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## NOTES

### MEETING THE BEST INTEREST OF THE CHILD: RECONSIDERING MASSACHUSETTS' FOSTER CARE SYSTEM

#### I. INTRODUCTION

Each year thousands of children across the United States are placed in foster care. Foster care systems across the country service two groups of children: dependant and neglected children, and children with special emotional, behavioral and/or medical needs.<sup>1</sup> The number of children in foster care continues to rise each year, reflecting the continued growth of problems in the areas of poverty,<sup>2</sup> child care and health care,<sup>3</sup> race,<sup>4</sup> and alcohol and drug abuse.<sup>5</sup>

The foster care system in Massachusetts is equally extensive. In 2000, the Massachusetts system served 18,011 children.<sup>6</sup> Of this number, only 3,147, or 17.5 %, were waiting to be adopted.<sup>7</sup> Even those children awaiting adoption spend a

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<sup>1</sup> NAT'L COMM'N ON FAMILY FOSTER CARE, A BLUEPRINT FOR FOSTERING INFANTS, CHILDREN, AND YOUTHS IN THE 1990'S 2 (1991) [hereinafter NAT'L COMM'N ON FAMILY FOSTER CARE].

<sup>2</sup> There is a particularly strong connection between poverty and the need for child welfare services. Families that earn less than \$15,000 per year are twenty-two times more likely to be involved in the child welfare system than families with yearly incomes greater than \$30,000. National cuts in early intervention programs and preventive services have forced poor families to turn toward child welfare systems as their primary source of assistance. Martin Guggenheim, *The Foster Care Dilemma and What to Do About it: is the Problem That Too Many Children are not Being Adopted Out of Foster Care or That Too Many Children are Entering Foster Care?* 2 U. PA. J. CONST. L. 141, 145 (1999) (citing Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, THE FUTURE OF CHILDREN, Spring 1998, at 95).

<sup>3</sup> Child Welfare League of America, *Family Foster Care Fact Sheet*, at [www.cwla.org/programs/fostercare/factsheet.htm](http://www.cwla.org/programs/fostercare/factsheet.htm) (last visited May 17, 2005).

<sup>4</sup> In 2000, only 35 % of children in foster care were white. *Id.*

<sup>5</sup> NAT'L COMM'N ON FAMILY FOSTER CARE, *supra* note 1, at 3.

<sup>6</sup> US Department of Health and Human Services, *Child Welfare Outcomes 2000- Annual Report*, available at [www.acf.hhs.gov/programs/cb/publications/cwo.htm](http://www.acf.hhs.gov/programs/cb/publications/cwo.htm) (last visited May 17, 2005). During that year, 7,361 children entered foster care, and 6,392 exited foster care. On October 1, 1999, 10,630 children were in foster care. A year later on September 30, 2000, there were 11,619 children in foster care. *Id.*

<sup>7</sup> Children awaiting adoption will not be returned to their biological parents. Therefore, 82.5% were simply moving within the system, waiting to be reunited with their original families. *Id.*

great deal of time in the foster care system: 43.2% have spent more than forty-eight months in foster care.<sup>8</sup>

Massachusetts must concern itself with the number of children in foster care and their well-being. Massachusetts's state departments, including the Department of Social Services (DSS) which operates the foster care system, must conform to "the best interest of the child" standard.<sup>9</sup> This standard demands that state courts and state agencies act with the needs of the individual child in mind and fulfill those needs to the best of their ability.<sup>10</sup> The standard requires that which is "reasonable and appropriate"<sup>11</sup> for each child.

Unfortunately, Massachusetts fails to protect adequately and provide for the safety of foster care children; in 2000 the incidence of maltreatment in foster care homes was 1.1%.<sup>12</sup> a higher percentage than both the national standard of 0.57% and the national median of 0.47%.<sup>13</sup> In addition to permitting an intolerable rate of maltreatment, the foster care system fails to provide adequately for children in other ways, for example, it places them in unsuitable homes,<sup>14</sup> it fails to conduct follow-up reviews on foster children,<sup>15</sup> and it moves children to new foster homes more often than necessary.<sup>16</sup>

The situation in Massachusetts is unacceptable; the discrepancy between Massachusetts's "best interest of the child" standard and the actualities of the foster care system begs for a change. As a solution to the problem, Massachusetts should implement a policy of placing children in group homes.

Part I of this note explains the "best interest of the child" standard as defined by Massachusetts statutory law and Massachusetts case law. Part II describes federal laws that direct the application of the interest of the child standard in state foster care systems. Part III addresses the current foster care system's failure to provide for the best interest of the child. First, part III examines the Massachusetts

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<sup>8</sup> *Id.*

<sup>9</sup> Defined in MASS. GEN. LAWS ANN. ch. 119, §1 (2003).

<sup>10</sup> See generally Elizabeth P. Miller, Note: *DeBoer v. Schmidt and Twigg v. Mays: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 505 (1994) (citing Gloria Christopherson, *Minnesota Developments, Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings: In re J.J.B.*, 71 Minn. L. Rev. 1263, 1269 (1987)).

<sup>11</sup> American Academy of Pediatrics, *Policy Statement: Health Care of Young Children in Foster Care*, at [www.aap.org/policy/re0012.html](http://www.aap.org/policy/re0012.html) (last visited May 24, 2005).

<sup>12</sup> Maltreatment is defined as neglect, emotional abuse, medical neglect, and/or physical and sexual abuse. US Department of Health and Human Services, *Child Welfare Outcomes 2000- Annual Report* available at [www.acf.hhs.gov/programs/cb/publications/cwo.htm](http://www.acf.hhs.gov/programs/cb/publications/cwo.htm) (last visited May 17, 2005).

<sup>13</sup> *Id.*

<sup>14</sup> Carrie Leonetti, *In the Interests of Children: the Role of the Massachusetts Department of Social Services in Private Custody Proceedings*, 10 AM. U.J. GENDER SOC. POL'Y & L. 67, 76 (2001).

<sup>15</sup> *Care and Protection of Three Minors*, 467 N.E.2d 851, 859 (Mass. 1984).

<sup>16</sup> See generally Richard B. McKenzie, *Rethinking Orphanages for the 21<sup>st</sup> Century: A Search for Reform of the Nation's Welfare System*, in *RETHINKING ORPHANAGES FOR THE 21<sup>ST</sup> CENTURY* 290 (Richard B. McKenzie ed., Sage Publications, Inc. 1999).

