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Ninesling v. Nassau County Department of Social Services: Awarding Custody of a Foster Child Surrendered for Adoption

Ninesling v. Nassau County Department of Social Services: Awarding Custody of a Foster Child Surrendered for Adoption

The New York courts have maintained[1] that "the best interest[s] of . . . children must govern in the adjudication of custody."[2] In the recent case of *Ninesling v. Nassau County Department of Social Services*,[3] foster parents unsuccessfully sought to win legal custody of a foster child surrendered for adoption by his natural parent. The New York Court of Appeals claimed to be fulfilling its duty of awarding custody based on the best interests of the child while it also claimed to be considering the "future viability" of the foster case system.[4] The approach adopted by the court, however, actually subordinated the court's asserted duty of awarding custody on the basis of best interests to the court's concern for the preservation of the foster care system.

The pertinent facts of *Ninesling* follow: the Nassau County Department of Social Services certified Joseph and Betty Ninesling as foster parents and placed a four-day old infant, Chuck F., in their temporary care, expressly reserving the right to remove the child upon notification.[5] Less than four months later, the Department informed the Nineslings that Chuck's natural mother had surrendered him for adoption and that he would be removed from the foster home and permanently placed with an adoptive family.[6] The identity of the prospective adop-

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1. *See* note 51 and accompanying text *infra* (discussing best interests as controlling custody award in New York) and notes 137-39 and accompanying text *infra* (discussing court's duty to award custody based on best interests of the child).

2. Nehra v. Uhlar, 43 N.Y.2d 242, 246, 372 N.E.2d 4, 5, 401 N.Y.S.2d 168, 169 (1977).

3. 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

4. *Id.* at 389, 386 N.E.2d at 237, 413 N.Y.S.2d at 628. *See* notes 128-39 and accompanying text *infra*.

5. Brief for Respondent at 14, Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

6. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 385, 386 N.E.2d 235, 237, 413 N.Y.S.2d 626, 628 (1978). The Department refused to disclose to the Nineslings the standards for eligibility as adoptive parents, grant the Nineslings a study of their suitability as adoptive parents, or allow the Nineslings to apply to adopt Chuck. Brief for Appellant on Motion for Reargument at 4-5, Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

tive family was not revealed.[7] The Department refused to grant the Nineslings permission to adopt the child and served them with formal notice of removal.[8] The New York Supreme Court denied the Nineslings' application for a writ of habeas corpus.[9]

The Department had investigated the Nineslings' suitability as foster parents before Chuck was placed in their care. 46 N.Y.2d at 387, 386 N.E.2d at 238, 413 N.Y.S.2d at 629. The Department had also previously placed four other children with the Nineslings for foster care, *id.* at 385, 386 N.E.2d at 237, 413 N.Y.S.2d at 628, and had presented them with an award for their foster care service. Brief for Appellant on Motion for Reargument at 4, Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

7. Discussion with Brian C. Baker, Attorney for the Nineslings, in New York (Jan. 9, 1980). This fact does not appear in the court of appeals decision.

8. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 385-86, 386 N.E.2d 235, 237, 413 N.Y.S.2d 626, 628 (1978). The statutory review mechanism provides for an administrative "fair hearing" on request. N.Y. Soc. Serv. Law § 400 (McKinney 1976) (current version at N.Y. Soc. Serv. Law §§ 22, 400 (McKinney Supp. 1979-1980)). Unless the foster parent has continuously cared for the child for a period of at least eighteen months, such hearing is held after removal of the child. *See* N.Y. Soc. Serv. Law § 392 (McKinney Supp. 1979-1980). Judicial review is then available through an Article 78 proceeding. N.Y. Civ. Prac. Law §§ 7801-7806 (McKinney 1976). This statutory review procedure has been determined not to violate due process, although the United States Supreme Court has not determined whether foster parents or foster children have a liberty or property interest of constitutional magnitude in their relationship. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977). *See generally* Note, *Constitutional Protection of Long-Term Foster Families*, 79 Colum. L. Rev. 1191 (1979).

By employing a habeas corpus proceeding, the Nineslings bypassed the statutory review mechanism and retained the child pending appeal. Their de facto custody was continued throughout the proceedings by judicial stays. Some foster parents using the statutory mechanism have also obtained judicial stays which enabled them to retain foster children pending the exhaustion of administrative and judicial remedies. *See, e.g.*, In re Denise W., 77 Misc. 2d 374, 355 N.Y.S.2d 245 (Family Ct. N.Y. County 1974). *See also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 830 n. 27, 832 n. 32 (1977). The court of appeals stated that a habeas corpus proceeding was inappropriate because the statutory mechanism was ignored and because the Nineslings had retained de facto custody of the child. Instead, the court of appeals treated the proceeding as an Article 78 proceeding. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 387, 386 N.E.2d 235, 238, 413 N.Y.S.2d 626, 629 (1978). The court of appeals did not permit the Nineslings to base a claim for statutory adoption preference on judicially permitted retention of the child. *See* notes 119-27 and accompanying text *infra*. Pre-Christmas media coverage followed the court of appeals decision; both the publicity and the prolonged retention of Chuck were undoubtedly critical factors in the Department's decision then to change its position and consent to the Nineslings' adoption of Chuck. *See* N.Y. Post, Dec. 23, 1978, at 1.

9. The supreme court first mandated an administrative fair hearing, in accordance with N.Y. Soc. Serv. Law § 400 (McKinney 1976). Following the hearing, the Social Services Commissioner upheld the departmental decision to remove Chuck as in the best interests of the child. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382,

The court determined that removal from the foster parents' care would not cause the child "permanent detrimental harm."[10] On that basis, the supreme court affirmed the Department's decision that removal would serve the best interests of the child.[11] The decision to remove Chuck was affirmed by the appellate division[12] and the court of appeals.[13] At the time of the court of appeals decision, Chuck had been in the Nineslings' continuous care for a period of over two years.[14]

The court of appeals considered two questions. First, what burden must foster parents meet to win custody of a child who has been surrendered for adoption? The court held that foster parents must meet a "detrimental impact" standard by showing "not only that they would make suitable adoptive parents, but, rather, that they would provide a better adoptive home than that planned by the department;" as noted by the court, this is a "virtually impossible" burden.[15] Second, did the Nineslings qualify for the statutory adoption preference[16] afforded foster parents who have continuously cared for a child for two years? The court of appeals held that the Nineslings did not qualify for the preference; the Department's initial notice of removal was received only four months after the child came into their care,

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386, 386 N.E.2d 235, 237, 413 N.Y.S.2d 626, 628 (1978). After holding its own supplemental judicial hearing, the supreme court denied the habeas corpus application. Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977).

10. Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977). *See* note 69 *infra* (discussing the supreme court opinion). *Cf.* note 55 and accompanying text *infra* (discussing linguistic differences in "best interests" test). *See generally* notes 51-58 and accompanying text *infra* (discussing "best interests of the child").

11. Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977).

12. Ninesling v. Nassau County Dep't of Social Servs., 61 A.D.2d 1053, 403 N.Y.S.2d 1022 (2d Dep't 1978) (mem.).

13. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

14. *Id.* at 391, 386 N.E.2d at 240, 413 N.Y.S.2d at 632 (Wachtler, J., dissenting).

15. *Id.* at 389-91, 386 N.E.2d at 239, 413 N.Y.S.2d at 631. All the judges agreed with the detrimental impact standard stated by Judge Jasen in the majority opinion; however, Judges Wachtler, Gabrielli, and Fuchsberg dissented on the disposition of the case. *Id.* at 391-93, 386 N.E.2d at 240-41, 413 N.Y.S.2d at 632-33.

16. The period of continuous care required to qualify for the statutory preference was changed to eighteen months, effective October 9, 1979. N.Y. Soc. Serv. Law § 383(3) (McKinney Supp. 1979-1980). *See* notes 27-28 and accompanying text *infra*.

and subsequent delays were caused by the Nineslings' reluctance to give up the child.[17] In answering both of these questions, the court emphasized the importance of preserving the viability of the foster care system.[18]

Part I of this note examines the foster care system. Part II explores the "best interests of the child" standard as the basis for awarding custody of a child in New York. Part III sets forth the reasoning of the court of appeals in *Ninesling*, and Part IV critically analyzes this reasoning. In evaluating the court's reasoning, the note concludes that no sound basis exists for placing either a heavy or a virtually impossible burden of proof upon foster parents opposing a department for custody of a surrendered child; that the court might have applied the statutory adoption preference to the Nineslings; and that the court's primary responsibility is to award custody based on the best interests of the child, even if such award endangers the foster care system.

I. Foster Care

Surveys indicate that over half a million American children are growing up outside of the homes of their natural parents and under the responsibility of public child care systems.[19] Children may be placed temporarily in public child care systems while families are unable to care for their children, or while children are being freed for adoption and suitable adoptive homes are being sought.[20] Foster care provides for a child's physical needs in a temporary family setting that will contribute to the child's healthy psychological development.[21] If foster care were not available, many of these children might be relegated to institu-

17. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d at 390, 386 N.E.2d at 240, 413 N.Y.S.2d at 631. Judge Wachtler, joined in his dissent by Judge Gabrielli, and Judge Fuchsberg, in a separate dissenting opinion, would have awarded custody to the foster parents because of the overriding concern for the best interests of the child whose foster care had been prolonged beyond two years. *Id.* at 391-93, 386 N.E.2d at 240-41, 413 N.Y.S.2d at 632-33 (dissenting opinions).

18. *Id.* at 388-89, 386 N.E.2d at 239, 413 N.Y.S.2d at 630.

19. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 1-2 (1978). *See generally* III R. BREMMER, CHILDREN & YOUTH IN AMERICA 634-77 (1974).

