

Book Reviews

Foster Care Reform: Two Books for Practitioners

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Since 1960, there has been an almost fivefold increase in the number of children in foster care. In that year, about 100,000 children were in foster care.¹ In 1977, the most recent year for which there are national statistics, about 500,000 children were in foster care.²

Many children must be placed in foster care to protect them from serious injury. But many others are removed from parental custody because of the lack of appropriate treatment services for parents—or because of inappropriate decisionmaking.

Although many children benefit from foster care,³ for a large proportion of the children taken away from their parents, the conditions of foster care are a “national disgrace,” in the words of Marion Wright Edelman, president of the Children’s Defense Fund.⁴ In theory, foster care is supposed to be a short-term remedy—to protect children from harm while parents have time to respond to treatment. However, because existing treatment programs are unable to improve parental functioning in such a large proportion of cases,⁵ the reality is far different. More than 50 percent of the children in foster care are in this “temporary” status for

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1. Author’s estimate, based on JUVENILE COURT STATISTICS 13 (U.S. DHEW 1966).
2. U.S. CHILDREN’S BUREAU, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES 109 and 117, Table 5-3 (DHEW 1978).
3. See, e.g., D. FANSHIEL & E. SHINN, CHILDREN IN FOSTER CARE (1978).
4. CHILDREN’S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE xiii (1978).
5. See Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 151, 165–66 (1983).

over two years; over 30 percent are away from their parents for over six years.⁶ As the U.S. Supreme Court has recognized, these children are lost in the "limbo" of the foster care system.⁷

Long-term foster care can leave lasting psychological scars. Foster care is an emotionally jarring experience; it confuses young children and unsettles older ones.⁸ Over a long period, it can do irreparable damage to the bond of affection and commitment between parent and child. The period of separation may so completely tear the fragile family fabric that the parents have no chance of being able to cope with the child when he is returned.

While in foster care, children are supposed to receive treatment services desperately needed to remedy the effects of past maltreatment. Few do. Worse, children who stay in foster care for more than a short time (especially if they are older) tend to be shifted through a sequence of ill-suited foster homes—denying them the consistent support and nurturing that they so desperately need.⁹ Increasingly, the graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home situation might have been.¹⁰

Besides being harmful to children, foster care is expensive. Depending on the community, and the child's need for special care, it costs from \$5,000 to \$15,000 per year. Six years of foster care cost between \$40,000 and \$90,000. The foster care placement of each additional child in the family costs that much more. Nationally, the annual cost for keeping children in foster care exceeds \$3.5 billion.

From both financial and humanitarian points of view, it makes great sense to reduce the number of children in foster care—by preventing the inappropriate or unnecessary placement of children in the first place, by requiring their return home whenever possible and, when necessary, by terminating parental rights so that the children can be adopted. Thus, recent years have witnessed nationwide efforts to reform foster care. The crown jewel of this effort is, of course, the Adoption Assistance and Child Welfare Act of 1980.¹¹

Two recent books bear witness to the major progress that has been made in placing foster care reform on the national agenda.

In *Foster Children in the Courts*, Mark Hardin and his colleagues have

6. NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* note 2, at 120.

7. *Smith v. Organization of Foster Families*, 431 U.S. 816, 833-38 (1977).

8. *See, e.g.*, E. WEINSTEIN, *THE SELF-IMAGE OF THE FOSTER CHILD* (1962); *see also* S. KATZ, *WHEN PARENTS FAIL* 90-113 (1971).

9. *See, e.g.*, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* note 2, at 117-18, Table 5-4.

10. *See, e.g.*, J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 13 (1980).

11. Pub. L. No. 96-272, 94 Stat. 500-535.

created a major new resource for lawyers, judges, and child welfare professionals in general. The book, available from Butterworth Legal Publishers, Newton, Massachusetts, for \$45, is 653 pages long, and has twenty-three chapters (written by twenty-five different authors) on the full range of foster care issues, from initial placement to the termination of parental rights—and everything in between.

A book review, of course, cannot do justice to a work of this breadth and depth; nevertheless, a summary of the book's contents is in order. The book is divided into six parts.

Part one, "The Early Stages of Intervention," covers child protective court proceedings and voluntary foster care agreements. Gary T. Wienerman, a clinical professor of law at Loyola Law School, provides a step-by-step description of how to prepare for and handle emergency custody hearings, adjudicatory hearings, and dispositional hearings; he provides a general review of the procedural, evidentiary, and strategic issues at each hearing. Robert L. Walker, of counsel to the National Center for Youth Law, describes the different strategies for representation for eight different forms of child maltreatment—physical abuse, sexual abuse, emotional neglect, mental illness of parent or child, dirty or unsafe home, failure to thrive, parent's unavailability, and lifestyle (including the homosexuality of parents); he explains how the attorney's basic strategy must necessarily vary depending on the form of alleged maltreatment involved. Henry J. Plum, a special assistant district attorney of Milwaukee County, and Mark Hardin identify the factors that can lead to delay in child protective proceedings and then they describe specific, practical steps that can be taken to minimize delay. In another chapter, Mark Hardin describes the problems associated with voluntary placements and describes how the process can be improved through more restrictive use of voluntary placements, improved placement agreements, and more careful judicial review; he concludes with a brief discussion of how the Adoption Assistance and Child Welfare Act of 1980 can be used to help implement these reforms.