Department of Social Services (DSS) and its basis for power under statutory law. Part III then demonstrates the lack of checks and balances in DSS and the foster care system, and the resulting inadequacies in child care. Part IV proposes that Massachusetts should place children in institutional group homes instead of family foster care as a solution to the problems plaguing the current foster care system, and to ensure that the best interest of the child standard is met.

## II. MASSACHUSETTS'S BEST INTEREST OF THE CHILD STANDARD

### A. *The Statutory Definition*

States can invoke the *parens patriae* power to protect the well-being of children. This power emanates from the state's traditional role as guardian of persons under "legal disability."<sup>17</sup> States protect children because they "lack the capacity and maturity to act in their own best interest."<sup>18</sup> As *parens patriae*, Massachusetts acts to further the best interest of the child.<sup>19</sup>

The best interests of the child, as defined by DSS, include, but are not limited to:

considerations of precipitating factors and previous conditions leading to any decisions made in proceedings related to the past, current and future status of the child, the current state of the factors and conditions together with an assessment of the likelihood of their amelioration or elimination; the child's fitness, readiness, abilities and developmental levels; the particulars of the service plan designed to meet the needs of the child within his current placement . . . ; and the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein.<sup>20</sup>

In sum, "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child."<sup>21</sup> As stated, the purpose of this chapter is to ensure Massachusetts protects children "against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes."<sup>22</sup>

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<sup>17</sup> Miller, *supra* note 10, at 505 (citing Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 Issues L. & Med. 283, 288 (1991)).

<sup>18</sup> *Id.* at 505-06

<sup>19</sup> *Id.* at 506(citing Griffith, *supra* note 17, at 290).

<sup>20</sup> MASS. GEN LAWS ANN. ch. 119, §1 (2003).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

## B. *The Case Law Definition*

Massachusetts state courts have readily adopted this broad standard. In *Custody of a Minor*, the Supreme Judicial Court of Massachusetts (SJC) declared that the "[s]tate has a long-standing interest in protecting the welfare of children living within its borders."<sup>23</sup> In particular, the state must focus on the needs of the individual child.<sup>24</sup> Moreover, as asserted in *Petition of the Department of Public Welfare to Dispense with Consent to Adoption* (hereinafter *Petition of the Department*), "[t]he first and paramount duty of the state is to 'consult' the welfare of the child."<sup>25</sup> The standard demands specific application to each *individual* child; when applying the best interest of the child standard, state courts must take into consideration "the various factors unique to the situation of the individual for whom it must act."<sup>26</sup>

There is a strong argument that placing children in homes with families, particularly families related to the child, best serves the children.<sup>27</sup> In *Petition of the Department*, the SJC found that a judge may be warranted in finding that the interests of a child are best served by a placement which is "'least restrictive' of parental rights."<sup>28</sup> The court declined to hold, however, that this must always be the case, and stated that, above all, the court must adequately protect the needs and interests of the child.<sup>29</sup> Therefore, the state must conform to this duty even if it results in permanent legal separation from the child's family.<sup>30</sup> In *Care and Protection of Robert*,<sup>31</sup> for example, the SJC stated that initially, Massachusetts' *parens patriae* interest is in maintaining a stable family environment.<sup>32</sup> If a stable family environment is not available, then the interest shifts to ensuring "adequate care and protection" of the child.<sup>33</sup>

The SJC recognized three interests in child care and protection cases: (1) a parent's interest in having a relationship with his or her child; (2) a child's interest in having a relationship with his or her family; and (3) a child's right to be free from abusive or neglectful behavior.<sup>34</sup> The SJC noted that the first two interests are

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<sup>23</sup> *Custody of a Minor*, 379 N.E.2d 1053, 1066 (Mass. 1978) (citing *Hersey v. Hersey*, 271 Mass. 545, 552 (1930); *Prince v. Massachusetts*, 321 U.S. 158, 165-166 (1944)).

<sup>24</sup> See *id.*

<sup>25</sup> *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 381 N.E.2d 565, 572 (Mass. 1978) [hereinafter *Petition of the Department*] (citing *Custody of a Minor*, 379 N.E.2d at 1063 quoting *Purinton v. Jamrock*, 195 Mass. 187, 199 (1907)).

<sup>26</sup> *Custody of a Minor*, 379 N.E.2d at 1065.

<sup>27</sup> *Petition of the Department*, 381 N.E.2d at 571. Respondents cited ALM c. 119 §1, arguing that it is Massachusetts policy to "direct its efforts . . . to the strengthening and encouragement of family life . . . ."

<sup>28</sup> *Petition of the Department*, 381 N.E.2d at 573.

<sup>29</sup> *Id.* (finding that the Department of Public Welfare (now DSS) was right to place one child in a family situation and the child's brother in a group home).

<sup>30</sup> *Id.* at 572.

<sup>31</sup> *Care and Protection of Robert*, 556 N.E.2d 993, 1000 (Mass. 1990).

<sup>32</sup> *Id.* at 1000.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 997.

not absolute; these interests must be weighed against a parent's willingness and ability to adequately care for the child, or, "to further the best interest of the child."<sup>35</sup> It follows that an unwilling or unable parent's interests will be set aside by the court.<sup>36</sup> The third interest, however, the child's right to be free from harmful behavior, is absolute.<sup>37</sup> A child may never be legitimately subjected to abusive or neglectful behavior.<sup>38</sup>

### III. NATIONAL DIRECTIVES FOR FOSTER CARE

Federal case law provides some guidance as to the state's *parens patriae* power and the application of the best interest of the child standard. In *Santosky v. Kramer*, the Supreme Court stated a state can attempt to limit or end parent-child contact and place the child in temporary or permanent care when parents do the following: (i) abuse, neglect or abandon children; (ii) become incapacitated in their ability to parent; (iii) refuse or are unable to remedy serious problems in caring for their children; or (iv) experience a particularly serious breakdown in the relationship with their children.<sup>39</sup>

Federal statutes also direct state foster care systems. The most recent and important Congressional act is the Adoption and Safe Families Act of 1997 (ASFA).<sup>40</sup> Like state statutes, ASFA adheres to the best interest of the child standard and declares that the "child's health and safety shall be the paramount concern."<sup>41</sup> The goals of ASFA are to reduce the amount of time spent in preserving unsuitable or "hopeless families," to minimize the amount of time that children spend in foster care (or reduce "foster care drift"), and to make adoption incentives the main focus of the law.<sup>42</sup>

Overall, a "new intolerance of parental failure" and a focus on adoption as a way to move children out of the foster care system drive the Act.<sup>43</sup> The Act shifts the emphasis from family preservation to child safety. The Act has ambitious yet countervailing goals: it means to assure permanency for children, while

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<sup>35</sup> *Id.* at 997-998.