20. *See* Note, *Constitutional Protection of Long-Term Foster Families*, 79 COLUM. L. REV. 1191 (1979).

21. *See generally* Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283 (1971).

tional temporary care.[22]

In New York, foster parents are licensed by a New York State social services commissioner or certified by a state-authorized private agency.[23] Foster parents provide care for children on a compensated, contractual, and temporary basis.[24] While the foster parents care for the child, the department or agency has legal custody of the child[25] as well as the right to remove the child from the foster home.[26] Foster parents who have continuously cared for a child for the required period of time have the statutory right to apply to adopt the child and to intervene in any custody proceeding involving the child.[27] They also receive "preference and first consideration" over other applicants seeking to adopt the foster child.[28]

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22. *See* CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 2, 45-46 (1978). *See generally* Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283 (1971).

23. N.Y. Soc. SERV. LAW §§ 375-376 (McKinney 1976); N.Y. Soc. SERV. LAW § 377 (McKinney Supp. 1979-1980). *See generally* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 823-38 (1977) (description of New York foster care system).

24. *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 824-26 (1977). *See also* N.Y. Soc. SERV. LAW § 392 (McKinney Supp. 1979-1980).

25. N.Y. Soc. SERV. LAW § 383(2) (McKinney 1976).

26. Typically, the department or agency will reserve an express contractual right to remove the child on notice. The right to remove, however, is also reserved by statute: "[s]uch authorized agency may in its discretion remove such child from the home where placed or boarded." *Id.*

27. N.Y. Soc. SERV. LAW § 383(3) (McKinney Supp. 1979-1980). In 1979, the required period of continuous care was changed from two years to eighteen months. *Id.*

28. The statute creating the preference provides:

> Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of eighteen months or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoption placements. However, final determination of the propriety of said adoption of such foster child shall be within the sole discretion of the court, as otherwise provided herein.

N.Y. Soc. SERV. LAW § 383(3) (McKinney Supp. 1979-1980). Some affirmative action to claim an adoption preference is required; a timely, formal application, however, is apparently not necessary. *See* Andrews v. Beaudoin, 39 A.D.2d 1005, 1006, 333 N.Y.S.2d 717, 719 (3rd Dep't 1972) (dictum); *In re* Dionisio R., 81 Misc. 2d 436, 442-43, 366 N.Y.S.2d 280, 287-88 (Family Ct. N.Y. County 1975) (dictum).

Following several well-publicized cases in which foster children were removed from foster homes, the legislature enacted several provisions benefiting foster parents. These legislative actions have been variously attributed as responses to Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (natural mother

A department or agency investigates the qualifications of those persons seeking to become foster or adoptive parents.[29] Foster parents care for the child in a stable family setting for a temporary period of time; the adoptive relationship is permanent. To reflect these different functions within the child care system, the criteria for assessing eligibility are applied differently to the two types of prospective parents.[30] Such criteria as age, financial means, and similarity of race and religion to that of the natural parent are less rigorously applied to proposed foster parents than to proposed adoptive parents.[31]

Commentators have criticized the foster care system.[32] Although the system is designed to provide only temporary care, most foster children are neither adopted nor returned to their natural homes; instead, many foster children are retained within the foster care system for more than a "temporary" period of time, and some are shifted from one foster home to another.[33] The foster care system also tends to isolate children from their

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can revoke surrender of child at discretion of court), *appeal dismissed*, 404 U.S. 805 (1971); *In re* Jewish Child Care Assn., 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (in order to place child in second foster home for eventual return to natural mother, agency can remove child from loving foster parents who want to adopt); and Fitzsimmons v. Liuni, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (Family Ct. Ulster County) (commissioner can remove child from foster home for placement with unknown adoptive parents where court independently finds it in best interests of child), *rev'd on other grounds*, 26 A.D.2d 980, 274 N.Y.S.2d 798 (3d Dep't 1966). These attributions were made respectively in *In re* Dionisio R., 81 Misc. 2d 436, 439, 366 N.Y.S.2d 280, 284-85 (Family Ct. N.Y. County 1975); *In re* Ida Denise W., 77 Misc. 2d 374, 374, 355 N.Y.S.2d 245, 247 (Family Ct. N.Y. County 1974); and Foster & Freed, *Family Law*, 19 SYRACUSE L. REV. 478, 479 (1967).

29. *See* N.Y. SOC. SERV. LAW §§ 374, 377 (McKinney Supp. 1979-1980).

30. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 388, 386 N.E.2d 235, 238, 413 N.Y.S.2d 626, 630 (1978); Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971).

31. *Id.*

32. *See generally* CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES (1978); Mnookin, *Foster Care — In Whose Best Interests?* in THE RIGHTS OF CHILDREN 158 (1974); Foster & Freed, *Children and the Law*, 1966 ANN. SURVEY OF AM. L. 649.

33. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 829 (1977); CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 3 n. 7 (1978); Mnookin, *Foster Care — In Whose Best Interests?* in THE RIGHTS OF CHILDREN 158, 171 (1974). One statistical survey revealed that over 52% of foster children studied had been in foster care for more than two years and 33% from four to six years; 56% of the foster children had each been in more than one foster home. *Id.* at 187. This tendency to retain foster children within the foster system may be reduced by New York's recent institution of periodic judicial review of foster care and adoption subsidies. *Id.* at 161.

natural families: inadequate efforts are made to prevent the initial need to remove children from their natural parents; insufficient consideration is given to placing children within the extended family; insufficient encouragement is given for natural parents to visit their children once the children are placed in foster care.[34] Further, the foster care bureaucracy has been attacked for allegedly arbitrary application of placement criteria.[35]

Criticism of the system, however, must be balanced against an understanding of the positive ends foster care seeks to serve and the consideration that institutional care may be the only practical alternative to the present system.[36] The underlying facts of *Ninesling*, rather than demonstrating the faults of the system, demonstrate that the system can perform well. Within four months, Chuck was placed in a foster home and surrendered for adoption. In that short time, the Department also found a permanent adoptive home for him.

II. Awarding Custody on The Basis Of The "Best Interests Of The Child" Standard

At common law, a father had a "parental right" to the custody of his child based upon the father's duty to support the child[37] and upon his property right in the services and earnings

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34. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 5, 192-94 (1978). Recent statutory enactments, which post-date *Ninesling*, require agencies and departments to provide preventive services. *See* N.Y. SOC. SERV. LAW §§ 398, 398-b, 409-b, 409-e (McKinney Supp. 1979-1980). Additional state funds are also being allocated to preventive services. N.Y. Times, May 25, 1979, at B3, col. 5.

35. *See* Foster & Freed, *Children and the Law*, 1966 ANN. SURVEY OF AM. L. 649, 660-61. *See generally* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 833-38 (1977); CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES (1978).

Foster care systems have also been accused of discriminatory treatment of minorities. Minorities are overrepresented in the child care system and underrepresented in permanent placements compared to their proportion in the population as a whole. *Id.* at 49-51.

36. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 285 (1971).

37. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 192 (12th ed. O.W. Holmes, Jr., ed. 1873) (father entitled to custody "[i]n consequence of the obligation of the father to provide for the maintenance and, in some qualified degree, for the education of his infant children"); 1 W. BLACKSTONE, COMMENTARIES *434, 440 (parents given authority over their children to enable the parents to more effectively perform their duty of maintenance, protection, and education, and to recompense parents for discharging this duty); Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737, 740 (1944).

of the child.[38] The decline of "parental right" paralleled, and has been attributed to, the development in feudal England of the doctrine of *parens patriae*.[39] Under this doctrine, the Crown assumed jurisdiction over the estates of minors; later it acquired the prerogative of "ultimate parent" of all children, with the power to protect their welfare and determine their custody.[40] Subsequently, this power was delegated by the Crown to the chancellor.[41] It finally passed to the chancellor's successor, the courts of equity.[42]

Parens patriae, as it developed in English custody decisions, involved a determination of the child's welfare in the fullest sense of the term, including moral, religious, and physical well-being, as well as ties of affection.[43] "The Court has to consider . . . the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any relig-

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38. *See* Katz, *Who Looks After Laura?* in THE CHILDREN'S RIGHTS MOVEMENT 48, 52-53 (1977) (father's property right in the child could be sold or transferred). *Cf.* Walters v. Davies, 143 Misc. 759, 761, 257 N.Y.S. 118, 121 (Sup. Ct. Fulton County 1932) (modern view that parent has no proprietary right to custody since child is no longer chattel of parent); 2 J. KENT, *supra* note 37, at 193 n.b. (father has a right to child's services or to their value if rendered to a third person; both custody and property right are a consequence of father's duty to support child); 1 W. BLACKSTONE, *supra* note 37, at 441 (father "may indeed have the benefit of his [minor] children's labour while they live with him, and are maintained by him").

39. *See* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 155 (1963) [hereinafter cited as *Alternatives*]; Comment, *Determination of Custody Between Welfare Agency and Foster Parents*, 34 N.Y.U.L. REV. 1323, 1323 (1959) [hereinafter cited as *Determination*].

40. *See* Eyre v. Countess of Shaftsburg, 2 P. Wms. 103, 119, 24 Eng. Rep. 659, 664 (Ch. 1722). *Parens patriae* encompassed the care and protection of "charities, idiots, lunatics, and infants." *Id. See also* note 39 *supra*.

41. *See* Eyre v. Countess of Shaftsburg, 2 P. Wms. 103, 118, 24 Eng. Rep. 659, 666 (Ch. 1722); Finlay v. Finlay, 240 N.Y. 429, 432-34, 148 N.E. 624, 626 (1925) (Cardozo, J.).

42. *See* Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925).

