

## **Competing Rights in the U.S. Foster Care System**

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### **Abstract**

*The process of taking children away from their biological parents and placing them under the care of foster parents is deemed by the state to be in their best interest. Legal rights often give the biological parents the freedom to visit their child and make life decisions for them, while the foster parents are given little more power than making everyday decisions while providing a stable home for the child. The children have fewer rights than the foster parents, in certain respects, and enjoying those rights often requires the assistance and knowledge of adults. This paper argues that many of these legal rights coincide with universal human rights that protect the rights of families, but that change needs to take place in the U.S. foster care system. More research also needs to be done to better understand how the rights of all involved parties can be protected.*

The United States child welfare system often has a negative image for the way children are separated from their families. These children may face instability as they move from home to home, and miss out on parental figures that provide them with love and support. The foster care system, for example, has a bad reputation due to family separation and the idea that foster families house them just to collect money from the state. However, this limited view of the U.S. foster care system is misleading. Even though children taken away from an unsafe home life are not guaranteed a better one through foster care, it does not mean this is the fate of all foster children. The system and how it handles family crises may not be perfect, but the idea behind the system is to protect (what the state and society

deems to be in) the child's best interest. This paper highlights some stereotypes of the U.S. foster care system and outlines some truths that may be surprising.

Debates aside for a moment, the simple fact is children in foster care are separated from their parents and placed under the care of someone else instead. Throughout this process, the rights of several different parties are called into question. Foster care is associated with the rights of four different groups: biological parents, foster parents, children, and the state. For this paper, only the first three groups will be looked at. According to the United Nations Universal Declaration of Human Rights, all people are guaranteed the right to found a family according to Article 16 (United Nations General Assembly, 1948). However, some could argue that the foster care system conflicts with this right by taking children from biological parents. On the other hand, it also raises the question of what exactly makes a family. Even though foster parents are not biologically related to a child, does this make them any less important in a child's life? Are they able to claim the rights to form and support a family which is not biologically their own? Likewise, under the U.N. Convention on the Rights of a Child, children are guaranteed the right to live with their parents – only being separated if it is for their own wellbeing – and even then they are supposed to have regular contact with their biological family. They have rights to grow and develop under the protection of the family free from harm and through the responsibility of their parents (Office of the High Commissioner for Human Rights, 1989). Again, the foster care system illustrates conflicting parties and how rights actually play out in reality. Although these rights are considered universal, the focus of this paper is on the United States and their foster care system. Therefore, this paper explores the various rights related to the U.S. foster care system, particularly in regards to competing rights claims by biological parents, foster parents, and even children.<sup>1</sup>

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<sup>1</sup> Research findings vary on how foster care may affect a child, but the point of this paper is not to lay out the possible consequences a child may face as a result of foster care. Nor is this paper aiming to fight for or against the foster care system. The aim of this paper is to show that throughout the foster care process, the rights of several different parties both clash and work together with at least the intention of protecting the best interest of the child.

## **Foster Care Background**

Foster care is “24 hour substitute care for children placed away from their parents and guardians and for whom the state agency has placement and care responsibility” (Schweitzer & Larsen, 2005, p. 2). The foster care system is primarily seen as a last resort to solving problems. However, sometimes it is necessary for a child to enter into a foster home for their own best interest. Reasons that a child may enter the foster care system can widely vary. Reasons include, but are not limited to: child abuse, neglect, domestic violence, drug and alcohol addictions, and mental health problems. Although these reasons can take place within any family, children who enter the foster care system are more likely to come from poor families (Maluccio, 1981). Being poor not only makes it harder for a family to fulfill a child’s needs, but the stressful environment can make it easier for these problems to occur. Notably, since children are guaranteed the right to parental care, being forced to separate from their parents for any reason not directly related to their well-being would be a violation of one’s human rights. Some children may actually enter the foster care system due to the request and action of a parent, but most children in the United States become foster children through the use of the courts. One way this happens is through Child Protective Services (CPS). CPS may intervene when they have reason to believe a child is in harm’s way. If their investigation shows that the home is not safe for the child, then minors may be placed in some form of out-of-home care, such as foster care.

When children become part of the foster care system, the move is generally viewed as a short-term fix for problems until a more permanent solution can be achieved – whether that be returning home to their biological parents (which is the state’s top priority) or by being adopted. Contrary to popular belief, most children in foster care actually enter the system in hopes of one day returning to their parents. According to the Adoption and Safe Families Act of 1997, the goal is that within 12 months of being placed in the foster care system, all children would be reunited with their biological families if

possible (Barth & Lloyd, 2010). Whether this actually happens is another story. If the circumstances which placed the child in foster care are too severe and cannot be remedied – such as ongoing abuse or neglect – then adoption becomes a child’s best hope for a permanent home and family. Over 50,000 children (about 20 percent of children in U.S. foster care) are adopted every year (Barth & Lloyd, 2010, p. 48). Before any adoption can take place, however, children usually spend significant amounts of time in foster care. Types of foster care include living with/in: an outside foster family, relatives or members of kinship groups, an emergency shelter, a therapeutic foster home, a group home, a residential treatment center, child care institutions, pre-adoptive homes, or an independent living situation for older children (Schweitzer & Larsen, 2005; National Technical Assistance Center for Children’s Mental Health, 2005).