<sup>36</sup> *Id.* at 998

<sup>37</sup> *Care and Protection of Robert*, 556 N.E.2d at 998.

<sup>38</sup> *Id.*

<sup>39</sup> Richard J. Gelles & Ira Schwartz, *Article: Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 97 (1999) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)). In *Care and Protection of Robert* DSS sought to remove children from their father because it learned that there were insufficient sleeping quarters (seven children shared two bunk beds), some of the children had ingested alcohol, and there was an incident of sexual misconduct between an older and younger child. See *Care and Protection of Robert*, 556 N.E.2d at 994-996.

<sup>40</sup> Adoption and Safe Families Act of 1997, Publ. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>41</sup> Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 73 (2002) (citing 42 U.S.C. §671(a)(15)).

<sup>42</sup> *Id.* at 72-74.

<sup>43</sup> *Id.* at 74.

simultaneously acknowledging that there needs to be a new focus in quickly recognizing parental shortcomings and removing the child from the home when necessary.<sup>44</sup> In order to carry out these goals, the Act provides financial incentives to states to carry out such requirements as holding hearings within thirty days to find permanent placement<sup>45</sup> and moving to terminate parental rights after a child spends fifteen of twenty-two months in foster care.<sup>46</sup> ASFA also offers a financial bonus to states for each child adopted above a predetermined minimum.<sup>47</sup>

One major criticism of ASFA is its over-emphasis on adoption.<sup>48</sup> ASFA focuses on adoption to the exclusion of providing adequate care for those children awaiting adoption.<sup>49</sup> A blanket policy to move children wholesale out of foster care cannot make the interests of an individual child- his or her "health and safety"- the "paramount concern."<sup>50</sup> More specifically, ASFA fails the best interest of the child standard because it focuses only on moving children *out* of foster care; it addresses the problems of the foster care system by trying to reduce the system altogether a misplaced goal.<sup>51</sup> Effective and meaningful change in the foster care system must also deal with the children for whom it cares, for it is impossible to solve the problem merely by trying to rid the system of them. Scholars agree that Congress should put efforts into "stabilizing temporary foster care placements by establishing a significant degree of permanency within the foster care system itself."<sup>52</sup> By providing incentives for states to place children in institutional homes and break the status quo of family care states should follow suit.

#### IV. THE CURRENT FOSTER CARE SYSTEM IN MASSACHUSETTS

##### A. *Who May Be Protected by the State*

In Massachusetts, DSS runs the child welfare program. A child enters the foster care system in one of the three following ways: (1) upon application of a parent or guardian or anyone acting on behalf of the child, or of the child himself; (2) upon the parents' voluntary surrender of custody of children under eighteen years old; or (3) upon order of a probate court regarding a child under eighteen who is without

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<sup>44</sup> *Id.* at 52.

<sup>45</sup> *Id.* at 74.

<sup>46</sup> *Id.* at 73.

<sup>47</sup> *Id.* at 74. The Act grants states \$4,000 for each adoption above a base number, and an additional \$2,000 for each "special needs" adoption. 42 U.S.C. §673b(d)(1).

<sup>48</sup> Sanders, *supra* note 41 at 75.

<sup>49</sup> *Id.* at 73.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> *Id.* at 87 (citing Dean Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 461 (1997)). For example, Deborah Sanders suggests making a foster care "a more loving and quality childhood experience" for those children that spend a significant amount of time in the system. The federal and state governments must treat these children with the necessary sensitivity and care. *Id.*

proper guardianship due to death, unavailability, incapacity or unfitness.<sup>53</sup> DSS may also accept into care any of the following: a child under eighteen who is left in any place and who seems to be without a parent or legal guardian; a child whose parents consented to his adoption and DSS has been unable to place the child in an adoptive home within sixty days; and a child referred from any division of the juvenile court department who is in need of foster care or in need of services.<sup>54</sup>

#### B. *Who May Be Foster Parents*

Under the Code of Massachusetts Regulations, a person will not be eligible to be chosen as a foster parent if she/he, or a member of the household, fits any of the following characteristics:<sup>55</sup> has a criminal record which bears adversely upon the person's ability to assume and carry out the responsibilities of a foster parent; had an open case with DSS during the twelve months immediately preceding the initial screening process; is identified by DSS as alleged to be responsible for abuse or neglect of a child; or has a history of involvement with DSS, including but not limited to, being the victim or the perpetrator of child abuse or neglect.<sup>56</sup>

In addition, a person is not eligible to be a foster parent if the individual's home does not meet the proper physical standards;<sup>57</sup> the individual's schedule would require that a foster child would spend an excess number of hours in day care;<sup>58</sup> the individual does not have a stable source of income that is sufficient to support the current household members; the individual does not have a stable housing history; the individual does not have the basic ability to read and write in English or in his or her primary language;<sup>59</sup> the individual does not have a working telephone; the individual is under eighteen years of age; the individual is the parent of the child in question; or the individual is not a United States citizen or a Qualified Alien.<sup>60</sup> In summary, the person must be able to provide for the child's basic needs and provide a suitable physical environment.

#### C. *How DSS Fails to Provide for the Best Interest of the Child*

Unfortunately, the current outdated foster care system is based on century-old, invalid assertions.<sup>61</sup> First, the system assumes that, by and large, dependent and neglected children need foster care, and that their emotional needs can be meet

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<sup>53</sup> MASS. GEN. LAWS ANN. ch. 119 §23 (A) – (C) (2003).

<sup>54</sup> MASS. GEN. LAWS ANN. ch. 119 §23 (E) (2003).

<sup>55</sup> There are no positive requirements. See MASS. REGS. CODE tit.110, §7.100 (2003).

<sup>56</sup> See MASS. REGS. CODE tit. 110, § 7.100(3) (2003).