43. Queen v. Gyngall, [1893] 2 Q.B. 232, 243 (C.A.). This case involved a fifteen-year-old girl who had been separated from her Roman Catholic mother for long periods of time while the mother attempted to earn her livelihood as a maid and dressmaker. The child, who was happily living with Protestant persons, had adopted their religion and did not wish to return to her mother. The court affirmed the denial of the mother's habeas corpus application for custody of the child, determining that this decision was essential for the welfare of the child. *Id.*

Although decided too late to be part of New York common law by reception, the latter case is repeatedly cited by the New York Court of Appeals in Finlay v. Finlay, 240 N.Y. 429, 432-34, 148 N.E. 624, 625-26 (1925).

ion, and the happiness of the child."[44]

The New York Constitution vests the state supreme court with general original jurisdiction in equity as well as in law.[45] As a court of equity, the supreme court can exercise *parens patriae* jurisdiction[46] to protect a child by acting as a "wise, affectionate and careful parent"[47] would act for the welfare of the child. In order to benefit the child, the court will, "in a proper case,"[48] supersede or suspend the legal rights of parties contending for custody[49] and will "do what is best for the interest of the child."[50]

In New York, "the paramount concern in all custody matters [is] . . . the best interest[s] of the child."[51] This standard is set forth both in case law,[52] and in various provisions of the Domestic Relations and Social Services Laws.[53] In awarding cus-

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44. Queen v. Gyngall, [1893] 2 Q.B. 232, 243 (C.A.).

45. N.Y. CONST. art. 6, § 7.

46. Wilcox v. Wilcox, 14 N.Y. 575, 578-79 (1856).

47. Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (Cardozo, J.) (quoting Queen v. Gyngall, [1893] 2 Q.B. 232, 241 (C.A.)).

48. Wilcox v. Wilcox, 14 N.Y. 575, 578 (1856).

49. *Id. See* Queen v. Gyngall, [1893] 2 Q.B. 232, 242 (C.A.) (court can interfere with legal rights if "clearly right" for the welfare of the child "in the widest sense" of the word).

50. Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (Cardozo, J.).

51. Nehra v. Uhlar, 43 N.Y.2d 242, 250, 372 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977). *See* Cusano v. Leone, 43 N.Y.2d 665, 371 N.E.2d 784, 401 N.Y.S.2d 21 (1977); Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971). *But see* Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. Queens County 1950) (although contrary to best interests of this child, agency may retain custody to protect placement and adoption program).

52. *See* note 51 *supra*. "Extraordinary circumstances" must be found before the "best interests of the child" test is "trigger[ed]" in a custody contest between a natural parent and a non-parent. Bennett v. Jeffreys, 40 N.Y.2d 543, 548, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 826 (1976). This requirement, however, does not negate the test of "best interests." Instead, it employs the "best interest" test while recognizing the existence of a rebuttable presumption that a child's best interest will be served by awarding custody to the natural parent. *Id.* at 547-48, 356 N.E.2d at 282, 387 N.Y.S.2d at 826. *See* notes 59-66 and accompanying text *infra* (discussing parental presumption).

53. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (McKinney 1977) (in habeas corpus proceeding for child detained by parent, "court shall determine solely what is for the best interests of the child, and what will best promote its welfare and happiness, and make award [of custody] accordingly"); N.Y. DOM. REL. LAW § 240 (McKinney 1977) (custody in matrimonial action is awarded "having regard to the circumstances of the case and of the respective parties and to the best interests of the child"); N.Y. SOC. SERV. LAW § 383(5) (McKinney 1976) (if natural parents seek to regain custody after child surrendered for

tody based upon the "best interests of the child," New York courts consider a multitude of different factors such as the custodian's moral fitness, financial means, race, and religion; emotional ties and continuity of relationships between the child and the custodian; and the child's wishes, age, sex, and health.[54] Difficulties in predicting what will serve the child's best interests and in applying the best interests test have been recognized, and the doctrine has been disparaged as uncertain, unworkable, subjective,[55] and a "mere cloak for judicial intuition."[56] Commentators have criticized courts for failing to consider sufficiently the child's psychological well-being in determining best interests.[57]

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adoption, "custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition").

54. *See, e.g.*, Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977) (mother abducted children); Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (long separation, unwed mother, no established home, child attached to custodian); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (boarding parents overly possessive, emotionally involved); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949) (mother adulterer and perjurer, father successful physician). *See generally Alternatives*, *supra* note 39, at 153.

55. *See Alternatives*, *supra* note 39, at 153-54; Rodham, *Children Under the Law*, in THE RIGHTS OF CHILDREN 1, 27 (1974) ("best interests standard . . . not properly a standard . . . [but] a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured"); Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167, 206-07 (1969) (best interest standard poses insoluble problems of prediction and judgment). *Cf.* Mnookin, *Foster Care — In Whose Best Interest?* in THE RIGHTS OF CHILDREN, 158, 177 (1974) (noting some of the various values that may be used in determining best interests: stability, happiness, intellectual stimulation, economic productivity, short or long term interests, spiritual goodness). New York courts have examined best interests, *see* Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971); ultimate best interests, *see* Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977); and long range best interests, *see* Alan D.M. v. Nassau County Dep't of Social Servs., 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dep't 1977). The supreme court in *Ninesling* spoke of permanent detrimental harm, Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77, at 8 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977), while the court of appeals spoke of detrimental impact. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978). It is uncertain whether these are qualitatively different standards.

56. *Alternatives*, *supra* note 39, at 153-54.

57. *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 53 (1973) [hereinafter cited as *Goldstein*] (suggesting a least detrimental alternative test); *Alternatives*, *supra* note 39, at 157 (suggesting a psychological best interests test).

Despite these criticisms of the doctrine and its application, however, the best interests of the child is the standard that has been employed in adjudications of custody in New York.[58]

As a corollary to the best interests test, New York courts apply a rebuttable presumption that awarding custody to the natural parent is in the best interests of the child.[59] The presumption might be viewed as a vestige of the "parental right" doctrine.[60] This presumption also imparts some objectivity and certainty to the subjective and uncertain best interests standard.[61] In addition, the presumption accords with current psychological theory[62] and reinforces the positive societal values of

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58. *See, e.g.*, Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978); Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977); Cusano v. Leone, 43 N.Y.2d 665, 371 N.E.2d 784, 401 N.Y.S.2d 21 (1977); Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949). *But see* Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. Queens County 1950) (child removed from boarding home to preserve usefulness of foster care program although, on the record, best interests of the child would be served by permitting her to remain where she was). *Cf.* note 52 *supra* (need to "trigger" best interests test in custody contest involving a natural parent). *See generally* Note, *Constitutional Protection of Long-Term Foster Families*, 79 COLUM. L. REV. 1191, 1193-94 (1979).

59. Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). *Cf.* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (natural mother has right to custody except in extraordinary circumstances). The presumption is eliminated by statute when the child has been surrendered for adoption. *See* N.Y. SOC. SERV. LAW § 383(5) (McKinney 1976). *See generally Alternatives*, *supra* note 39, at 154 n. 18.

60. *Cf.* Bennett v. Jeffreys, 40 N.Y.2d 543, 555 n. 2, 356 N.E.2d 277, 286 n. 2, 387 N.Y.S.2d 821, 830 n. 2 (1976) (Fuchsberg, J., concurring) (burden of proof favoring custody of natural parents has the same result as treating child as chattel of the parents); Roche v. Roche, 25 Cal. 2d 141, 145, 152 P.2d 999, 1000 (1944) (Schauer, J., dissenting) (natural parental presumption treats child as chattel and makes property interest of parent paramount to best interests of child). *See also* notes 37-38 and accompanying text *supra*.

The presumption may also be viewed as a vestige of the right of the parent under natural law. *Cf.* Bachman v. Mejias, 1 N.Y.2d 575, 582, 136 N.E.2d 866, 870, 154 N.Y.S.2d 903, 908 (1956) (parent's right is fundamental and derived from natural law). The United States Supreme Court has recognized, absent a powerful countervailing interest, a natural parent's constitutionally protected right to custody of his child. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

61. *See* notes 55-57 and accompanying text *supra*.

62. At least theoretically, the blood ties between natural parent and child will eventually result in a love that is deeper than the love developed between foster or adoptive parent and child because of the realities of conception and birth, the confirmation of the

family privacy and autonomy.[63] To rebut this presumption in favor of the natural parent and succeed in winning custody, an opposing party has the heavy burden of demonstrating grave detriment to the child if he is returned to the natural parent.[64] Overcoming the presumption requires an affirmative showing of the natural parent's unfitness, bad moral character, bad home environment, abandonment of the child, surrender of the child for adoption, prolonged separation from the child, or some other extraordinary circumstance.[65] The presumption has also been applied against foster parents and in favor of an agency that intends eventually, although not immediately, to return the child to his natural parent.[66] In *Ninesling*, the court articulated for the first time the required burden of proof for foster parents seeking to win custody of a child who has been surrendered for adoption and who will not be returned to his natural parent, a burden which is, in the court's own words, "virtually impossible" to satisfy.[67]

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parent's sexual identity, and the extension of the parent's self-love to include the child. Such love will, in turn, result in better psychological development of the child, and, thereby, in the realization of the best interests of the child. *See Goldstein, supra* note 57, at 17 (biological parent usually credited with invariable, instinctive, positive tie to child); *Alternatives, supra* note 39, at 158. This theory, however, has been strongly attacked. *See Goldstein, supra* note 57, at 17 (suggesting that the incidence of infanticide, abuse, battering, neglect, and abandonment disproves the theory and maintaining that an absent biological parent will not become a "psychological" parent); *Alternatives, supra* note 39, at 158-59. *Cf. Determination, supra* note 39, at 1328 (parental presumption basically inconsistent with best interest rule).

63. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167, 207 (1969).

64. Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 203, 274 N.E.2d 431, 435, 324 N.Y.S.2d 937, 943 (1971).

65. *Cf. In re* Sanjivini K., 47 N.Y.2d 374, 382, 391 N.E.2d 1316, 1321, 418 N.Y.S.2d 339, 344 (1979) (in best interests to be raised by parents unless parents are unfit); Bennett v. Jeffreys, 40 N.Y.2d 543, 548, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 827 (1976) (extraordinary circumstances trigger best interests test); *Alternatives, supra* note 39, at 153. *See also* N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1979-1980) (legislature finds that natural parents can usually best meet a child's need for normal family life and that natural parents are entitled to bring up their own children unless the best interests of the child are thereby endangered; court may terminate parental rights and free destitute or dependent child for adoption).

66. *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 229, 156 N.E.2d 700, 704, 183 N.Y.S.2d 65, 71 (1959). The agency stands "in a representative capacity as the protector of Laura's mother's inchoate custodial right and the parent-child relationship which is to become complete in the future." *Id.* at 229, 156 N.E.2d at 704, 183 N.Y.S.2d at 70.

67. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 391, 386

III. Court of Appeals Decision

In *Ninesling v. Nassau County Department of Social Services*, the New York Court of Appeals noted its *parens patriae* duty to award custody based on the best interests of the child.[68] The court examined the burden of proof that foster parents must meet to establish that awarding custody to them would serve the child's best interests.[69]

The court first discussed the situation in which foster parents seek to win custody in opposition to a natural parent:

> [Under prior case law,] it is not sufficient for the foster parents to demonstrate that they would offer the child a better home: they have a far greater burden. To succeed, they must demonstrate

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N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978).

68. *Id.* at 382, 386 N.E.2d at 235, 413 N.Y.S.2d at 626. The scope of appellate review in custody cases is restricted to a determination of whether the supreme court abused its discretion or committed an error of law. *See In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959); Mundie v. Nassau County Dep't of Social Servs., 88 Misc. 2d 273, 387 N.Y.S.2d 767 (Sup. Ct. Nassau County 1976); *Determination, supra* note 39, at 1325. *But see* McCanliss v. McCanliss, 255 N.Y. 456, 175 N.E. 129 (1931) (Cardozo, J.) (appellate division can deal with custody question on its merits). The *Ninesling* court did not discuss the scope of its review.

69. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 630 (1978).

The supreme court had stated:

> The sole issue herein is whether or not it is in the best interests of Chuck to be removed from the foster home for the purpose of placement in a proposed adoptive home. Stated another way, will removal of Chuck from his foster home for the purpose of placement for adoption cause permanent detrimental harm to Chuck. The issue herein does not narrow to a determination as to whether the present foster parents or the proposed adoptive parents are better equipped to raise Chuck, or whether the foster parents or the proposed adoptive parents can offer better surroundings . . . .
>
> . . . .
>
> The overriding consideration is what grave psychological trauma will fall to Chuck if he is removed from the home of the foster parents to be placed in an adoptive home.

Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77, at 3-4 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977). By examining the possibility of grave psychological trauma, the supreme court may have been inquiring about the existence of an extraordinary circumstance, and thereby employing the grave detriment standard applied in the past in the foster parent-natural parent context. *See* notes 64-66 and accompanying text *supra* (discussing grave detriment). *Cf.* Bennett v. Jeffreys, 40 N.Y.2d 543, 550, 356 N.E.2d 277, 284, 387 N.Y.S.2d 821, 827 (1976) ("child may be so long in the custody of the nonparent that . . . the psychological trauma of removal is grave enough to threaten destruction of the child"). The supreme court's consideration of grave psychological trauma was not mentioned by the court of appeals.

> that the return of the child to his or her natural parent would result in the child's grave detriment.[70]

The court stated that, by analogy, foster parents must also meet a heavy burden when they seek to win custody in opposition to a department with legal custody of a foster child surrendered for adoption.[71] According to *Ninesling*, in this situation:

> [F]oster parents . . . must demonstrate not only that they would make suitable adoptive parents,[72] but, rather, that they would provide a better adoptive home[73] than that planned by the department or agency.[74] In other words, to succeed foster parents

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70. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 630 (1978).

71. *Id.* at 389, 386 N.E.2d at 239, 413 N.Y.S.2d at 630-31.

72. Whether suitability is a separate element which foster parents must demonstrate in addition to demonstrating that theirs is the "better adoptive home," or whether suitability is a threshold issue which then becomes subsumed within the "better adoptive home" element, is not clear. *See* note 73 *infra* (discussing better home).

73. For a discussion of the lack of opportunity or known standard for comparison in determining the better home whenever departmental plans are unrevealed and, perhaps, when plans are revealed, see note 79 *infra*. If an actual comparison is made, the determination of the better home logically should involve a broad inquiry into the best interests of the child. *See* Nehra v. Uhlar, 43 N.Y.2d 242, 250, 373 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977) (best interests of the child is the "paramount concern in all custody matters"). Thus, the inquiry should include the particular circumstances of the child and the qualifications of all prospective adoptive parents. Such broad interpretation of better home is consistent with the court's "analogy" of the *Ninesling* situation to the foster parent-natural parent situation. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 630 (1978). *See* text accompanying note 71 *supra*. In the foster parent-natural parent situation, after the presumption which favors the natural parent is rebutted, *see* notes 59-66 and accompanying text *supra*, the court will broadly inquire into all relevant factors in assessing the best interests of the child. Bennett v. Jeffreys, 40 N.Y.2d 543, 548, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 826 (1976).

74. The "planned" home can be interpreted as meaning either the currently proposed adoptive home or the eventually realized adoptive home. While the detrimental impact standard explicitly requires a comparison of the foster home to some other home, the opinion does not clearly indicate whether the other home against which the foster home is to be measured is, in fact, the proposed adoptive home or the ultimately realized adoptive home.

Ninesling can be interpreted as requiring a comparison to the proposed home. Foster parents must demonstrate that their home is better than that "planned" by the department. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978). By a common sense interpretation, a currently proposed home would be a planned home.

On the other hand, *Ninesling* can also be interpreted as requiring a comparison to the realized adoptive home. The court states that foster parents must prove their home

must bear the burden of showing a detrimental impact upon the child resulting from his or her removal from their foster care.[75]

The court indicated that this burden of detrimental impact is lighter than the burden of grave detriment that must be met to gain custody in opposition to natural parents.[76] Nevertheless, the court also indicated that a custody proceeding would not provide an appropriate opportunity to evaluate and compare the qualifications of foster parents and proposed adoptive parents.[77]

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better than the home of "the, as yet undetermined, parents" who the Department "would eventually select to adopt." *Id.* at 390, 386 N.E.2d at 240, 413 N.Y.S.2d at 631. The court further indicates that foster parents are not likely to succeed "inasmuch as the adoptive plan formulated by the child's legal custodian remains as yet unrealized." *Id.* at 391, 386 N.E.2d at 240, 413 N.Y.S.2d at 631. *See* note 79 *infra* (discussing the burden of proof of foster parents under the above alternative interpretations of planned home in two situations: when adoptive plans are not revealed and when adoptive plans are revealed).

75. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239-40, 413 N.Y.S.2d 626, 631 (1978).

76. *Id.* at 389, 386 N.E.2d at 239, 413 N.Y.S.2d at 631. Proving grave detriment requires an initial showing of some "extraordinary circumstance which would drastically affect the welfare of the child," Bennett v. Jeffreys, 40 N.Y.2d 543, 549, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 827 (1976), such as the unfitness of the natural parent or the natural parent's prolonged separation from the child. *See* notes 64-66 and accompanying text *supra*. *Cf.* Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978) ("not sufficient for the foster parents to demonstrate that they would offer the child a better home"). A judicial finding of such extraordinary circumstances will rebut the presumption that awarding custody to the natural parent will serve the best interests of the child. *See* Bennett v. Jeffreys, 40 N.Y.2d 543, 547-48, 356 N.E.2d 277, 282-83, 387 N.Y.S.2d 821, 825-26 (1976). *See also* notes 59-67 and accompanying text *supra*. Once the presumption is rebutted, the court will examine all the circumstances affecting the child including the qualifications of the foster and natural parents. *See* Bennett v. Jeffreys, 40 N.Y.2d at 548-52, 356 N.E.2d at 282-85, 387 N.Y.S.2d at 826-29. Thus, for foster parents to win custody in the foster parent-natural parent context, the foster parents must demonstrate grave detriment, and this requires initial proof of some extraordinary circumstance.

Establishing detrimental impact requires proof that the foster home is a suitable adoptive home and that the foster home is a better adoptive home than that planned by the department. *See* notes 72-73 *supra* (discussing suitable and better home). Proof of detrimental impact does not require proof of an extraordinary circumstance. Hence, the articulated burden of proving detrimental impact is lighter than the burden of proving grave detriment. In short, the court appears to be correct in stating that it is imposing a burden, in the *Ninesling* context, "[i]n a similar vein, although to an obviously lesser degree." Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978). *But see* note 79 *infra* (discussing situations in which it will be impossible, as a practical matter, to prove detrimental impact).

77. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978). *See* Alan D.M. v. Nassau County Dep't of

The court went on to state that proving detrimental impact would be "virtually impossible, as a practical matter."[78] Foster parents, in order to win custody, would have to prove that the home they provide would better serve the child's interests than that provided by the "as yet undetermined" parents the department "would eventually select."[79]

Social Servs., 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dep't 1977). *But cf.* Williams v. Windham Child Care, 55 A.D.2d 146, 147, 389 N.Y.S.2d 860, 861 (1st Dep't 1976) (although court refused to determine eligibility to adopt on writ of habeas corpus, court stated, in dictum, that in an appropriate case its role as *parens patriae* would permit it to cut through "procedural thickets" for the best interests of child).

78. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 391, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978).

79. *Id.* at 390, 386 N.E.2d at 240, 413 N.Y.S.2d at 631. During custody proceedings, adoptive plans may be revealed or unrevealed. The adoptive plans in *Ninesling* were unrevealed, although nowhere in its opinion does the court of appeals state this fact. *See* note 7 *supra*. *Ninesling* requires either a comparison of the foster home with the proposed adoptive home or with the eventually realized adoptive home. *See* note 74 *supra* (discussing these alternative interpretations of planned home). If adoptive plans are not revealed, as in *Ninesling*, either comparison will impose an impossible burden of proof on foster parents unless they qualify for a statutory adoption preference. *See* note 82 and accompanying text *infra* (discussing the preference).

Ninesling can reasonably be interpreted as requiring a comparison with the realized adoptive home. Adoptive plans may be changed prior to adoption; therefore, the identity of the realized adoptive home cannot be known until an actual adoption occurs. Whether the proposed home will become the realized home also cannot be known prior to adoption. Thus, under this interpretation, it is immaterial whether adoptive plans are unrevealed, as in *Ninesling*, or whether plans are revealed. In either situation, at the time of the custody proceeding, foster parents do not know the identity of the realized adoptive home. They could succeed against this unknown home only by proving their own home better than any possible adoptive home the department might choose, a practical impossibility unless the foster parents qualify for a statutory adoption preference. *See* note 82 *infra*.

Alternatively, *Ninesling* can be interpreted as requiring a comparison with the proposed, rather than the realized, adoptive home. *See* note 74 *supra*. If the proposed adoptive plan were not revealed, as in *Ninesling*, and if comparison with the proposed home were required, foster parents would again have to prove their superiority to an unknown. As a practical matter, foster parents could only succeed in winning custody by qualifying for a statutory adoption preference.

If the proposed adoptive plan were revealed, and if comparison with the proposed, as opposed to the realized, home were required, the opinion does not clearly indicate whether the foster parents would be permitted to make this comparison and thereby meet their burden of proof. *Ninesling* indicates that, in custody proceedings, the qualifications of proposed adoptive parents are not at issue and foster parents "have no medium" in which to prove their home better. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978). Thus, even if the identity of the proposed home were both relevant and known, an opportunity to make the comparison might be lacking. This interpretation would again present foster

The court stated that the "inherent difficulty" of proving that a child's best interests would be served by awarding custody to the foster parents is "tempered" by the "legislative recognition that at the expiration of an extended period of foster care the [Department's adoptive plan] . . . loses something of its prima facie validity as an expression of the best interests of the child."[80] Pursuant to statute, foster parents who had continuously cared for a child for a period of at least two years could apply to adopt the child and would receive a preference over other adoption applicants.[81]

Although the Nineslings had, at the time of the court of appeals decision, cared for Chuck for more than two years, the court refused to apply the statutory adoption preference.[82] The court noted that only four months had elapsed when the Nineslings first received notification of removal and that their own actions had caused the subsequent delay.[83] The court indicated that a contrary decision would encourage foster parents to bring litigation, delay removal, and "render nugatory the two-year custodial requirement imposed by the Legislature."[84] The

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parents with an impossible burden of proof unless they qualify for a statutory adoption preference.

Under all interpretations, if, as in *Ninesling*, adoptive plans are not revealed, the court of appeals imposed an impossible burden of proof upon foster parents who do not qualify for a statutory adoption preference. If adoptive plans are revealed, however, the opinion does not clearly indicate whether foster parents will have either an opportunity or a known standard for comparison; lack of either would again impose an impossible burden upon foster parents who do not qualify for a statutory preference.

80. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 631 (1978).

81. N.Y. Soc. Serv. Law § 383(3) (McKinney 1976). *See* note 16 *supra*.

82. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978). Although *Ninesling* was a custody, and not an adoption, proceeding, the court specifically addressed the applicability to the Nineslings of the statutory adoption preference. Thus, an inference can be drawn that foster parents could use their preference eligibility in a custody proceeding to meet their burden of proof. Moreover, the possibility that foster parents could thereby meet their burden of proof is consistent with the court's characterization of the detrimental impact standard as "virtually impossible," rather than as "impossible." *See* note 79 *supra* (discussing whether the burden is necessarily impossible in all situations in which the foster parents do not qualify for the statutory preference).

83. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978). *But see* note 127 and accompanying text *supra* (discussing the dissenters' view on court-ordered delays).

84. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386

court also expressed great concern that allowing foster parents to delay would undermine the foster care system by destroying its temporary nature, and thereby cause "a concomitant return to institutionalized temporary care."[85] As Judge Wachtler indicated in his dissent, by upholding departmental plans, *Ninesling* makes it more difficult for foster parents to obtain future judicial stays and to delay removal of a foster child.[86]

When the court began its determination of the child's best interests, it noted that "the nature and function of foster care as a program must be borne in mind."[87] In establishing the appropriate burden of proof, the court considered the "future viability" of foster care.[88] Finally, the court, in summation, stressed the danger to "continued utilization" of the foster care system if foster parents were permitted to "frustrate" departmental plans.[89]

IV. Analysis

A. *Virtually Impossible Burden of Proof*

Prior to *Ninesling*, a heavy burden of proof was imposed upon foster parents seeking custody of a child in opposition to a natural parent. *Ninesling* enunciated a new standard, detrimental impact, that applies in a foster parent-departmental contest for custody of a surrendered child. The court of appeals noted that this new standard imposes a virtually impossible burden of proof on foster parents. If, as in *Ninesling*, adoptive plans are not revealed, the detrimental impact standard actually places an impossible burden of proof upon foster parents who do not qualify for a statutory adoption preference.[90]

The propriety of placing a heavy burden of proof on foster parents opposing a natural parent may be questioned: a neutral assessment of the child's best interests is thereby foreclosed;[91]

N.E.2d 235, 240, 413 N.Y.S.2d 626, 631 (1978).

85. *Id.* at 388-89, 386 N.E.2d at 239, 413 N.Y.S.2d at 630.

86. *Id.* at 392, 386 N.E.2d at 241, 413 N.Y.S.2d at 632 (Wachtler, J., dissenting).

87. *Id.* at 387, 386 N.E.2d at 238, 413 N.Y.S.2d at 629.

88. *Id.* at 389, 386 N.E.2d at 239, 413 N.Y.S.2d at 629.

89. *Id.* at 390, 386 N.E.2d at 240, 413 N.Y.S.2d at 629.

90. *See* note 79 *supra*.

91. *See Determination*, *supra* note 39, at 1328.

the child is treated as a species of property in which the natural parent has a right;[92] the natural parent and the child may not have developed a healthy psychological relationship;[93] the absent natural parent and the child may have developed no psychological ties at all.[94] Further, the court of appeals recently has broadened the category of circumstances which will rebut the parental presumption,[95] and the legislature has eliminated the parental presumption after a child has been surrendered for adoption;[96] this indicates a general trend towards circumscribing the parental presumption and requiring a neutral determination of best interests.[97] Several of the above factors suggest that it is equally inappropriate to place a heavy burden of proof upon foster parents who seek custody of a surrendered child. In this situation as well, a neutral assessment of best interests is foreclosed; the child is treated like a chattel; and imposing a heavy burden seems to contradict the legislative and judicial trend towards eliminating barriers to a neutral best interests determination.

Nevertheless, the presumption in favor of the natural parent, with the corresponding heavy burden of proof placed upon the opposing foster parents, can be justified on historical, constitutional, sociological, and psychological grounds, justifications which do not pertain to a department nor to prospective adoptive parents. Placing a heavy burden of proof on foster parents opposing a natural parent is justifiable, in part, on the basis of the historically developed common law "parental right."[98] No

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92. *See* note 60 *supra*.

93. *Goldstein, supra* note 57, at 17. *Cf.* M. BENET, THE POLITICS OF ADOPTION 216 (1976) (noting child abuse and battering).

94. *Goldstein, supra* note 57, at 17.

95. Bennett v. Jeffreys, 40 N.Y.2d 543, 546-47, 356 N.E.2d 277, 281-82, 387 N.Y.S.2d 821, 825 (1976).

96. N.Y. Soc. SERV. LAW § 383(5) (McKinney 1976).

97. *See* Bennett v. Jeffreys, 40 N.Y.2d 543, 546-48, 356 N.E.2d 277, 281-83, 387 N.Y.S.2d 821, 824-26 (1976).

98. *See* notes 37-38 and accompanying text *supra*. *Cf. In re* Sanjivini K., 47 N.Y.2d 374, 382, 391 N.E.2d 1316, 1321, 418 N.Y.S.2d 339, 343 (1979) ("neither is the child the property of the State").

A 1925 case, Our Lady of Victory Infant Home v. Venniro, 126 Misc. 135, 212 N.Y.S. 741 (Sup. Ct. Monroe County 1925), which was not cited by the *Ninesling* court, did devise a doctrine of custodial "superior right". In *Venniro*, a habeas corpus proceeding, a child of English-speaking background was removed from the home of Italian-speaking foster parents and returned to the agency which was his legal custodian. The child, who

comparable common law doctrine supports the placing of a heavy burden of proof upon foster parents if the child will not be returned to the natural parent.

A natural parent also has rights of recognized constitutional magnitude to the custody of his child and to the control of the upbringing of his child.[99] These rights cannot readily or lightly be displaced by the state without violating the parent's Fourteenth Amendment due process rights.[100] Thus, a heavy burden of proof when opposing a natural parent is justified and perhaps necessary as a response to constitutional requirements. Neither the department nor a prospective adoptive parent possesses comparable constitutional rights, and thus, no constitutional justification supports placing a heavy burden of proof on foster parents seeking custody of a surrendered child.

