

**DISPUTES OVER CHILDREN BETWEEN
NATURAL PARENTS AND FOSTER PARENTS:
A COMPARATIVE STUDY
OF RECENT DEVELOPMENTS**

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The Impact of *J. v. C.* in England

The decision of the House of Lords in the case of *J. v. C.*¹ was of considerable importance for two main reasons: it strengthened the hand of foster parents in disputes with natural parents over custody of children and, especially, undermined the notion that claims based on the rights of natural parents could prevail over the welfare of the children concerned. It is the purpose of this article to examine recent developments in relevant jurisdictions in relation to custody disputes between natural parents and foster parents and, in so doing, to consider the impact of *J. v. C.* on subsequent case law. The facts of *J. v. C.* are well known: a ten year old Spanish boy, who had not seen his natural parents since he was three, was in the care of an English solicitor and his wife. He had spent seventeen months in Madrid but could not stand the heat so that his natural parents asked the foster parents to take him back. The boy had become English in his ways and enjoyed a good relationship with the son of the foster parents. The natural parents, who were not in any way unsuitable, sought the boy's return. At first instance, Ungood-Thomas J. was of the view that the boy should not be returned to Spain on the grounds that he might well have problems adjusting to life there and, accordingly, directed that the foster parents should have care and control.² Ungood-Thomas J.'s decision was ultimately upheld by both the Court of Appeal and the House of Lords.

Perhaps the most important aspect of the case was the attitude expressed by Lord MacDermott, Lord Guest and Lord Pearson to s. 1 of the English *Guardianship of Infants Act 1925*. These members of the Court seemed to regard the welfare of the child as the only relevant consideration. The words of the enactment, said Lord MacDermott must mean more than,

. . . the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims, and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be allowed will be that which is most in the interests of the child's welfare . . . That is the first

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1. [1970] A.C. 668. For comment on some implications of this case see F. Bates, "Redefining the Parent/Child Relationship: A Blueprint" (1976), 12 U.W.A.L.R. 518, at 520 *ff.*

2. He also directed that the boy should be brought up a Roman Catholic, even though the foster parents were Anglicans, in an attempt to ease the boy's acceptance of his Spanish past.

consideration because it is of first importance and the paramount consideration because it rules on or determines all that follows.³

There can be little doubt, it is suggested, that this is a particularly significant statement of judicial policy, despite the facts that Freeman does not consider it to be a legitimate interpretation of the statute⁴ and that Lord Upjohn and Lord Donovan, who came to the same ultimate conclusion, adopted a more traditional approach. Their view can be represented by Lord Upjohn's comments that, "The natural parents have a strong claim to have their wishes considered; first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the child that he should be with them, but also because as natural parents they themselves have a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world."⁵

In England, the influence of *J. v. C.*, both direct and indirect in many areas of child law,⁶ has been considerable and the broad principles enunciated in it seem to have generally been accepted. Examples factually close to *J. v. C.* are provided by the cases of *Re O.*⁷ and *Re E.O.*⁸ In the former case, English foster parents had applied for care and control of a nine year old girl born in England of Ghanaian parents, who was a ward of the court. She had been placed with the foster parents at the age of three months and had remained with them ever since. Until 1970, the natural parents had visited her about six times a year, but had not, apart from two gifts of money, contributed to her upkeep. In 1971, when she was staying with the natural parents for a short time, the girl learned of their intention to take her back to Ghana. She was very distressed about this and telephoned the foster parents who came and took her to their home. There was evidence that she regarded the foster parents as her natural parents and her natural parents as strangers and she had written a spontaneous letter to the President of the Family Division of the High Court in which she expressed a desire to remain in Britain. Sir George Baker P., after expressing an awareness of the difficulty of the case, held that the girl should remain a ward of court and that care and control be awarded to the foster parents. On behalf of the natural parents, the Official Solicitor contended that it would be in the child's best interest to return to Ghana on the basis that her home, her colour and the social situation existing in Britain could

3. *Supra* n.1, at 710.