<sup>57</sup> MASS. REGS. CODE tit. 110, §7.105.

<sup>58</sup> The maximum number of hours of day care allowed is fifty hours per week for a pre-school aged child, and 25 hours per week for a child in the first grade or beyond. Tit. 110, 7.100(4)(b).

<sup>59</sup> This requirement can be put aside if another household member who is applying to be a foster parent fits the criteria. Tit. 110, 7.100(4)(e).

<sup>60</sup> *Id.*

<sup>61</sup> NAT'L COMM'N ON FAMILY FOSTER CARE, *supra* note 1, at 3.



through love alone;<sup>62</sup> it does not take into account the special psychological and emotion needs of abused children.<sup>63</sup> Secondly, the system assumes that there exist sufficient families with adequate resources, economic and emotional, and time that are willing and able to help these children.<sup>64</sup> The system seems dependent on the existence of a traditional family model, in which one working parent provides sufficient economic support, and one stay-at-home parent provides the emotional care.<sup>65</sup> Finally, the system operates under the assumption that caseworkers have the time and skill to supervise foster home replacements.<sup>66</sup> As a result, a great disparity exists between the goals of the system and its ability to effectively and adequately serve children in need of care.<sup>67</sup>

### 1. DSS's Disorganization and Incompetence

DSS plays a critical role in the foster care system. DSS representatives are involved in the legal proceedings against a child's parents or guardian.<sup>68</sup> DSS is also responsible for choosing a child's foster or adoptive family and monitoring the child's care. When granted permanent custody of a child, DSS has almost full discretion to decide how much family visitation there should be, if any, and to decide whether the child should be adopted.<sup>69</sup> Massachusetts law requires DSS to conduct foster care review only every six months.<sup>70</sup> The best interest of the child standard presents DSS and the presiding trial judge with many discretionary decisions.<sup>71</sup> It is this very discretion, however, that leads to the lack of funding and the shortage of qualified staff that creates a DSS that falls short of providing for the best interest of the child standard.<sup>72</sup>

DSS, like most state agencies, lacks the resources to provide acceptable levels of service due to under-funding, poor organization and a lack of staff that can comply with professional standards.<sup>73</sup> In 1970, the Boston District Office of DSS had 100 caseworkers who served approximately 4,500 children.<sup>74</sup> The caseworkers'

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<sup>62</sup> *Id.*

<sup>63</sup> Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care* at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 18, 2005).

<sup>64</sup> NAT'L COMM'N ON FAMILY FOSTER CARE, *supra* note 1, at 3.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> MASS. GEN. LAWS ANN. ch. 119 §24 (2053); Gelles, *supra* note 39, at 99.

<sup>69</sup> *Care and Protection of Three Minors*, 467 N.E.2d at 860 (citing MASS. GEN. LAWS ANN. ch. 119 §26 (2003)).

<sup>70</sup> *Id.*

<sup>71</sup> Adoption of a Minor, 327 N.E.2d 875, 879 (Mass. 1975).

<sup>72</sup> *See id.*

<sup>73</sup> Laura A. Harper, Note: *The State's Duty to Children in Foster Care- Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 797 (2003).

<sup>74</sup> Then called the Department of Child Guardianship. Catherine E. Campbell, *The Neglected Child: His and His Family's Treatment under Massachusetts Law & Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK U.L. REV. 632, 642 (1970)(citing

responsibilities involved conducting intake investigations and supervising the foster child's development during the child's time in DSS's care.<sup>75</sup> The majority of the caseworkers had just graduated from college and never received any training beyond their Bachelor's curriculum.<sup>76</sup> There was no formal on-the-job training.<sup>77</sup> Indeed, the standards for being a caseworker were even less demanding than the standards for being foster parents,<sup>78</sup> and, unfortunately, caseworkers are the people who train and oversee foster parents.<sup>79</sup>

DSS experienced a high turn-over rate. Caseworkers faced large case loads, non-existence of rehabilitative facilities and low pay.<sup>80</sup> Caseworkers were thrown into the job with little supervision and guidance; the chief source of information was the supervisor, but caseworkers were only in the office approximately one day each week.<sup>81</sup> Because the supervisor was also the only person to check a caseworker's performance, the lack of communication between the caseworker and supervisor resulted in an unchecked and uninformed method of dealing with cases.<sup>82</sup>

DSS's problems are not unique and are reflected in foster care systems across the United States.<sup>83</sup> Insufficient funding for services; lack of training for social workers, supervisors, attorneys, and judges; overwhelming case loads; and the constant need for foster and adoptive parent recruitment are problems in every foster care system.<sup>84</sup> Indeed, under large pressures and with such inadequacies, case workers are often unable to provide minimal care to their clients.<sup>85</sup>

Placing children in institutional homes would streamline the foster care system, thus, reducing the workload of an overburdened DSS. Group homes would require DSS to make less tough decisions about placing children in unsuitable homes, and less staff to monitor the caretakers. Additionally, children would stay in group homes for longer periods of time, thus making it easier for DSS to monitor a child's care and conduct the necessary follow-up checks.

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the MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, BUREAU OF RESEARCH AND STATISTICS, DIVISION OF CHILD GUARDIANSHIP: 1967 DISTRICT VARIATIONS I (September, 1968).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 643

<sup>77</sup> *Id.* at 644.

<sup>78</sup> *Id.*

<sup>79</sup> Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. L. ISSUES 1, 11 (1995). See discussion *infra* Part 3 c for the qualifications one must fulfill in order to be a foster parent in Massachusetts.

<sup>80</sup> Campbell, *supra* note 74, at 643.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Timothy Araco, *Florida's Foster Care System Fails Its Children*, 25 NOVA L. REV. 641, 651 (2001) (citing Libby S. Adler, *The Meaning of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1 (2001)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, at 661.