A heavy burden of proof in opposition to a natural parent

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was surrendered for adoption, had been in the care of the foster parents for several years. Since both the agency and the foster parents were proper guardians, the court awarded custody to the agency based upon the agency's superior right as legal custodian of the child. The court refused to assume that the child would not be properly cared for under agency control. Moreover, the court noted that the agency's refusal to consent to adoption by the foster parents foreclosed the development of a complete parent-child relationship. *Id.* *See* note 129 *infra* (discussing adoption consent and impermanent status).

Only in one other New York case, *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959), has "superior right" been considered in awarding custody. In this case, however, it was expressly found that an award to the agency would be in the best interests of the infant. Since "best interests" alone could control, any reliance on a "superior right" theory could be viewed as dictum. Moreover, *Jewish Child Care*, unlike *Venniro* and *Ninesling*, involved a child who had not been surrendered for adoption and who would eventually be returned to her natural mother, thus buttressing "superior right" with "parental right."

Venniro has been criticized as internally inconsistent in finding a superior right in the agency while at the same time recognizing the inherent power of the court to determine best interests without being bound by an agency decision. Fitzsimmons v. Liuni, 51 Misc. 2d 96, 103-04, 272 N.Y.S.2d 817, 826-27 (Family Ct. Ulster County), *rev'd on other grounds*, 26 A.D.2d 980, 274 N.Y.S.2d 798 (3d Dep't 1966). Moreover, performance of the *parens patriae* function does not involve a determination of "rights" between parties and is therefore inconsistent with awarding custody on the basis of "superior right." *See id.* at 103-04, 272 N.Y.S.2d 817, 827; Mary I. v. Convent of Sisters of Mercy, 200 Misc. 115, 123, 104 N.Y.S.2d 939, 947 (Sup. Ct. Kings County 1951) (test of superior rights to custody is unacceptable). *See also* notes 48-50 and accompanying text *supra*.

99. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 213-15 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

100. *See* note 99 *supra*.

can also be justified as a means of strengthening existing family units, and thereby preserving both the values of family life and the role of the family in society.[101] Between surrender and adoption, a child is not part of any permanent family unit. Sociological considerations which indicate that the child should be permanently placed in an adoptive home and thereby become part of a family unit[102] do not dictate which home should become the child's adoptive home. If both the foster parents and the adoptive parents proposed by the department are suitable[103] and able to adopt,[104] no sociological justification exists for favoring those adoptive parents initially selected by the department, nor for placing a heavy burden of proof on the foster parents.

In addition, some psychological basis exists for a parental presumption and thus for placing a heavy burden on foster parents opposing a natural parent. Biological ties alone may result in ties of affection and love, leading to sound psychological development in the best interests of the child.[105] No such positive psychological basis supports placing a heavy burden upon foster parents after the child has been surrendered for adoption by the natural parent. Instead, psychological theory supports favoring the foster parents. Strong emotional ties may have developed during the foster relationship and the foster parents may have become "psychological" parents to the child.[106] Statutory recog-

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101. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167, 207 (1969). *See* J. BENNETT & M. TUMIN, SOCIAL LIFE 545, 548-49 (1949) ("family . . . [has] been traditionally considered as indispensable to the 'ongoingness' of American society"; "from the family . . . the child first acquires his place in society . . . [h]is identity . . . the basic models of behavior . . . [his] values . . . [and the] conception any child has of himself"); B. BERELSON & G. STEINER, HUMAN BEHAVIOR 313-14 (1964) ("family has . . . universal importance in human society . . . [and] performs major social functions . . . [such as] child rearing . . . placement [of the child] in the class system, emotional support"); P. ROSE, THE STUDY OF SOCIETY 524 (1967) ("family is . . . the primary agency of socialization . . . [and] ascribes initial status to the individual, teaches him the basic skills, instills aspirations and sets limits upon them, and provides him with models of performance").

102. *See* note 101 and accompanying text *supra*. *Cf.* R. ISAAC, ADOPTING A CHILD TODAY 208 (1965) ("adoption provides the best way of providing love and care for the child whose parents cannot or will not provide that love and care themselves . . . accepted pretty much without question by the social work profession").

103. *See* note 72 and accompanying text *supra*.

104. *See* note 129 *infra*.

105. *See* note 62 *supra* (discussing psychological basis for parental presumption).

106. *Cf.* 1 J. BOWLBY, ATTACHMENT AND LOSS 306 (1969) (role of principal attach-

nition has been given to the strong psychological links that develop when a child has remained with foster parents for over two years, as well as to the emotional disturbance, perhaps permanent, that might occur if the child were uprooted.[107] Recently, the statutory period was reduced to eighteen months,[108] thereby indicating legislative recognition that strong psychological bonds develop in a relatively short period of time. The affection relationship that develops in a child's first year with his parent-substitute is believed to be the prototype for any subsequent relationships developed by that child.[109] After such a relationship

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ment-figure can be taken by mother-substitute); Banham, *The Development of Affectionate Behavior in Infancy*, in HUMAN DEVELOPMENT 206, 211 (1960) (affectionate attachments develop towards person bringing up child); Bowlby, *Child Care and the Growth of Love*, in HUMAN DEVELOPMENT 155 (1960) (deprivation of mother substitute or mother may adversely affect character development). A presumption favoring the foster parents finds support in the proposed standards unanimously approved by the Family Law Section of the American Bar Association at their 1963 annual meeting, which include the following:

> Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.

Standards Approved by Family Law Section, American Bar Association (1963), *reprinted in* Foster & Freed, *Child Custody (Part II)*, 39 N.Y.U.L. REV. 615, 628-29 (1964).

A presumption in favor of the foster parents, however, may not be warranted because the commitment made to the child is only temporary and is more easily terminable than is a natural or adoptive parent-child relationship. *See* Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 286 n. 16 (1971).

107. The legislature gave a preference and first consideration in adoption to such foster parents, N.Y. SOC. SERV. LAW § 383(3) (McKinney 1976 & Supp. 1979-1980), *see* note 28 *supra*, required that this preference be made a part of the contractual foster care agreement, N.Y. SOC. SERV. LAW § 374(1-a) (McKinney 1976), and allowed intervention as of right by such foster parents in any custody proceeding involving the foster child. N.Y. SOC. SERV. LAW § 383(3) (McKinney 1976 & Supp. 1979-1980).

In urging enactment of the preference, one interested organization stated:

> When a child has resided in a particular home for over 2 years, that home has become his "Island of Security." To uproot this child, who may have had many traumatic experiences in his past, is only increasing the possibilities of making him permanently emotionally disturbed.
>
> . . . .
>
> If foster families were given a preference: . . . .
>
> 4. Our community would be blessed with more children in good mental health.

Memorandum of Adoptive Parents Committee, N.Y.S. LEGIS. ANN. 335, 336 (1969).

108. *See* notes 27-28 and accompanying text *supra*.

109. *See generally Goldstein, supra* note 57; M. RIBBLE, THE RIGHTS OF INFANTS (2d

has developed, the trauma of separation may be the psychological equivalent of orphaning the child.[110] If a heavier burden is to be imposed, arguably, it should be placed upon the department, rather than the foster parents.

The court cited two cases to support the detrimental impact standard it articulated; neither case is controlling and one is clearly distinguishable. *State Department of Public Assistance v. Pettrey*,[111] a West Virginia case, while not controlling in New York, does lend support to the *Ninesling* decision. In *Pettrey*, the court awarded custody to a department as in the best interests of the child and stressed the following considerations, all of which also apply in *Ninesling*: the department was entitled to legal custody of the child; statutory requirements and contractual obligations of child custody arrangements must be upheld; and the contesting foster parents had made no showing that the department could not or would not provide a home for the child equivalent to, or better than, the home that the foster parents were then providing.

The *Ninesling* court also cited a Georgia case, *Drummond v. Fulton County Department of Family and Children Services*,[112] which is not controlling and is clearly distinguishable. The *Drummond* court held that an agency, which had legal custody of a child and the consent of which was necessary for adoption of the child, stood in loco parentis; had all the legal rights of

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ed. 1965) (first two years generally important and fourth month crucial in early emotional development); C. WENAR, PERSONALITY DEVELOPMENT FROM INFANCY TO ADULTHOOD (1971); Bowlby, *Child Care and the Growth of Love*, in HUMAN DEVELOPMENT, 155 (1960); Spitz, *Hospitalism*, 1 THE PSYCHOANALYTIC STUDY OF THE CHILD 53 (1945); Spitz, *Hospitalism*, 2 THE PSYCHOANALYTIC STUDY OF THE CHILD 113 (1947). *But see* Reingold & Bayley, *The Later Effects of an Experimental Modification of Mothering*, in READINGS IN CHILD BEHAVIOR AND DEVELOPMENT 86, 92 (C. Stendler ed. 2d ed. 1964) (minimizing most effects of institutionalization during first nine months of life but noting less verbalization).

110. *See generally* 2 J. BOWLBY, ATTACHMENT AND LOSS (1973); *Goldstein, supra* note 57; C. WENAR, PERSONALITY DEVELOPMENT FROM INFANCY TO ADULTHOOD (1971); Spitz, *Analytic Depression*, 2 THE PSYCHOANALYTIC STUDY OF THE CHILD 313 (1947).