4. M.D.A. Freeman, "Child Law at the Crossroads" (1974), 27 C.L.P. 165, at 184.

5. *Supra* n.1, at 724.

6. Particularly in adoption; see F. Bates *Supra* n. 1, at 521-24 and "Consent in Adoption Cases and the Nature of the Relationship of Parent and Child" [1977] S.L.T. 4.

7. (1973), 3 Fam.L. 40.

8. (1973), 3 Fam.L. 48.

result in difficulties of employment, marriage prospects and general racial prejudice. The President, however, noted the possibility of a different kind of racial prejudice existing in Ghana and commented that the girl was an English natural by birth and wholly English by nature and that, after nine years of fostering, her natural father had no insight into her character and, thus, the President said that he could not bring himself to return the girl to Ghana without a sense of injustice.⁹ In *Re E.O.*, which involved facts very similar to those in *Re O.*, the Court of Appeal reversed a decision of Latey J. to return a 5 year old girl of Nigerian background to her natural mother who had returned to Nigeria. Davies L.J., as Baker P. had done in *Re O.*, emphasised that the child had a Western upbringing and was as Western as any English girl, and in Nigeria she would have been in a totally alien environment.¹⁰ To some degree, despite Latey J.'s decision at first instance, in one respect, at least, *Re E.O.* was an easier decision to make than that in *Re O.*: In *Re E.O.* there was evidence that the mother was unreliable and had shown little understanding or affection for the girl.¹¹

The Australian View

The Australian courts, however, have taken a somewhat different view of the position: in *Powell & Anor. v. Anderson*¹² the natural parents of a three and a half year old boy had appealed against a decision refusing to order that the foster parents, who had cared for the boy for approximately three years, to return him to them. It was agreed between the parties that the child had been given into the foster parents' custody on a temporary basis when the natural father's father had died. He remained with the foster parents because they had developed an attachment for him, because of his natural mother's pregnancy and because her father had also died. Although the natural father was illiterate and had been unemployed, there was no evidence that either he or his wife were unfit to have custody by reason of cruelty or neglect as was required by s. 10 of the New South Wales *Infants' Custody and Settlement Act 1899-1934*, before custody could permanently be given to a third party. There was also evidence to the effect that they had tried to get their son back and, indeed, had done so on two separate occasions but had returned him to the foster parents when he showed distress in his new surroundings. The New South Wales Court of Appeal allowed the natural parents' appeal and ordered that the child be returned to its natural parents before a specified date.

9. *Supra* n. 7.

10. *Supra* n. 8.

11. *Id.*, at 48, per Davies L.J.; *Id.*, at 49, per Cairns L.J.

12. (1977), F.L.C. 90-235 at 76, 254.

Although the Court of Appeal could probably have justified their decision simply by reference to the legislation,¹³ they elected to consider the matter on a broader basis. In what might be described as the leading judgment, Moffitt P. considered that the trial judge, Allen J., had appeared to base his decision to leave the child with the foster parents on the grounds that it would cause him immediate distress to be returned to his natural parents.¹⁴ Moffitt P., however, went still further when he stated that,

When the welfare of a child is under consideration, being brought up by its natural parents within its own family group must be regarded as a powerful, almost dominant consideration, not to be overridden except by considerations, which demonstrate in the clearest fashion, that its welfare demands otherwise. This is a simple truth long accepted by any wise parent in communities such as ours structured on the family.¹⁵

Moffitt P. adduced, in support of his view, *dicta* by Latham C.J. and Dixon J. in the High Court of Australia's decision in *Storie v. Storie*¹⁶ and, perhaps a little surprisingly, Lord MacDermott's judgment in *J. v. C.* In *Storie*, Latham C.J. had said that,

Prima facie the welfare of a young child demands that a parent who is in position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also provide a good (or even, I should say, a better) home is in such circumstances an element of only slight, if any, weight.¹⁷

