process under the Fourteenth Amendment, will have been violated.

It appears from the fact pattern that the report of abuse was anonymous and that the child-welfare workers may not have had any other evidence of abuse. Given the fact that “an anonymous tip may justify investigation but will not provide reasonable grounds for removal of a family member absent independent, articulable criteria of reliability,” Croft, 103 F.3d at 1126, it appears that the parents’ and child’s rights under the Fourteenth Amendment right to familial integrity were violated.

Conclusion
While child-welfare workers have the important but difficult job of ensuring the safety of children, they nonetheless must act in accordance with constitutional principles. Child-welfare workers, and the agencies they work for, cannot and should not interfere with the fundamental constitutional right to familial relations and integrity, the right to make decisions as to the companionship, care, custody, and management of one’s children, or the right to be free from illegal seizure, without being subjected to a civil-rights action. Although it is nearly impossible to train social-service workers for every possible fact pattern and contingency, in the authors’ opinion, providing child-welfare workers with exhaustive and detailed training is the best way to avoid the substantial harm that can arise from the improper interference with a family.

Keywords: civil rights litigation, due process, First Amendment, seizure, Fourth Amendment, Fourteenth Amendment

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NEWS & DEVELOPMENTS

Attorney-Client Privilege Upheld for Florida Foster Youth

In *R.L.R. v. The State of Florida and the Florida Department of Children and Families, et al.*, the Florida Third District Court upheld the attorney-client privilege for a 17-year-old foster youth. The lower court had ordered the child's lawyer to disclose the child's location after he had run away from his foster care placement. The district court ruled that that protecting the attorney-client privilege protects the administration of justice.

**Keywords**: litigation, children’s rights, attorney-client privilege, foster care

—Cathy Krebs, committee director, ABA Section of Litigation, Children's Rights Committee, Washington, D.C.

Raised on the Registry

Human Rights Watch has published a report, *The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, that details the harm public registration laws cause for youth sex offenders. The report outlines the sex-offender laws that apply to youth and how they affect a youth through the course of their lives. The laws, which can apply for decades or even a lifetime and are layered on top of time in prison or juvenile detention, require placing offenders’ personal information on online registries, often making them targets for harassment, humiliation, and even violence. The laws also severely restrict where, and with whom, youth sex offenders may live, work, attend school, or even spend time.

**Keywords**: litigation, children’s rights, public registration laws, sex offenders, Human Rights Watch, report

—Cathy Krebs, committee director, ABA Section of Litigation, Children's Rights Committee, Washington, D.C.