111. 141 W.Va. 719, 92 S.E.2d 917 (1956). The natural mother had, by contract and in accordance with state law, relinquished the child for adoption. The natural mother, who was not seeking custody herself, attempted to repudiate the relinquishment and vest custody in the foster parents. Her attempted repudiation did not meet statutory requirements and, thus, was unsuccessful. *Id.*

112. 237 Ga. 449, 228 S.E.2d 839 (1976).

natural parents, including the benefit of a prima facie right to custody; and had absolute discretion to refuse to consent to adoption by the foster parents.[113] In Georgia, however, a best interests standard did not control a custody award in a contest in which a foster parent was a party; best interests only applied to a custody contest between natural parents.[114] In New York, on the other hand, a best interests standard is applicable in all custody adjudications.[115] Thus, neither *Drummond* nor *Pettrey* is authoritative support for the *Ninesling* court's enunciated detrimental impact standard.

Placing a heavy burden of proof on any foster parent seeking custody of a child can be questioned as distorting the best interests test. Nevertheless, historical, constitutional, sociological, and psychological bases do support a heavy burden of proof when foster parents oppose a natural parent. Neither these bases nor legal precedents, however, justify placing a heavy burden of proof on foster parents seeking custody of a child surrendered for adoption. Moreover, the *Ninesling* court actually goes beyond imposing an onerous burden and imposes a burden that it describes as virtually impossible to satisfy. Thus, the effect of the *Ninesling* decision on determinations of the best interests of a child is to accord more deference to a department than to a natural parent. Foster parents opposing a natural parent have an opportunity to satisfy their burden of proof because a natural parent's identity is known, and the natural parent's qualifications can be reviewed. Foster parents seeking custody of a surrendered child may have no opportunity to satisfy their burden of proof. The identity of the planned home may be unknown; no opportunity may exist to explore the qualifications of prospective adoptive parents; no opportunity may exist for foster parents to prove that their own qualifications are superior, either in

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113. *Id.* at 456, 228 S.E.2d at 846. The agency refused to consent to the foster parents' adoption of the child, who had lived in the foster home for more than two years. The agency gave no reason for its refusal, but racial difference between the foster parents and the child was known to be a factor in the agency's decision. *Id.* at 458, 228 S.E.2d at 847. The court held that the foster parents had not been denied equal protection or due process and that the foster parents had no standing to contest the absolute discretion of the agency to withhold adoption consent. *Id.* at 454, 228 S.E.2d at 843.

114. *Id.* at 451, 228 S.E.2d at 842.

115. *See* notes 51-58 and accompanying text *supra*.

the abstract, or in terms of the needs of the particular child.[116] Incomplete information compounds the difficulties of predicting a child's best interests.[117] A determination without inquiry into adoptive plans and without a fair consideration of the qualifications of the foster parents and the relationship between the foster parents and the child is based upon incomplete information and is, in fact, no gauge of the child's best interests at all. In addition, whenever foster parents fail to satisfy the detrimental impact standard, the department will retain legal custody of the surrendered child. The effect of establishing a standard which is virtually impossible to satisfy is to make it virtually impossible to deprive a department of legal custody. This amounts to an extreme vote of confidence in the social services system.[118]

B. *Refusal to Apply Statutory Preference*

The court of appeals denied the Nineslings the benefit of the statutory adoption preference.[119] The court was concerned that granting an adoption preference to foster parents who met the two year statutory requirement only through their delay in surrendering a foster child would encourage other foster parents to refuse to surrender children on demand.[120] In turn, such delay could undermine the temporary nature of foster care and thereby prompt a return to institutionalized temporary care.[121] It is clear that the Nineslings had not met the two year statutory requirement at the time either of the initial demand for return

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116. *See* note 79 *supra*.

117. *Cf.* Cusano v. Leone, 43 N.Y.2d 665, 371 N.E.2d 784, 401 N.Y.S.2d 21 (1977) (court cannot decide what is best for child without sufficient information on all possible custodians); Mnookin, *Foster Care — In Whose Best Interest?* in THE RIGHTS OF CHILDREN, 158, 173-85 (1974) (best interest test recognizes each child is unique; judge must have fullest knowledge of circumstances and available alternative arrangements). *But see* Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. Queens County 1950) (agency awarded custody on record which does not indicate whether adoptive parents selected or, if selected, their background; however, best interests standard specifically not followed).

118. The system has been criticized, and thus, such confidence may be unwarranted. *See* notes 32-35 and accompanying text *supra*.

119. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 240, 413 N.Y.S.2d 626, 632 (1978).

120. *See id.* at 391-92, 386 N.E.2d at 240-41, 413 N.Y.S.2d at 632 (Wachtler, J., dissenting).

121. *See id.* at 389, 386 N.E.2d at 239, 413 N.Y.S.2d at 630.

of the child or the initial judicial determinations.[122] Nevertheless, denial of the statutory adoption preference to the Nineslings can be questioned on several grounds.

According to legislative history, enactment of the preference had the dual purpose of benefiting both foster children and foster parents.[123] Foster children would be protected from the emotional disturbance caused by uprooting, and, if adopted by the foster parents, the children would benefit from the permanent status of adoption.[124] Judge Wachtler, in his dissent, stated that the primary purpose of the statute is to serve the child's best interest and that the child, who had not caused the delay, should not be denied this benefit.[125]

In addition, the Nineslings came within the literal language of the statute, having "cared for a child continuously for a period of two years or more."[126] Their retention of the child for over two years pursuant to court orders was legal and, as Judge Wachtler points out, distinguishable from a situation in which custody of a child is obtained by lawless abduction and self-

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122. *Id.* at 390, 386 N.E.2d at 240, 413 N.Y.S.2d at 631.

123. *See* note 107 *supra.*

124. *See id. Cf.* notes 109-10 *supra* (discussing psychological impact on the child). A 1970 amendment mandated that the requirements for the statutory preference be included in any foster parent-agency contract. N.Y. Soc. Serv. Law § 374(1-a) (McKinney 1976). The purpose of this latter amendment was to inform foster parents of their rights "so that this law can be properly implemented to the *advantage of the homeless children of this State.*" Memoranda of Adoptive Parents Committee, Inc., N.Y.S. Legis. Ann. 31, 32 (1970) (emphasis added).

125. Ninesling v. Nassau Dep't of Social Servs., 46 N.Y.2d 382, 392, 386 N.E.2d 235, 241, 413 N.Y.S.2d 626, 632 (1978) (Wachtler, J., dissenting). While the United States Supreme Court has recognized that children have some rights of constitutional magnitude, *see, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975); *In re* Winship, 397 U.S. 358, 365 (1970); Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969), no constitutional argument was made in *Ninesling.* Neither the supreme court nor the court of appeals addressed the possible need to appoint a "law guardian" for the child, an issue raised by the Nineslings' attorney. Brief for Appellant on Motion for Reargument at 8, Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

126. N.Y. Soc. Serv. Law § 383(3) (McKinney 1976). *See* note 28 *supra.* The statute has been strictly interpreted. *See* Williams v. Windham Child Care, 55 A.D.2d 146, 389 N.Y.S.2d 860 (1st Dep't 1976) (alternative holding) (denying preference to married woman separated from husband as not within words of statute: "any adult husband and his adult wife and any adult unmarried person"). A similar strict but literal interpretation of the statute would have permitted the Nineslings to claim the preference.

help.[127] Thus, denial of the adoption preference can be questioned on at least two grounds: the Nineslings, having continuously and legally cared for Chuck for two years, perhaps should have been permitted to claim the benefit; and the child should not have been denied the benefit.

C. *Preservation of the Foster Care System*

The *Ninesling* decision was actually based upon the court's stated concern that delay in giving up a child would destroy the temporary nature of the foster care system, thereby causing the social service system to rely instead on institutionalized temporary care.[128] The court of appeals focused on the role of the foster parents in precipitating delay.[129] The result of the *Ninesling*

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127. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 392, 386 N.E.2d 235, 241, 413 N.Y.S.2d 626, 632 (1978) (Wachtler, J., dissenting). *Compare* Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977) (mother abducted children, father's custody confirmed) *with* Golden v. Golden, 95 Misc. 2d 447, 408 N.Y.S.2d 202 (Family Ct. Rockland County 1978) (child's best interests transcend need to avoid child snatching). *See also* note 129 *infra* (discussing court-ordered "lawful custody" as a theoretical basis for adoption consent, a theory which could never be applied to illegally obtained custody).

128. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 630 (1978). "Abandonment of the foster care program with a concomitant return to institutionalized temporary care would deal a staggering blow needlessly to children already accustomed to the taste of a bitter pill." *Id.*

129. *Id.* The impact of delay on the system must be viewed separately from the impact of delay on the child. If the contesting foster parents were awarded custody but remained unable to adopt, the child would be perpetually consigned to an impermanent status. An evaluation of the best interests of the child necessarily requires consideration of impermanent status and all that emanates therefrom, such as inability to inherit, inability to ensure that foster parents will not choose to terminate the relationship, lack of social status, and lack of psychological security. *See* Fitzsimmons v. Liuni, 51 Misc. 2d 96, 114, 272 N.Y.S.2d 817, 837 (Family Ct. Ulster County), *rev'd on other grounds*, 26 A.D.2d 980, 274 N.Y.S.2d 798 (3d Dep't 1966); *In re* Adoption of Runyon, 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (Ct. App. 1969). *But see* Alan D.M. v. Nassau County Dep't of Social Servs., 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dep't 1977) (ultimate question of adoption need not be controlling on resolution of writ of habeas corpus; bootstrap argument that writ should be denied because department will not consent to adoption must be rejected).

In determining the weight to be accorded impermanent status, however, the difficulty of forecasting whether consent to adopt can be obtained and the possibilities of adoption without such consent must also be considered. The person or agency with "lawful" custody of the child must consent to adoption. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 1977). To predict that the Nineslings or any other foster parents could never receive agency consent is an uncertain proposition. This uncertainty is clearly demonstrated by the aftermath of *Ninesling*: the Department reversed its position and con-

decision will be to reduce the incentive of foster parents to seek court-ordered stays and, thus, to reduce the probability of delay in the future.