The passage from Lord MacDermott's judgment to which Moffitt P. made reference reads as follows:

While there is no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way and must therefore preponderate in many cases.¹⁸

In view of the ultimate decision in *J. v. C.* and the other remarks of Lord MacDermott, earlier quoted,¹⁹ one cannot help but be of the view that the passage relied on by Moffitt P. has been somewhat decontextualised and, second, it is also clear that Lord MacDermott and Latham C.J. were not, in fact, saying the same things. Latham C.J. was saying that the natural parent would succeed in almost all cases, whilst Lord MacDermott was saying that the natural parents rights and wishes would prevail in many cases, not by reason of any rule of law but because of the usual circumstances in particular cases. Finally, Moffitt P. justified reversing Allen J.'s decision at first instance on the grounds that his, "... conclusion . . . could not have

13. A temporary order could have been made under the legislation.

14. *Supra* n. 12, at 76, 257. Indeed, Allen J. specifically noted that it was difficult to assess the long term effects on the child, see *Id.*, at 76, 258, per Moffitt P.

15. *Id.*, at 76, 258.

16. (1950), 80 C.L.R. 597 (H.C.).

17. *Id.*, at 603.

18. *Supra* n. 1, at 715.

19. *Supra* n. 5.

been arrived at except by ignoring or giving insufficient weight to the importance to the child of his future with his own family."²⁰

Hutley J.A. likewise noted²¹ the importance to the child, in the long term, of being with his natural parents and on the suitability of those parents to have custody²² and said that, "The claims of the parents cannot be denied. Any other doctrine would mean that where parents are compelled to place children with others because of misfortune or ill-health, they are in peril of losing their children altogether to strangers."²³ It is suggested that this statement is, in broad terms, erroneous for two reasons: first, it was made independent of any consideration of the welfare of the child and, second, it was made without reference either to recent case law, including *J. v. C.*, or to developments in related disciplines. Probably the most spectacular instance of the courts granting custodial rights to third parties — the use of the word 'strangers' in this area is also to be deprecated as, *ex hypothesi*, the third parties cannot be strangers to the child — is provided by the American case of *Ross v. Hoffman*.²⁴ In that case, both Maryland Appellate Courts upheld a lower court decision to grant custody of a nine year old girl to a couple who had acted as babysitter to the child and had finished up keeping her all the time except for holidays and weekends. The natural mother had seen little of her daughter because, particularly over one two year period, she had been involved with drugs and was indulging in promiscuous behaviour, which had resulted in her undergoing a series of abortions, though she had since reformed and married. Second, when modern knowledge of the internal dynamics of the family, especially knowledge of intra-familial violence, is taken into account it becomes abundantly clear that the conjugal family is by no means the entirely beneficent institution which it was (and, indeed, is still) claimed to be.²⁵ If perhaps, because of violent propensities, ill-health (whether physical or mental), unsatisfactory domestic circumstances or for any other cause which can be judged, in an objective manner, to prove deleterious to the welfare of relevant children, then there would seem, it is suggested, no valid obstacle to depriving natural parents of the custody of their children. We have come quite some distance from relatively formalised guidelines for dealing with custody disputes, and, indeed in Australia, Hutley J.A. himself, in the landmark deci-

20. *Supra* n. 12, at 76,259.

21. *Id.*, at 76, 260.

22. *Ibid.*

23. *Id.*, at 76, 261.

24. (1976), 3 Fam. L. Rep. (BNA) 2001, 364 A. (2d) 596 (Md. Ct. Spec. Apps.); (1977), 3 Fam. L. Rep. (BNA) 2434, 372 A. (2d) 582 (Md. C. A.).