Those in foster care enter the system at a range of different ages, but most children tend to fall between either under four years old or between ten and fourteen. Not surprisingly, those who are younger are more likely to get adopted than the older children. Younger ages tend to give children a better chance of being adopted, with infants under six months old having the greatest chance of adoption. However, this age group consists is only about 40 percent of the total amount of small children who eventually get adopted (Wulczyn, 2003). Recent research also shows that neither race nor gender seem to have an effect on how long a child will wait to be adopted (Barth & Lloyd, 2010).

### **Biological Parents**

If CPS is performing an investigation of the child and home, then the legal rights of the parent(s) are still intact. The rights may be suspended or terminated if the child is taken out of the family home due to an urgent situation (National Technical Assistance Center for Children’s Mental Health, 2005). The parents are still able to make decisions regarding their children and perhaps even frequently visit them, unless directed otherwise by the courts. In many cases, contact is actually encouraged. Scheduled

visitations are the most frequent kinds of contact, but other forms of contact (such as e-mail, telephone, and special occasion visits) permit children more ways to get in touch with their family. Scheduled supervised visitations may eventually grow into unsupervised visits and weekend visits. These visits tend to become more common, longer, and come with less rules and regulations if reunification is possible and gets closer (Sanchirico & Jablonca, 2000). The children who receive these parental visits are twice as likely to be released from the foster care system. On the other hand, the longer a child is in foster care, the more likely the amount of visits will decline (Fanshel & Shinn, 1978).

Even though children may maintain frequent contact with their biological parents, this separation of children and parents is still at fundamental odds with human rights to family. Children no longer enjoy parental care, and biological parents do not have the ability to supervise their family; the protection guaranteed to the family unit is disregarded in deference to the perceived best interests of the child. When a child is taken from the family to be placed in out-of-home care, the termination of parental rights may also take place. To warrant this drastic step, a situation usually includes circumstances such as abuse, neglect, abandonment, mental illness, addiction, and mistreatment or termination of parental rights in regard to another child in the house. However, in some cases, exceptions do exist; these exceptions take place when a child is given over to a relative's care, if the state believes it is in the best interest of the child, or if the parent has not been given the appropriate services outlined for family reunification to take place. In some U.S. states, depending on the severity of the reasons for termination as well as the time apart and status of the child, parental rights can be petitioned to be reinstated (Child Welfare Information Getaway, 2011).

Biological parents retain some legal rights to children in foster care, even while family separation infringes on some human rights related to the family unit. For instance, the parents have the right to suggest a family member or someone they are familiar with to take in the child. If the child is unable to be taken in by family or friends, then they are put into another form of foster care. Wherever

the child is placed, the family is required to sign a legal contract regarding the service plan, which outlines why the child was taken, the needs of the child, the goals of the plan (such as eventual reunification), and the actions which will be taken to meet those goals. The parents are also required to sign a "Release of Information Form" and a consent form so the children can receive the necessary care. Although the children may be living in a foster home, the parents still have rights to the child's records – such as medical records – and can make decisions related to health care. Also, the parents are still able to make decisions on significant life choices the child faces, such as those related to religion or education. These are referred to as the residual parental rights. Ultimately, in hopes of seeing eventual family reunification, the parents are likely to be part of the concurrent planning which takes place in foster care. This is when the family and the courts work together to keep the child in a stable, safe environment (such as with a foster family) and also work to bring the biological family back together. As the child temporarily lives within the foster care system, the biological parents try to successfully prove they are capable of following the service plan and creating the right home for their child to return to (National Technical Assistance Center for Children's Mental Health, 2005).

### **Foster Parents**

When a child is placed in a foster family's care, the foster parent(s) are given the task of looking after and caring for the children when they are separated from their biological families. This task comes with its own rights and responsibilities, which are central to the foster care system. Most importantly, the foster family has the responsibility to provide a child with a safe home for them to live and grow in during their time together. The foster parents are supposed to provide them with a nurturing environment which includes all the necessities, such as food and shelter, and to treat them as part of their own family. They have the right to make the day-by-day decisions concerning the child and his/her welfare. The same goes for the amount of authority they possess; for the most part, foster parents

become guardians and take on most of the decision-making in the child's daily life. As noted above, biological parents usually retain the right to make major decisions, such as those related to health care, education, and religion. The foster parents can drive the child to a medical checkup, enroll them in the public school district they live in, or bring him/her with the family to their religious services, but cannot take a more active role in making choices (Schweitzer & Larsen, 2005). This differentiation in terms of decision-making questions what it means to be a parent, to a degree. Similar to the case of surrogacy, foster parents provide the support and care a child is supposed to receive from biological parents that, for different reasons, they are unable to provide. While foster parents may hold some rights and responsibilities as they care for the child, the fact that they cannot make any major life decisions shows they do not have full legal custody of the foster child.