Part two, "Securing Placement for Children in Foster Care," addresses permanency planning issues. Diane Dodson, assistant director of the Foster Care Project of the ABA's National Legal Resource Center for Child Advocacy and Protection, describes periodic foster care reviews conducted by courts, citizen review boards, and administrative agencies; she provides a comprehensive orientation to the relevant substantive and procedural issues, with helpful checklists and practice guides. Mark Hardin provides a thoughtful examination of the legal options available for the long-term care of children who cannot return home but who, also, should not have their parental rights terminated; he describes the alternate options that should be considered, noting the benefits and drawbacks of each. Wallace J. Mlyniec, director of the Juvenile Justice Clinic at the Georgetown University Law Center, gives a concrete summary of

the procedural and substantive issues in the presentation of parental rights; he also describes some of the "nonlegal" problems facing petitioners (such as hearsay information from missing caseworkers) and parental defenses (such as the successful rehabilitation of the parent). A sample case summary, evidence chart, model petition, and a checklist of the information social workers should provide the petitioning attorney have been helpfully added to this chapter by Mark Hardin. Carol Hewitt, former director of litigation for the National Juvenile Law Center, discusses the defense of a termination proceeding. She describes the role of counsel, how counsel can deal with difficult parents, the parent's right to counsel, conflicts of interest (between parents or siblings), and a range of more neglected issues (such as how to find an appropriate expert witness). Marcia Lowry, director of the ACLU's Children's Rights Project, describes how individual and class action litigation can facilitate the adoption of children in foster care; she explains the various legal theories that can be used in state and federal courts to assert the child's right to an adoption.

Part three, "The Rights of Foster Parents," describes the basis for, and growing recognition of, foster parent rights. Robert Horowitz, associate director of the National Legal Resource Center, covers the expanding rights of foster parents to case information and to grievance procedures. He provides practical information about the nature of these rights, and when they should be exercised. Mark Hardin and Josephine Bulkley, formerly director of the Child Abuse Project of the National Legal Research Center for Child Advocacy and Protection, describe the rights of foster parents to challenge agency removal of the children in their care and to seek to adopt such children without agency consent. In doing so, they survey a broad range of state laws, agency regulations, and judicial decisions.

Part four, "Interdisciplinary Issues in Case Planning for Foster Children," provides invaluable information about how child welfare agencies operate—and how lawyers should relate to them. Bradley N. Gator, director of the Juvenile Law Clinic at Tulane University School of Law, and Holly Ackerman, social work coordinator at the clinic, explain how lawyers should interact with caseworkers. They describe methods of gaining access to caseworkers, sharing and obtaining information, assuring adequate case planning (and the implementation of case plans), coordinating activities and assignment of service responsibilities, and dealing with adverse agency decisions and caseworker inadequacies. Theodore Stein, professor of social work at New York University, presents the elements of successful case plans and explains the important role that lawyers can play in developing them. Karen Blumenthal, formerly program specialist at the Resources for Permanence Project of the Child Welfare League of America, and Anita Weinberg, the project's former director, present the competing, and often inconsistent, factors

that must be considered in deciding whether parents should be permitted to visit their children while in foster care. They provide straightforward guidance about when visitation is indicated, and how it should be accomplished. Emily Jean McFadden, assistant professor of social work at Eastern Michigan University, provides an easy-to-use analytical guide to three troublesome issues: the placement of sibling groups, single-parent adoptions, and transracial adoptions. Similarly, Theodore Stein gives a comprehensive overview of services to families and children in foster care, together with general guidelines for evaluating the appropriateness of services for specific family situations. Eileen D. Gambrill, professor of social welfare at the University of California, offers guidelines that lawyers can use in evaluating the services provided by social workers. She presents a detailed eighteen-item checklist for doing so. Elizabeth S. Cole, director of the Permanent Planning for Children Unit of the Child Welfare League of America, describes the legal and, more importantly, the operational elements of the adoption process. She explains that adoption is appropriate for many more children than is commonly assumed and she describes how children with special needs, the so-called hard to place, can be successfully placed for adoption.

Part five, "Working with Mental Health Professionals," provides an in-depth view of the psychological assessments that can be crucial to child welfare decision making. Donald N. Duquette, director of the Child Advocacy Law Clinic at the University of Michigan Law School, describes how to select among psychologists, psychiatrists, and social workers and how to work collaboratively with these professionals. He also reviews evidentiary and testimonial issues that most often arise when the evaluations these professionals conduct are introduced into evidence. Ernest Kinnie, a psychologist with the Delaware County Mental Health Clinic, and Mark Hardin describe the psychological factors that go into deciding whether a child should remain in, or be returned to, parental custody. They provide a specific list of the factors to be considered, and how they can be assessed. Martin E. Glasser, director of the Child Study Unit at the University of California, gives a candid description of those parents who are presently beyond the reach of existing treatment programs, and for whom the early termination of parental rights seems indicated. Leon A. Rosenberg, associate professor of pediatrics and medical psychology at Johns Hopkins University School of Medicine, gives a sophisticated description of the techniques of evaluation that goes far to demystify the process.