25. There is, of course, copious writing on this important subject: for a useful collection of materials on child abuse, see J.E. Leavitt (ed.) *The Battered Child: Selected Readings* (1974).

sion in *Barnett v. Barnett*,²⁶ sought to throw off this outdated approach and, elsewhere, state intervention in the parent/child relationship is clearly increasing.²⁷

In addition, Hutley J.A. commented in the *Powell* case that the foster parents had no continuing commitment to the boy and might return him to his parents at any time,²⁸ and the Judge remarked that, "The sooner the child is removed from a stranger with this attitude the better."²⁹ This is, with respect, a remarkably obtuse statement: the inaccurate use of the term 'stranger' has already been noted and Hutley J.A. referred to³⁰ the final respondent's desire to have the child as her own son. Although there can be no question that, in strict law, Hutley J.A. was correct in his view; in fact, there was effectively no intrinsic evidence to suggest that the foster parents would be likely to wish to return the child arbitrarily to its natural parents. The Judge also emphasised the need for the transfer to the natural parents to be made as expeditiously as possible. Next, however, in almost direct contradiction of his previous remarks, Hutley J.A. referred to the issue of access and hoped that, even though the Court had no power to order it, the final respondent would have access to the child as she had looked after it for such a long period.³¹ Quite apart from the fact that the value of access *per se* has been queried by one notable authority,³² one can hardly conceive of a situation which would be more productive of confusion and uncertainty to a child. Regrettably, one must conclude that Hutley J.A. has placed the rights of the natural parent first, the rights of the foster parents second and the welfare of the child last. This is the more disappointing when one considers the same Judge's judgment in *Barnett*³³ and his dissenting judgment in *Epperson v. Dampney*.³⁴

Mahoney J.A. emphasised the need to consider the relationship between the child and his natural parents if he were to remain with the foster parents and was of the opinion that the trial judge had not taken significant account of that factor.³⁵ Further, Mahoney J.A. was of the opinion that being brought up by the foster parents would result in the boy's knowing that he was not in the care of his natural

26. [1973] 2 N.S.W.L.R. 403 (C.A.). For comment on this case, see F. Bates, "Custody of Children: Towards a New Approach" (1975), 49 A.L.J. 129.

27. See, for instance, the decision of the English Court of Appeal in *Re D.J.M.S. (a Minor)*, [1977] 3 All E.R. 582.

28. (1977), F.L.C. 90-235 at 76, 262.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*

32. J. Goldstein, A. Freud and A.J. Solnit, *Beyond the Best Interests of the Child* (1973) 37-38.

33. *Supra* n. 26.

34. (1976), 10 Aust. L. Rep. 227, at 232-38 (S.C.N.S.W.).

35. (1977), F.L.C. 90-235, at 72, 263.

parents and could have led to antagonism between the two families.³⁶ Additionally, the Judge also noted that the boy had been with his parents for the first seven months of his life.³⁷ The comment made regarding the boy's uncertainty over his origins is, it is submitted, totally without foundation: the severance of a natural relationship and the creation of an artificial one is the basis of the institution of adoption.³⁸ The comment regarding the possibility of friction between the two families, again, cannot be treated too seriously as the situation could be avoided by the commonsense of both families, backed, in the end, by court intervention.³⁹

More recently still, the New South Wales Court of Appeal have affirmed the approach adopted in *Powell v. Anderson* in the case of *Overton v. Martinez*.⁴⁰ There, when the child was only a few months old, his natural mother died and his father placed him with a foster mother, who was not related to him. The father continued to care for his two older children and to have contact with the youngest child in the foster home. When the child in question was five years old, his father took him back into his own home and the foster mother sought a formal custody order. There was no doubt that the boy received excellent care in the foster home. There was also evidence that the father did not speak English well although the elder children were both bilingual, speaking both English and Spanish. In addition, the father suffered from poor hearing. There was no mother figure in the father's home, although he intended to marry in the future. Expert evidence had been adduced as to the successful way in which the boy had settled into his father's home, and the trial judge had accepted this evidence. The foster mother appealed to the Court of Appeal, who upheld the finding of the judge at first instance. In giving the judgment of the Court, Hope J.A. quoted the statement of Moffitt P., referred to earlier,⁴¹ to the effect that, in considering the welfare of the child, the possibility of its being brought up by its natural parents was a powerful, almost dominant consideration.⁴² The judge considered that the problems which faced the father did not justify depriving him of custody, and an agreement had been reached between the parties as to access.⁴³

36. *Id.*, at 76, 264.