## 2. Foster Care Drift: the Instability of Family Foster Care

Foster care is supposed to provide a "temporary, safe haven for children whose parents are unable to care for them."<sup>86</sup> Before ASFA, the belief that abusive or neglectful parents could be helped and taught to become better caretakers characterized the development of the foster care system;; foster care was thought to provide a temporary place for children to stay while their parents improved.<sup>87</sup> Despite ASFA's emphasis on moving children toward adoption, too often children in foster care still spend years in the system, never reunited with their families or adopted by new ones.<sup>88</sup> The lack of quality foster family homes and group homes results in frequent transfers of children between placements.<sup>89</sup>

Multiple placement is one of the gravest problems facing foster care children.<sup>90</sup> The average stay in foster care rose over the past fifteen years.<sup>91</sup> The longer children stay in the system, the more placements they require because they do not stay in one home for long.<sup>92</sup> Although the foster care system is intended to provide temporary care, one in ten children spend more than seven years in the system.<sup>93</sup> In Massachusetts, 20.7% of the children awaiting adoption in 2000 spent between twenty-four and thirty-six months in the system, 20.3% spent thirty-six to forty-eight months, and 43.2% of the children spent more than forty-eight months in foster care.<sup>94</sup> The great amount of transferring between homes is due to the lack of quality foster family and institutional homes.<sup>95</sup>

For example, in *Petition of the Department of Public Welfare* the minor children were removed from their parents in January 1974 due to several instances of physical abuse.<sup>96</sup> Between the date of removal and the time of the trial in April 1978, the older child had stayed in three foster homes.<sup>97</sup> The younger child was

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<sup>86</sup> Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988) (emphasis added).

<sup>87</sup> Levesque, *supra* note 79, at 5.

<sup>88</sup> *Id.*, Sanders, *supra* note 41, at 52.

<sup>89</sup> Levesque, *supra* note 79, at 5.

<sup>90</sup> Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care* at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 18, 2005).

<sup>91</sup> Araco, *supra* note 83, at 647.

<sup>92</sup> *Id.* at 647-48.

<sup>93</sup> McKenzie, *supra* note 16, at 290.

<sup>94</sup> US Department of Health and Human Services, *Child Welfare Outcomes 2000- Annual Report* available at [www.acf.hhs.gov/programs/cb/publications/cwo.htm](http://www.acf.hhs.gov/programs/cb/publications/cwo.htm) (last visited May 17, 2005).

<sup>95</sup> Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care* at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 18, 2005).

<sup>96</sup> *Petition of the Department*, 381 N.E.2d at 568-69. Between the two of them the children were treated for a fractured arm, second degree burns, and a broken nose.

<sup>97</sup> *Id.*

initially placed with his brother in a foster home but was later removed to a group home.<sup>98</sup>

Multiple foster care placements place a great emotional toll on children.<sup>99</sup> This problem is particularly troubling when applied to abused children who require stability and predictability in order to heal.<sup>100</sup> Additionally, multiple placements are especially harmful to younger children because they have a unique sense of time.<sup>101</sup> Young children focus on the present and do not understand the difference between the permanent and the temporary; everything appears permanent to a young child.<sup>102</sup> Therefore, child welfare agencies need a sense of urgency when dealing with young children.<sup>103</sup>

According to Robert G. Gordon, state child welfare agencies are caught in a damaging and nonsensical compromise position.<sup>104</sup> For years agencies followed the ideologies of family preservation.<sup>105</sup> In recent years, however, there has been an attempt to lessen the focus on family reunification and take a harder stand against parental incompetence.<sup>106</sup> States continue to remove children from their home, however, they lack suitable placements for them.<sup>107</sup> As a result, foster children do not return to their families, but the states do not terminate parental rights, and children remain in long-term foster care.<sup>108</sup> Indeed, "[i]f the nation had deliberately designed a system that would . . . abandon the children who depend on it, it could not have done a better job than the present welfare system."<sup>109</sup>

### 3. Unsuitable Homes

Children placed in foster care have special emotional and psychological needs because they are often victims of neglect and abuse.<sup>110</sup> Placing a child in an

<sup>98</sup> *Id.*

<sup>99</sup> See generally Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care* at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 18, 2005).

<sup>100</sup> *Id.*

<sup>101</sup> American Academy of Pediatrics, *Policy Statement: Developmental Issues for Young Children in Foster Care*, at [www.aap.org/policy/re0012.html](http://www.aap.org/policy/re0012.html).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 673 (1998-1999).

<sup>105</sup> *Id.*

<sup>106</sup> Sanders, *supra* note 41, at 74.

<sup>107</sup> Gordon, *supra* note 104, at 700.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 638 (quoting NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 293 (1991)).

<sup>110</sup> See Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care*, at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 16, 2005); American Academy of Pediatrics, *Policy Statement: Developmental Issues for Young Children in Foster Care*, at [www.aap.org/policy/re0012.html](http://www.aap.org/policy/re0012.html) (last visited May 16, 2005).

inappropriate foster care home will damage the child further, because the home does not differ from the child's original abusive home.<sup>111</sup> Therefore, foster children need loving homes that are free from abuse and caretakers that are sensitive to their special needs.

One of the main causes for the large number of unsuitable foster homes is that foster parents receive inadequate training and they cannot depend on a reliable support system from the state.<sup>112</sup> DSS fails to properly screen potential foster parents and to conduct the required supervision of foster homes once children are placed with a family.<sup>113</sup> Another factor contributing to the further diminishing number of foster homes is the inadequate reimbursement given to foster parents.<sup>114</sup> Without extra financial help or education many foster families simply do not have the resources or the knowledge to give the special care that foster children require.<sup>115</sup> These shortcomings make the job of being a foster parent more difficult than it already is. Thirty thousand families leave the system every year and state agencies cannot replace them.<sup>116</sup> In a 1991 survey conducted by the National Foster Parent Association, the number of children in out-of-home care increased by 47% between 1985 and 1990, while the number of foster families decreased by 27%.<sup>117</sup>

A third reason for the shortage of foster homes is a general lack of respect for foster parents. Many in the government and child service agencies view foster parents as financially-driven and little more than babysitters.<sup>118</sup>

With the shortage of qualified families to choose from, DSS must place children in unfit homes. In one example of unsuitable foster placement, DSS placed a child with an individual who had an open Category 1 criminal charge.<sup>119</sup> DSS failed to immediately remove the child as required<sup>120</sup> and, instead, advised the individual to seek legal guardianship.<sup>121</sup> In addition, DSS failed to ensure that the individual facilitated a relationship between the child and the child's biological mother.<sup>122</sup> The Department also did not conduct the required 6-month periodical reviews.<sup>123</sup>

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<sup>111</sup> Araco, *supra* note 83, at 664.

<sup>112</sup> Harper, *supra* note 73, at 797 (citing Mushlin, *supra* note 86, at 210 n.55, 213 (1988)).