First, by placing a virtually impossible burden of proof on foster parents, the court reduced the likelihood of their success in a custody contest and, thus, reduced their incentive to contest custody at all. Second, in determining preference eligibility, the court refused to take cognizance of court-ordered stays. This refusal will reduce the likelihood that future stays will be sought in order to meet statutory requirements. Third, knowing that foster parents are unlikely to succeed in contesting custody, courts will have little basis on which to grant stays in the future. This result, in turn, will reduce the incentive of foster parents to seek such stays.[130] Thus, *Ninesling* helps preserve the smooth functioning of the foster care system.

The *Ninesling* court, however, did not effectively substantiate the theory that delay in giving up a foster child already surrendered for adoption would destroy the utility of foster care. The court relied, perhaps incorrectly, on several cases that recognize the importance of giving deference to agency determinations on removal in order to maintain an orderly and effective foster care program.[131] It cited *Spence-Chapin Adoption Service*

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sented to the Nineslings' adoption of Chuck. *See* N.Y. Post, Dec. 23, 1979, at 1. Agency consent to adoption has been waived in situations in which refusal to consent was an abuse of discretion. Alan D.M. v. Nassau County Dep't of Social Servs., 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dep't 1977). In addition, "lawful custody" arguably includes de facto custody pursuant to a lawful court order. Thus, theoretically, foster parents in the position of the Nineslings might be able to bypass the agency and consent to their own adoption of their own foster child. *Compare* Mary I. v. Convent of Sisters of Mercy, 200 Misc. 115, 123, 104 N.Y.S.2d 939, 947 (Sup. Ct. Kings County 1951) (implying foster parents with lawful custody might be able to approve adoption) *with* Fitzsimmons v. Liuni, 51 Misc. 2d 96, 114, 272 N.Y.S.2d 817, 837 (Family Ct. Ulster County) (specifically questioning the implication of *Mary I.* and stating that consent of public welfare commissioner is necessary for adoption), *rev'd on other grounds*, 26 A.D.2d 980, 274 N.Y.S.2d 798 (3d Dep't 1966). *See also Goldstein*, *supra* note 57 (advocating "common-law adoption"). *But see In re* Whitcomb, 271 A.D. 11, 61 N.Y.S.2d 1 (4th Dep't 1946) (no jurisdictional basis for adoption order if agency did not consent); *In re* Adoption of Pyung B., 83 Misc. 2d 794, 371 N.Y.S.2d 993 (Family Ct. Onondaga County 1975) (adoption statute created by state in derogation of common law must be strictly construed).

130. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 390, 386 N.E.2d 235, 241, 413 N.Y.S.2d 626, 632 (1978) (Wachtler, J., dissenting).

131. *Id.* at 388-89, 386 N.E.2d at 239, 413 N.Y.S.2d at 630. The court cited the two New York cases discussed in the text accompanying notes 132-35 *infra*. The court also

v. Polk[132] which expressed concern for the future viability of the foster care system if natural parents do not place children in foster care; if reluctant foster parents could delay giving up a child, natural parents might anticipate difficulties in regaining custody and choose not to place children in foster care in the first place. In contrast, *Ninesling* involved delays after a child was surrendered for adoption, and the *Ninesling* decision would not affect the return of a child to a natural parent. Delay in removing a surrendered child has only a tangential effect on the specific fears expressed in *Spence* and should not lead to avoidance of the foster care system by natural parents. The *Ninesling* court cited a second New York case, *Convent of the Sisters of Mercy v. Barbieri*,[133] in which the New York Supreme Court upheld agency plans. The *Barbieri* court expressed concern that the "boarding-out" system be preserved for the benefit of "hundreds, perhaps thousands, of little children."[134] Although *Barbieri* seems to support the *Ninesling* court's position, the *Barbieri* court acted contrary to its *parens patriae* duty by explicitly deciding against the best interests of the particular child whose custody was being determined.[135] The *Ninesling* court, on the other hand, professed to be satisfying its *parens patriae* duty while preserving the foster care system.

The requirement that a child must be given up on demand has already been diluted by various statutory provisions[136] with-

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cited cases from other jurisdictions: *In re* Adoption of Reinius, 55 Wash. 2d 117, 346 P.2d 672 (1959); *In re* Adoption of Runyon, 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (Ct. App. 1969). Some New York cases which the court failed to cite support a different position. *See* Alan D.M. v. Nassau County Dep't of Social Servs., 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dep't 1977) (doctrinaire or standardized approaches of placement system must give way to more urgent needs of individual child); Mary I. v. Convent of Sisters of Mercy, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. Kings County 1951) (system must yield to welfare of individual child).

132. 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

133. 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. Queens County 1950).

134. *Id.* at 113, 105 N.Y.S.2d at 4.

135. *Id.* at 113, 105 N.Y.S.2d at 3-4. "If this were an isolated instance, this court would have no difficulty in holding that upon the record the best interests of this child would be provided by permitting her to remain where she is." *Id.*

136. Prior to any removal of a child for whom they have continuously cared for a period of eighteen months or longer, foster parents can contest an order to return the child. *Cf.* N.Y. Soc. Serv. Law § 392 (McKinney Supp. 1979-1980) (periodic family court review). After eighteen months of continuous care, foster parents also have a preference when applying for adoption. N.Y. Soc. Serv. Law § 383(3) (McKinney Supp. 1979-1980).

out undermining the foster care system. The general fear that additional delays would have a devastating impact is therefore questionable. This anticipated impact is even more tenuous in the *Ninesling* context, in which the child has already been surrendered for adoption and the concerns of natural parents are not involved. Moreover, if delay would undermine the system, the legislature, which created the system, could devise corrective measures to ensure its preservation. The court need not have undertaken this task.

The court's stated primary obligation is to ensure that custody is awarded according to the best interests of the child.[137] Any concern of the court to protect the foster care system is secondary to its *parens patriae* function. The *Ninesling* court expressly committed itself to awarding custody based on the best interests of the child.[138] Nevertheless, the court opportunely, and perhaps incorrectly, foreclosed the possibility of conflict between preserving the foster care system and awarding custody based on the best interests of the child. The court accomplished this by requiring the Nineslings to satisfy an impossible burden in order to demonstrate that awarding custody to them would serve the child's best interests. Had the court not imposed this impossible burden, an application of the best interests test might have resulted in awarding custody to the Nineslings.[139]

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137. *See* note 51 and accompanying text *supra* (discussing best interests test as controlling custody award).

Specific statutory enactments do not affect the *parens patriae* jurisdiction or function of the court. *See* Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925). For example, the statutes granting an agency discretionary authority to remove a foster child will not supersede the *parens patriae* function of the court and prevent the court from awarding custody in the best interests of the child, even if this award reverses an agency determination. *See* Mundie v. Nassau County Dep't of Social Servs., 88 Misc. 2d 273, 279, 387 N.Y.S.2d 767, 772-73 (Sup. Ct. Nassau County 1976). Since the court's *parens patriae* function is not affected or diminished by a specific statute, it should not be affected or diminished by enactment of a legislative scheme.

138. Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d 382, 386, 386 N.E.2d 235, 239, 413 N.Y.S.2d 626, 630 (1978). *Compare* Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. Queens County 1950) (interest of particular child specifically sacrificed to preserve system for benefit of thousands of children) *with* Mary I. v. Convent of Sisters of Mercy, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. Kings County 1951) (system must yield to welfare of the particular child).

139. The Department had previously placed four other children in the Ninesling's temporary care and had presented the Nineslings with an award for their services as foster parents. *See* note 6 *supra*. The court of appeals stated that the Nineslings "appear

V. Conclusion

Prior New York case law established that, in situations in which a child has not been surrendered for adoption, foster parents can win custody in opposition to a natural parent, agency, or department only by showing that "grave detriment" would result if the child were removed from the foster home. In *Ninesling v. Nassau County Department of Social Services,* the New York Court of Appeals enunciated a similar standard for situations in which a child has been surrendered for adoption. Foster parents, under these circumstances, can win custody in opposition to a department only by showing that detrimental impact would result if the child were removed from the foster home. If adoptive plans are not revealed, as in *Ninesling,* this standard requires foster parents, who do not qualify for a statutory adoption preference, to prove the open-ended proposition that their home is better than any other adoptive home the department might choose. The *Ninesling* court also refused to apply the statutory preference since the two year continuous care requirement was met only because of court-ordered stays obtained by the foster parents.

The decision undermines the neutral application of the "best interests of the child" test by imposing a virtually impossible burden of proof on foster parents, a burden which is not justified by historical, constitutional, sociological, or psychological bases, or by legal precedent. The detrimental impact standard operates to assess, automatically and without inquiry, the best interests of the child in a situation in which adoptive plans are not revealed and foster parents do not qualify for a statutory preference. The court, professing to act in the best interests of the child, in reality did not examine and may have sacrificed the best interests of the particular child to ensure the preservation of the foster care system.

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to be of fine character." Ninesling v. Nassau County Dep't of Social Servs., 46 N.Y.2d at 387, 386 N.E.2d at 239, 413 N.Y.S.2d at 629. The supreme court praised the competency, character, and integrity of the Nineslings; however, it also recognized that their ages, 52 and 53, were a valid, although not critical, factor in determining custody based on the best interests of the child and an even more important factor in evaluating the Nineslings as adoptive parents. Ninesling v. Nassau County Dep't of Social Servs., No. 7810-77, at 36 (N.Y. Sup. Ct. Nassau County, Nov. 28, 1977).