37. *Ibid.*

38. Margaret Hughes, 'Adoption in Canada' in *Studies in Australian Family Law* (1972 ed. Mendes da Costa) 103 defines adoption as, "... the creation by court order of a relationship of parent to child by persons not so previously related, consisting of substantially the same mutual rights and duties, that exist between a natural parent and child".

39. See, in particular, H.D. Kirk, *Shared Fate: A Theory of Adoption and Mental Health* (1964).

40. (1978), F.L.C. 90-406.

41. *Supra* n. 14.

42. *Supra* n. 40, at 77, 087.

43. *Id.*, at 77, 087-88.

It is clear that *Overton v. Martinez* is by no means as strong a decision as *Powell v. Anderson* in that the relationship between the natural father and the child was much closer in *Overton* than in *Powell* and there was expert evidence of the child's assimilation into the natural father's household. Thus, *Overton v. Martinez* is not a decision, on its facts, which is particularly susceptible to criticism. However, the decision in *Powell v. Anderson*, on which reliance was placed in *Overton*, is much less satisfactory, as, implicit in processes of reasoning used by the Court in that case is the notion that claims of parental right outweigh welfare considerations. This view, it is suggested, is at odds both with modern developments⁴⁴ and with desirable policy.

The Canadian Perspective

In Canada, the traditional attitude of the courts to disputes over children between natural parents and third parties had been expressed by Rand J. of the Supreme Court of Canada in *Hepton v. Maat*,⁴⁵ who said that, "It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstances affecting them it is evident that the welfare of the child requests that that fundamental natural relation be severed." This *dictum* was applied by the trial judge in what may now be regarded as the leading Canadian case on the relative position of natural and foster parents: the decision of the Ontario Court of Appeal in *Re Moores and Feldstein*.⁴⁶ The facts of the case may be briefly stated: the plaintiff mother brought an action under the Ontario *Infants Act 1970* to retrieve the custody of her four year old daughter; the mother had delivered the child to the defendants a few days after her birth and the child had remained with them up to the time of the trial. At first instance, Donohue J., applying *Hepton v. Maat*, returned the child to the mother, the defendants appealed to the Court of Appeal who reversed the trial judge's decision. In delivering the judgment of the appellate court, Dubin J.A. traced⁴⁷ the development of changing attitudes towards the relationship of parent and child in much the same way as it had been traced by the House of Lords in *J. v. C.*⁴⁸ Dubin J.A. laid particular em-

44. See *Supra* n. 5.

45. [1957] S.C.R. 606, 607. See also *Meikle v. Authenac* (1971), 3 R.F.L. 84 (Alta. S.C. App. Div.) for a more recent affirmation of the principle.

46. (1974), 12 R.F.L. 273 (Ont. C.A.). For comment on the implications of this decision see K.M. Weiler and G. Berman, "Re Moores and Feldstein A Case Comment and Discussion of Custody Principles" (1974), 12 R.F.L. 294.

47. *Id.*, at 280-87.