<sup>113</sup> *Id.* (citing Mushlin, *supra* note 86, at 209-210)

<sup>114</sup> Levesque, *supra* note 79, at 11-12.

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* at 11.

<sup>117</sup> Edward Walsh, *As At-Risk Children Overwhelm Foster Care, Illinois Considers Orphanages*, WASH. POST, Mar. 1, 1994, at A9.

<sup>118</sup> Levesque, *supra* note 79, at 11-12.

<sup>119</sup> Leonetti, *supra* note 14, at 76.

<sup>120</sup> *Id.* 56 at 86 n. 56 (citing MASS. REGS. CODE tit. 110, §7.104(3) (1993)). The code states, "[a] foster/pre-adoptive parent applicant . . . must have a record which is free of criminal conduct . . ." MASS. REGS. CODE tit. 110, §7.104(3) (1993).

<sup>121</sup> Leonetti, *supra* note 14, at 76.

<sup>122</sup> *Id.*, at 86 (citing MASS. REGS. CODE tit. 110, §7.104(1)(h) (1993)). The code states, "[i]n order to be licensed as a foster/adoptive parent applicant must . . . accept and support the child's relationship with his/her parents and siblings . . ." MASS. REGS. CODE tit. 110, §7.104(1)(h) (1993)

<sup>123</sup> Leonetti, *supra* note 14, at 86 (citing MASS. REGS. CODE tit. 110, §6.10, §6.12 (1993)).

## V. A PROPOSED SOLUTION: A RETURN TO INSTITUTIONAL HOMES

Foster children deserve better treatment by the foster care system. There is a strong argument that foster children have an equal, if not greater, claim to judicial protection from harm while in state care than do institutionalized persons who are already accorded significant protections.<sup>124</sup> Michael B. Mushlin argues that a constitutional right-to-safety theory is well established for prisoners, mentally ill and mentally handicapped people, but that foster children have not received much benefit from the right.<sup>125</sup> Mushlin further argues that there is no logical distinction between foster children and the other groups of institutionalized children and that foster children stand to gain the most from the right to safety.<sup>126</sup>

A. *A Short History of Institutional Homes in the United States*

The first orphanage in the United States opened in New Orleans, Louisiana in 1729.<sup>127</sup> By the nineteenth century homes designated to orphaned or abandoned children were commonly found.<sup>128</sup> The orphanage population continued to grow into the twentieth century, until it reached its peak in 1923 with 143,000 children.<sup>129</sup>

Orphanages began to decline in popularity upon the introduction of early forms of foster care.<sup>130</sup> A writer and missionary named Charles Brace proposed a model in which children were placed with farm families.<sup>131</sup> The families cared for the children and, in return, received much needed help with farm labor.<sup>132</sup> The success of Brace's model, in combination with the bad reputation that some orphanages received for placing too much emphasis on religion and discipline, led to the increasing unpopularity of institutional homes.<sup>133</sup>

The growth of orphanages was also hindered by governmental guidelines.<sup>134</sup> The White House Conferences on the Care of Dependent Children in 1909 and 1919 promulgated policies that discouraged the growth of orphanages. Single mothers received financial aid, for example, as incentive to raise their children.<sup>135</sup>

By the 1930's it was no longer possible to follow the Brace model because of the tremendous urban growth in America and the financial difficulties faced by many

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<sup>124</sup> Mushlin, *supra* note 86, at 201.

<sup>125</sup> *Id.* at 227.

<sup>126</sup> *See generally id.*

<sup>127</sup> Marvin Olasky, *The Rise and Fall of American Orphanages*, in *RETHINKING ORPHANAGES FOR THE 21<sup>ST</sup> CENTURY* 65, 65 (Richard B. McKenzie ed., 1999).

<sup>128</sup> *Id.* at 67.

<sup>129</sup> *Id.* at 74.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 70.

<sup>132</sup> *Id.*

<sup>133</sup> Olasky, *supra* note 127, at 74.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

due to the Great Depression.<sup>136</sup> Instead, urban families took in children in exchange for a small amount of income and the modern day foster care system was born.<sup>137</sup>

Since the 1970's, federal governmental spending has encouraged the popularity and breadth of the foster care system. The federal government created financial incentives for state officials to use foster care.<sup>138</sup> States become qualified for federal funding exclusively through the Aid to Families with Dependent Children program by removing children from their families; thus, there is inducement to remove children when it is not necessary.<sup>139</sup> This floods the system unnecessarily, adding to the number of children who are shuffled in and out of unsuitable homes.<sup>140</sup>

B. *Orphanages are Consistent with Massachusetts' Best Interest of the Child Standard*

1. Orphanages are Consistent with the National and State Definitions of the Best Interest of the Child

The Adoption and Safe Families Act shifted the emphasis in foster care funding "from family preservation to child safety."<sup>141</sup> The Act was written to assure permanency for children, while at the same time understanding that the new focus may result in giving up on parents or turning away from reunification.<sup>142</sup> ASFA's focus on permanency for children is evident in its three goals.<sup>143</sup> Firstly, ASFA seeks to ensure that states do not make so-called "reasonable efforts" to return children to unsafe households.<sup>144</sup> Secondly, it attempts to reduce foster care drift by returning children to their original homes, or finding other permanent placements as quickly as possible. Thirdly, it endeavors to increase the number of children moving out of foster care via adoption.<sup>145</sup>

If the national directive, as defined by ASFA, seeks to provide permanency for children, then this goal is better served by placing children in orphanages rather than with foster families. Orphanages provide a more stable and permanent environment for children, thus providing what federal law has determined is in the best interest of the child.<sup>146</sup> Richard McKenzie, an orphanage alumni and a

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<sup>136</sup> *Id.* at 75; Levesque, *supra* note 79, at 4.

<sup>137</sup> Olaksy, *supra* note 127, at 75.

<sup>138</sup> Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM. J.L. & SOC. PROBS. 1, 3 (2002).

<sup>139</sup> *Id.*

<sup>140</sup> See Levesque, *supra* note 79, at 11.

<sup>141</sup> Sanders, *supra* note 41, at 52.

<sup>142</sup> *Id.* (citing Adoption and Safe Families Act of 1997, Publ. L. No. 105-89, 111 Stat. 2115 (1997)).

<sup>143</sup> Gordon, *supra* note 104, at 638-639.