Although the primary goal of foster care is eventual family reunification of children and their biological parents, sometimes adoption by foster parents is possible. In the meantime, foster parents have the responsibility to support the process toward reunification; for instance, by complying with scheduled visits and encouraging the child and biological family to stay in contact. Although the foster families are not required to offer the biological family help, those who are willing to extend their help beyond the child can provide the family with various resources and skills to reduce the amount of time foster care is needed (Maluccio, 1981). If the parental rights of the biological family become terminated, the foster family can choose to gain the legal custody of the child either through legal guardianship or adoption. This choice gives the foster family more authority and power in making decisions for the child, as well as gives the child a more permanent home. However, it's important to note that foster parents have limited parental rights until legal guardianship or adoption is finalized.

## **The Children**

Throughout this paper, the focus has been placed on those who take the parental authority in a child's life, whether that is biological parents or foster parents. However, the main concern regarding these rights is the most important party in this family dynamic: the children. The whole reason the foster care system is in place is to provide for the child. Whether the child actually is reunified with their biological family or becomes permanently placed with another family, the goal is to ultimately make sure the child's needs are being met. The right to a safe environment – one which provides them with adequate support and safety – is that goal. These rights are outlined in the Convention on the Rights of the Child, which states that all children have universal rights to protection and a suitable standard of living that allows them to grow and develop (Office of the High Commissioner for Human Rights, 1989).

Although some children are able to choose which parent they want to live with after a divorce or custody battle, children in the foster care system often have little say in the matter. In fact, they have no legal power to determine who they will live with. If an older adult, such as a social worker, listens to their request and brings that to the court, only then will their preference will be listened to. In other words, a child does not have the legal right to make that decision and it will only be recognized through adult representation. Luckily, the children in the foster care system are promised a right to an attorney or guardian ad litem who is supposed to listen to their requests and attempt to fight for them (Schweitzer & Larsen, 2005). Other rights children are given include comprehensive health care, a free and appropriate education, and to a speedy home after separation from biological parents (Schweitzer & Larsen, 2005). Since children probably are not aware of these rights, adult representation is required to protect these rights for them. If children do not receive someone capable enough as their representation, they may not receive the proper care and rights they are promised.

According to at least one study, children in U.S. foster care believe that the process of entering foster care needs improvement. Respondents felt that they should have been better informed of what

to expect. Also, they thought more children should have the opportunity to have their voices heard about foster care – to protect their own rights, to have the ability to communicate their feelings, to cope with stress, and to provide other children with knowledge about going through similar situations (Mitchell et al., 2010). While the foster care system is in place to achieve what is best for the child, it is unfortunate that they are not given more voice in their own situations. Children are also guaranteed the human right to parental care, but foster care makes this difficult to achieve. Separated from biological parents while living with foster parents who lack full legal custody, children in foster care are in a difficult situation.

## **Conclusion**

The foster care system is difficult for many to understand and rightly so. Between the biological parents, the foster parents, and the children, there are at least three different sets of actors and three different sets of rights which need to be taken into consideration. While the U.S. foster care system may get a bad reputation and may not always carry out procedures in the most effective way, the intentions of foster care are focused on the best interests of the child.

Moving forward, more research is needed to better understand several aspects of foster care and how it relates to human rights. Before one could argue for or against current practices in foster care, for instance, more research would need to be examined regarding the possible effects of family separation and involvement in foster care. More research also needs to be done to understand the dynamic of the family structure in foster care. For example, even though the children and the biological parents are the legal family, the foster family is probably doing more parenting work towards the child, at least on a day-to-day basis. The issue of who is actually providing for the child is not taken into consideration when determining family rights. While it is very important that the biological parents have some of their parental rights even when their children are not in their custody, perhaps the definition of

a family should be expanded to include foster families, as well. If foster families were seen as a legitimate family unit, then they could perhaps be more able to advocate for human rights and state legal protections as such. On the other hand, recognition needs to continue being given to the biological parents so they do not lose their rights to their family unit and their ability to preserve their familial bonds. There are clearly many complexities involved here, so more consideration of what it means to be a family – and how family rights can be expanded to better cover the situation of foster care – is necessary. The rights of all need to be considered so everyone is able to legally exercise their rights as a family to the fullest extent, all for the best interests of the child.

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