48. *Supra* n. 1, per Lords Guest, MacDermott and Upjohn.

phasis on statements made by Lord MacDermott in *J. v. C.*; he considered the following passage to be of especial importance:

'Some of the authorities,' said Lord MacDermott, 'convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of a close and anxious scrutiny which they undoubtedly received in this case.'⁴⁹

The dangers of changes in custodial arrangements have been well documented⁵⁰ and Dubin J.A. was of the opinion that insufficient attention had been paid to this consideration by the judge at first instance.⁵¹ After having considered the facts of the case in some detail,⁵² the Judge concluded that,

Considering the welfare of the child in its broadest aspect and giving due consideration to the fact that it is the mother who is now seeking her return, in my view the welfare of this child will best be served if left in its present happy surroundings, and I have concluded that the tie of affection of a mother to a child is not the overbalancing consideration in this case In my view, since the evidence does not show that the child will benefit by the mere fact of its blood relationship with its mother, it cannot be said that the welfare of the child in its broadest sense will best be served by its being returned to her.⁵³

Dubin J.A. thus rejected parental claims based on the blood tie, but also noted that the natural mother would, in all the circumstances, be unlikely to be able to provide a stable home environment.⁵⁴ *Re Moores and Feldstein* is a totally admirable decision, dealing, as it does, with the child's welfare on a humane and realistic basis. Weiler and Berman consider that *Re Moores and Feldstein* marks a departure from precedent and,

. . . is a landmark decision . . . not only because it extends the principle that the welfare of the child is the paramount consideration to be considered in custody disputes between parent and non-parent, but because it considers the welfare of the child apart from the wishes of the natural parent.⁵⁵

Although this may have marked a new development in Canada, as we have seen from the discussion of the English cases, it is a view inherent in the principles expounded in *J. v. C.*

Re Moores and Feldstein was applied by the Divisional Court of the Ontario Supreme Court in the recent case of *Dey (Tanguy) v. O'Leary*.⁵⁶ This case was, however, less complex than the earlier one

49. *Id.*, at 715.

50. See, in particular, N. Michaels, "The Dangers of a Change of Parentage in Custody and Adoption Cases" (1967), 83 L.Q.R. 547.

51. *Re Moores and Feldstein* (1974), 12 R.F.L. 273, at 288. (Ont. C.A.).

52. *Id.*, at 289-92.

53. *Id.*, at 292-93.

54. *Ibid.*

55. *Supra* n. 46, at 304.

56. (1978), 30 R.F.L. 109 (Ont. S.C.).

as, in the words of O'Leary J., "What is apparent from the evidence and from the reasons for judgment of the learned trial judge is that the O'Learys took into their household a child that was emotionally starved and disturbed and that that child is now normal".⁵⁷ Accordingly, the court ordered that the child remain with the foster parents.

Before leaving Consideration of Canadian authority, it is worth mentioning the decision of Monet J. of the Quebec Supreme Court in *Tse v. Chen and Fillion*.⁵⁸ In that case, a married couple had entered into an agreement prior to the birth of their child in 1961 by which the mother surrendered the custody of the child to the father. The father entrusted the child to a family in Quebec, delegating to them all attributes of parental authority. The father then returned to Hong Kong, where he resided at the time of the proceedings. In the meantime, the mother had obtained a divorce in 1970, where no ancillary relief was granted, and had subsequently married a doctor who then applied to the Superior Court of Quebec under Article 847 of the Quebec *Civil Code* for custody of the child. The Quebec family by whom the child had been raised indicated that they would abide by the court's disposition of the matter, although the father, through counsel, opposed the application. Monet J. awarded custody to the mother. He took the view that the interests of the child were paramount,⁵⁹ and referred to the Supreme Court of Canada's decision in *McKee v. McKee*.⁶⁰ Even though the Quebec family had provided a good home for the child, the mother was now able to provide excellent care and attention for the child after a long period of being unable to do so. The Judge applied⁶¹ an earlier *dictum* of the Quebec *Cour d'Appel* in the case of *St. Laurent c. St. Laurent* that,

Article 243 of the *Civil Code* reiterates the natural law which requires that a young child remain in close association with his natural parents, with whom he will feel secure. If he remains with strangers, even if they are very committed to his interests, he will lack confidence and will feel himself a burden to people who do not have the same commitment to him as do his true parents.⁶²

Monet J. extended this statement, by analogy, to the facts of the present case and referred to the fact that, despite his wish to maintain the current arrangements, the father had not shown much interest in the child's upbringing.⁶³ On the other hand, the mother, by reason of her continued attempts to assert her rights in the Courts of Ontario and Quebec, had demonstrated an interest in parenthood.⁶⁴ Other

57. *Id.*, at 110.