<sup>144</sup> *Id.* at 639.

<sup>145</sup> *Id.*

<sup>146</sup> See generally *id.*

proponent of orphanages, stated that living in an orphanage allowed him to experience the following: friendship with the other children, a sense of belonging, a daily routine, and discipline and moral lessons.<sup>147</sup>

Orphanages are also consistent with Massachusetts' best interest of the child standard. This standard seeks to protect children against the harmful consequences of the "absence, inability, inadequacy or destructive behavior of parents or parent substitutes."<sup>148</sup> The SJC declared that a child's right to be free from abusive and neglectful behavior is absolute.<sup>149</sup> Chapter 119, section 1 of Massachusetts General Laws demands that DSS shall define that best interest of the child as including "the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein."<sup>150</sup> Therefore, DSS is required to determine the best location for a child to be placed once the child is removed from his or her family; it is not sufficient to simply remove the child from an unsafe situation.<sup>151</sup>

Foster care does not effectively provide the level of care demanded by the best interest of the child standard. The difficulties and complexities of running the foster care system are such that DSS cannot guarantee a child the right to be free from abusive and neglectful behavior, the absolute right that is promised by the best interest of the child standard.<sup>152</sup> DSS lacks the resources to sufficiently monitor foster families.<sup>153</sup> This task is made all the more harder by the lack of suitable and available foster families.<sup>154</sup> Therefore, the best interest of the child standard is better served by placing children in orphanages.<sup>155</sup>

## 2. The Psychological and Developmental Benefits to Living in an Orphanage are Consistent with the Best Interest of the Child Standard

The best interest of the child standard demands that courts and child care agencies take various factors into account.<sup>156</sup> In order to meet this standard, DSS must place great importance on a child's mental and emotional health.<sup>157</sup> As is, the foster care system in Massachusetts creates opportunities for further psychological

<sup>147</sup> Joan Beck, *Time to Look at Residential Groups Homes for Kids*, CHI. TRIB., May 5, 1996, at 23.

<sup>148</sup> MASS. GEN. LAWS ANN. ch. 119, §1 (2003).

<sup>149</sup> *Care and Protection of Robert*, 556 N.E.2d 993, 998 (Mass. 1990).

<sup>150</sup> MASS. GEN. LAWS ANN. ch. 119, §1.

<sup>151</sup> *See id.*

<sup>152</sup> *See Care and Protection of Robert*, 556 N.E.2d at 1000.

<sup>153</sup> *See generally* Araco, *supra* note 83, at 651; Campbell, *supra* note 74, at 642.

<sup>154</sup> *See Gelles & Schwartz*, *supra* note 39, at 99-102.

<sup>155</sup> *See id.*

<sup>156</sup> *Custody of a Minor*, 379 N.E. 2d at 1065. These factors include, the child's past, the child's current fitness and developmental levels, and effectiveness and adequacy of the services provided. MASS. GEN. LAWS ANN. ch. 119, §1 (2003).

<sup>157</sup> *See* Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care*, at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 16, 2005).



and emotional damage to children. As previously stated, children in foster care are likely to suffer from psychological difficulties beyond those of the average child. Thirty percent of foster care children have severe emotional, developmental and behavioral problems.<sup>158</sup> An increasing number of children with complicated and serious physical, mental health, and developmental problems are being placed in foster care.<sup>159</sup> These children need specialized care and foster parents must be prepared to provide this.<sup>160</sup> However, the Code of Massachusetts Regulations, which lists the requirements to be a foster parent, does not include this.<sup>161</sup>

The American Academy of Pediatrics states that the key factor in a child moving beyond past abuse or neglect is a relationship with at least one person in a parent-like role.<sup>162</sup> A person fulfills this role for a child when the person is devoted to the child, loves the child unconditionally, and accepts and values the child for an extended period of time.<sup>163</sup> It is crucial to take this into account when determining what fits the best interest of the child. While foster care has the potential to provide a child with opportunities to develop a relationship with a parent-like figure, the opportunities are lessened every time the child is moved<sup>164</sup> or placed in an unsuitable home.<sup>165</sup> By placing a child in orphanages rather than in unsuitable and unstable foster homes, Massachusetts can provide the child with greater opportunities to form a relationship with a parent-like figure, the caretakers in the orphanage.<sup>166</sup> Ideally, children will be able to stay in orphanages for an extended period of time and avoid foster care drift.<sup>167</sup>

We cannot underestimate the importance of providing children, particularly young children, with adequately caring environments. The American Academy of Pediatrics states that early childhood is a crucial period in which a child develops the basis of "trust, self-esteem, conscience, empathy, problem solving, focused

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<sup>158</sup> American Academy of Child and Adolescent Psychiatry, *Foster Care: AACAP Facts for Families #64*, at [www.aacap.org/publications/factsfam/64.htm](http://www.aacap.org/publications/factsfam/64.htm) (last visited May 16, 2005).

<sup>159</sup> American Academy of Pediatrics, *Policy Statement: Health Care of Young Children in Foster Care*, at [www.aap.org/policy/re0054.html](http://www.aap.org/policy/re0054.html) (last visited May 16, 2005).

<sup>160</sup> See generally American Academy of Pediatrics, *Policy Statement: Developmental Issues for Young Children in Foster Care*, at [www.aap.org/policy/re0012.html](http://www.aap.org/policy/re0012.html) (last visited May 16, 2005).

<sup>161</sup> See MASS. REGS. CODE tit. 110, §7.100 (2003).

<sup>162</sup> American Academy of Pediatrics, *Policy Statement: Developmental Issues for Young Children in Foster Care*, at [www.aap.org/policy/re0012.html](http://www.aap.org/policy/re0012.html).

<sup>163</sup> *Id.*

<sup>164</sup> See Araco, *supra* note 83, at 647-48 (stating that the lack of quality in foster family homes results in frequent transfers of children between placements).

<sup>165</sup> See Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care* at [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 16, 2005) (stating that there is a shortage of foster families that are willing to care for abused and traumatized children, and that can provide for their special emotional and psychological needs).