Part six, which was inadvertently not labeled as such, discusses the Adoption Assistance and Foster Care Act of 1980. Mary Lee Allen, director of child welfare for the Children's Defense Fund, Carol Golubock, a senior staff attorney at the fund, and Lynn Olson, the editor of *CDF Reports*, have written a comprehensive description of the Act, and the intent behind its various provisions. They also discuss how they

believe the Act should be interpreted to maximize its beneficial effect. Abigail English, a staff attorney at the National Center for Youth Law, concludes this part, and the book, with a discussion of the possible use of the Act to enforce private substantive and procedural rights; she discusses the possibility of actions in both state and federal courts brought by parents or children to enforce its provisions.

In short, *Foster Children in the Courts* is an encyclopedic treatment of the subject by a group of authors uniquely qualified for the task. But like all anthologies, it has strong chapters—and it has weak ones. Some chapters stand out as thoughtful and comprehensive treatments of their subjects while others seem to be pasted together from old briefs and articles. And, although the editors have done an admirable job in limiting the overlap that is inevitable in such collaborations, the work remains overwritten and wordy.

Moreover, many of the authors are well-known advocates of certain positions, and their chapters sometimes reflect their opinion about what the law should be (or will become) rather than an even-handed analysis of the complex legal issues involved. Cases contrary to the authors' positions are often not cited, let alone discussed and distinguished. Thus, many assertions about the present state of the law must be read with great care, lest the reader wrongly conclude that the issue is settled or its resolution predictable.

Hardin's book also suffers because of a number of unfortunate publishing decisions. This book is designed to be a practical reference for practitioners. Cost considerations notwithstanding, it is inexcusable that the footnotes are not where they belong—at the foot of the page. By placing them at the end of each chapter, the publisher has saved a few dollars, but the reader is forced into the inconvenience of repeatedly turning back and forth between text and notes.

The book is also made unnecessarily difficult to use because of a superficial index and the lack of a comprehensive table of cases. It is often impossible to discover whether, and where, this 653-page book treats a particular subject without reading through one, two, and sometimes three chapters. It is a shame that a book of this quality has been marred by such shortsighted decisions.

Finally, although published in 1983, the book is already being overtaken by events. Child welfare practice—and law—is going through a period of radical and rapid change. For example, two recent and important Supreme Court cases are not even mentioned in the book: *Lehman v. Lycoming County Children's Services*,¹² holding that federal courts do not have jurisdiction to entertain a writ of habeas corpus to challenge the constitutionality of a state statute under which parental rights were terminated, and *Lehr v. Robinson*,¹³ upholding the notice provisions of

12. 458 U.S. 502 (1982).

13. 103 S. Ct. 2985 (1983).

New York's termination of parental rights statute. The Adoption Assistance and Child Welfare Act is only now having its full impact on state procedures, statutes, and case decisions. Indeed, it does not seem premature to suggest that the authors consider supplementing the book with more current materials.

These few negative comments, however, are not meant to detract from this important book's overall value. It brings together, in one place, material on almost every important aspect of foster care practice in the courts. There is nothing of comparable scope, detail, or quality. As an all-purpose reference tool, it belongs on the bookshelf of every lawyer involved in child welfare cases.

Foster Children in the Courts is one of many fine products of the ABA's Resource Center on Child Advocacy and Protection. Howard Davidson, who directs the resource center, and Mark Hardin, who directs its Foster Care Project, are to be commended for having had the foresight to identify the need for a book of this scope and quality and for having the dedication, and, I am sure, stubbornness, to insure its completion. Three organizations should also be given credit for sponsoring and supporting the book's preparation: the American Bar Association, the Edna McConnell Clark Foundation, and the Foundation for Child Development.

Decision Making at Child Welfare Intake is a very different book. First, it is only 130 pages long. Second, it is written for caseworkers. Nevertheless, in this book, Theodore J. Stein, a professor of social work at New York University, and Tina L. Rzepnichi, a research associate at the Jane Addams College of Social Work, have given an invaluable guide to lawyers seeking to understand, support, or challenge child welfare practices. The book is available from the Child Welfare League of America, in New York, for \$11.95.

This remarkable volume provides a comprehensive, clearly written, well documented, and brief statement of child welfare casework and decision-making practices. If used together with the Hardin book, it all but erases the disadvantage faced by lawyers who, because they handle child welfare cases only infrequently, are unfamiliar with the system's procedures and practical concerns.

These two books—one very long and the other comparatively short—add immensely to the tools available to lawyers who handle child welfare cases. They should be equally helpful to the social workers, psychologists, psychiatrists, and other mental health professionals who are involved in the forensic aspects of foster placements.