58. (1975), 17 R.F.L. 176. (Que. S.C.).

59. *Id.*, at 177-78.

60. [1950] 3 D.L.R. 577, especially at 585 (S.C.C.).

61. *Supra* n. 58, at 179.

62. [1970] Qué. C.A. 1099, at 1100. The translation, with some assistance, is my own.

63. *Supra* n. 58, at 179.

64. *Ibid.*

facts to which the Judge attached weight were that the child had expressed a wish to live with her natural mother,⁶⁵ and that the mother and her present husband were both of Asiatic origin and could provide a more suitable cultural environment for the girl.⁶⁶ Finally, Monet J. was of the view that the agreement by reason of which the mother had surrendered custody could not have been given with her free consent.⁶⁷

Although, on the facts of *Tse v. Chen*, it is hard to disagree with the ultimate decision, particularly as it did not seem that the foster parents did, in fact, have the same commitment to the child that can be found on the part of foster parents in some of the other cases, the process by which the decision was reached is not altogether beyond reproach, even though the court may have felt itself circumscribed by the terms of the Quebec *Civil Code*. First, in view of modern developments, notably the concept of the 'psychological parent' as enunciated by Goldstein, Freud and Solnit,⁶⁸ it is, at the very least, open to question as to whether natural parents *per se* are able to provide any more security in every case than foster parents. Second, it is not easy, from the facts of the case to justify the importance attached by the Judge to the child's Asian background; in *Re O.* and *Re E.O.* (and, to a lesser extent, in *J. v. C.*) the foster parents and the children had initially different cultural backgrounds, but the relationship between the two had altered that. It is impossible to tell from the report how far the child had been assimilated into French-Canadian society. In the end, however, the arrangement arrived at by the court seemed, at least at first sight, to satisfy all parties except the father, who had disqualified himself by his conduct.

Conclusions and Projections

In view of these recent cases, how, then, should the law view disputes over children between natural parents and foster parents? The distinction between fostering and the analogous institution of adoption is that the latter involves a permanent relationship whereas the former does not. This fundamental matter can give rise to problems both from the point of view of the child and the foster parent: Goldstein, Freud and Solnit are unhappy about the whole institution on the grounds that the foster parent-child relationship is unlikely to develop into the psychological parent-wanted child relationship which they consider to be essential for the proper development of the child.⁶⁹ From the child's point of view, they write that, ". . . he will

65. *Ibid.*

66. *Ibid.*

67. *Id.*, at 180.

68. *Supra* n. 32, at 19.

69. *Id.*, at 24-26.

at least after early infancy has passed, feel the impermanence and insecurity of the arrangement which clashes with his need for emotional constancy."⁷⁰ From the point of view of the foster parents, the relationship, ". . . implies a warning against any deep emotional involvement with the child since under the given insecure circumstances this would be judged as excessive".⁷¹

Yet, these comments notwithstanding, the institution of fostering, it is suggested, does have an important role to play in the continuing drama relating to the protection of children's rights. First, in Australia⁷² and England⁷³ legislative policy is aimed at curtailing private adoptions.⁷⁴ There are good reasons why this should be; experience has shown that private placements are unlikely to prove satisfactory, but at the same time one must not be blind to the difficulties and hardship which may result from this policy.⁷⁵ A good example is provided by the Australian case of *Re T.L.R. (an infant) and the Adoption of Children Act*,⁷⁶ where the applicants had made a personal application for the adoption of a girl aged three and a half years who had been placed with them some eighteen months earlier by a clergyman whom the child's mother had asked to find a home for the child. The evidence showed that the child was happy and well cared for by the applicants, who were in every way suitable to adopt the child, and that a real bond of affection existed between the applicants and the child, whose welfare would clearly be promoted by the grant of an adoption order. The applicants, however, had not placed their name on the adoption register of the New South Wales Child Welfare Department and had had no contact with the agencies specified in the legislation. Myers J. refused reluctantly to grant the application and was critical of the effect of the legislation. He said,