<sup>166</sup> See *id.*

<sup>167</sup> See discussion *supra* Part III C 2.

learning, and impulse control.”<sup>168</sup> Children need to live in a nurturing and stimulating environment in order to successfully develop the above traits and skills.<sup>169</sup> Such an environment is a crucial part of the best interest of the child standard, and is one more efficiently provided through orphanages where children can build and maintain lasting relationships with the caretakers and the other children.<sup>170</sup>

Orphanages are not immune to criticism. Some of the common criticisms are that they are insensitive to the needs of individual children, they have inadequate facilities and education, and they are subject to overcrowding.<sup>171</sup> This problem may be solved by enforcing custodian-child ratios and facilities and curriculum requirements. Other challenges to maintain sufficient care for the children are training and retaining enough skilled staff, controlling the violence among the children, and controlling abuse by the caretakers.<sup>172</sup> DSS may abate such problems by requiring specially-trained staff. DSS will also have an easier time of monitoring the caretakers and children because there will be less facilities.

According to the Child Welfare League of America, orphanages are not suitable for children who have a loving parent that is capable of caring for them, or have no need of residential care and treatment.<sup>173</sup> However, children who are removed from their homes due to abuse are in need of residential care and treatment because they require stability and predictability in order to heal.<sup>174</sup> Abused children have special emotional and psychological needs and as a result need caretakers that are aware and sensitive to these particular needs.<sup>175</sup> While orphanages are not the perfect solution for every child, orphanages are suitable for children removed from their homes due to abuse because of their special situations.<sup>176</sup>

Orphanage alumni seem to agree. In a survey of 300 former orphanage residents who had been in foster care before or after entering an orphanage, or working in professions that gave them knowledge of the foster care system, 90 to 92% of the

<sup>168</sup> American Academy of Pediatrics, *Policy Statement: Health Care of Young Children in Foster Care*, at [www.aap.org/policy/re0054.html](http://www.aap.org/policy/re0054.html) (last visited May 16, 2005).

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> NURITH ZMORA, ORPHANAGES RECONSIDERED: CHILD CARE INSTITUTIONS IN PROGRESSIVE ERA BALTIMORE 181 (1994).

<sup>172</sup> Bernardine Dohrn and David Reed, *Are Orphanages the Answer? It All Depends on the Question*, CHI. TRIB., Dec. 25, 1995, at 31. Interestingly, these challenges are the same problems that plague the foster care system: the lack of social care workers, a shortages of suitable caretakers (foster parents), and insensitivity to the individual child. ZMORA, *supra* note 171, at 194.

<sup>173</sup> Richard B. McKenzie, *Orphanage Alumni: How They Have Done and How They Evaluate Their Experience*, in RETHINKING ORPHANAGES FOR THE 21<sup>ST</sup> CENTURY 103 (Richard B. McKenzie ed., 1999).

<sup>174</sup> *See* Massachusetts Citizens for Children, *Working to End Child Abuse and Neglect in Massachusetts: Abused and Neglected Children in Foster Care at* [www.masskids.org/cta/cta\\_iii\\_ch10.html](http://www.masskids.org/cta/cta_iii_ch10.html) (last visited May 16, 2005).

<sup>175</sup> American Academy of Pediatrics, *Policy Statement: Health Care of Young Children in Foster Care*, at [www.aap.org/policy/re0054.html](http://www.aap.org/policy/re0054.html) (last visited May 16, 2005).

<sup>176</sup> *See id.*

residents stated that they preferred orphanages over foster care.<sup>177</sup> Another survey of orphanage alumni asked if they would have preferred to grow up in foster care.<sup>178</sup> Ninety percent said no, 1% said yes, and the rest were non-committal.<sup>179</sup> When asked if they would rather have lived with a member of their family, 80% said no, and only 10% said yes.<sup>180</sup> Whatever the faults of orphanages, those who have experienced them claim to prefer them to the alternative, foster care.<sup>181</sup>

Foster care need not become absolute. This paper only proposes that orphanages be considered as an alternative. Nurith Zmora suggests a system that is a combination of foster care and orphanages. In this system trained foster parents would take care of a large group of children in a traditional house situated in a good neighborhood.<sup>182</sup> The children would have access to the public school, public library and social and medical welfare agencies, much as any child living in a "normal" home.<sup>183</sup> If the foster parents have to leave, the children would remain in the house, thus benefiting from having the same school, environment and friends throughout their childhood.<sup>184</sup> The house becomes their permanent home.<sup>185</sup>

## VI. CONCLUSION

A family provides a child with the love and comfort needed to develop into a healthy member of society. When a family can not do this, and even goes so far as to abuse the child the state must intervene and provide the child with alternative care. The best interest of the child standard guides Massachusetts in such actions. This standard demands that "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child."<sup>186</sup> DSS, the organization in charge of the foster care system, is explicitly mandated to ensure that children are protected against the harmful effects resulting from the "absence, inability, inadequacy or destructive behavior of parents or parent substitutes."<sup>187</sup>

Unfortunately, the current foster care system does not meet the best interest of the child standard. Children in the foster care system fall victim to further abuse and/or inadequate care at the hands of unsuitable foster parents,<sup>188</sup> the

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<sup>177</sup> Richard B. McKenzie, *Orphanage Alumni*, in *RETHINKING ORPHANAGES FOR THE 21<sup>ST</sup> CENTURY*, *supra* note 173, at 116-117.

<sup>178</sup> Beck, *supra* note 147, at 23.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Richard B. McKenzie, *Orphanage Alumni*, in *RETHINKING ORPHANAGES FOR THE 21<sup>ST</sup> CENTURY*, *supra* note 174, at 116-117; 7, *supra* note 148, at 23.

<sup>182</sup> ZMORA, *supra* note 171, at 195.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> MASS. GEN LAWS ANN. ch. 119, §1 (2003).

<sup>187</sup> *Id.*

<sup>188</sup> See generally Harper, *supra* note 72.

incompetence and disorganization of DSS,<sup>189</sup> and the instability of the system itself which moves children from home to home for years on end.<sup>190</sup>

Foster children deserve better treatment by the foster care system. This note proposes placing children in orphanages as an alternative to family foster care. Orphanages would be better equipped to provide the special psychological and emotional care needed by foster children. Orphanages would also provide a stable and permanent environment for children. Both of these factors are crucial to meeting the best interest of the child standard, and thus, orphanages are a valid alternative to the failures of foster care.

*Ariana L. Johnson*

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<sup>189</sup> See *id.* at 797.

<sup>190</sup> See Levesque, *supra* note 79, at 5.