One can appreciate the desirability of requiring applications to be made by the Director or an adoption agency, because it ensures that there will be proper investigation of the circumstances to ensure that the adoption will be beneficial to the child, but it is not easy to understand why parents should not be able to consent to the adoption of their child by specified persons. It is common experience that parents of both legitimate and illegitimate children who have become unable to care for them, are prepared to have them adopted by persons whom they know and trust and they are naturally fearful of signing a consent which would permit of their adoption by anybody at all.⁷⁷

70. *Id.*, at 25.

71. *Id.*, at 24.

72. See A.D. Hambly, "Adoption of Children: An Appraisal of the Uniform Acts" (1968), 8 *J.W.A.L.R.* 281.

73. See *Children Act 1975*, 1975, c. 72, s. 28 (U.K.)

74. This policy has not taken effect in Canada, see M. Hughes, "Adoption in Canada," *Studies in Canadian Family Law* (1973 ed. Mendes da Costa) 103, at 108-13.

75. See H.L. Witmer, E. Herzog, E.A. Weinstein, and M. Sullivan, *Independent Adoptions — Follow Up Study* (1963), which found 30% of private placements to be unsatisfactory. Their view was not shared, however, by J.R. Wittenborn, *The Placement of Adoptive Children* (1957), who considered that independently placed children showed up better in some tests.

76. [1968] 1 *N.S.W.R.* 776. (S.C.).

77. *Id.*, at 777.

Having said that, despite this consideration, he could not go against the plain provisions of the Act. He went on to outline the procedure which the applicants ought to have followed, pointing out that an order might well not be made in their favour even if it was followed and that there would certainly be couples ahead of the applicants on the register to whom the Director or agency would be obliged to give the child.⁷⁸ The Judge then continued:

That consequences in this case, which is [sic] typical of many, cannot fail to cast doubt on the wisdom of a priority scheme, in which the order is determined by mere chance. Indeed, any arbitrary order of priority among proposing adopters must necessarily disregard both the interests of the children concerned, for it prevents the most suitable parents for a particular child being selected, and also the relative merits of the proposing adopters. Thus people with families - I recently had the case of applicants with five natural children - will receive priority over childless married couples who are unable to have children, or, as in another case, priority will be given to a couple one of whom had been voluntarily sterilised. One might be pardoned for thinking that skilled social workers would be able to judge who should come first.⁷⁹

Where this kind of legislative policy is implemented, the institution of long term fostering is appropriate, provided that adequate steps are taken to insure the development of a proper bond between the child and foster parent. Second, even though the difficulties described by Goldstein, Freud and Solnit may exist, the institution of fostering can help to mitigate the effects of an unsatisfactory family of origin. More, today, is known about the internal dynamics of the family, and it is clear that an environment where a child is not abused or neglected is preferable to one where he is so treated. Third, as the Australian *Royal Commission on Human Relationships* noted in its recent report,⁸⁰ judiciously used foster care can often be used to assist a family of origin to overcome problems in times of stress.

In conclusion, foster care can be seen as part of the complex of socio-legal institutions which can be used to protect the interests of the child. It must not be perceived in isolation but must be considered in relation to adoption, institutional care and the whole area of children's rights.⁸¹ In that context *J. v. C., Re Moores and Feldstein* and the cases which support them are important and valuable developments.

78. *Id.*, at 779.

79. *Ibid.*

80. *Report of the Royal Commission on Human Relationships* (1977), Vol. 4, 130-32.

81. See F. Bates, "Adoption in the Context of Children's Rights," Second National Conference on Adoption, Melbourne, Australia (1978).

