THE RECORDER
COMMENTARY

Foster parent applicants that look good on paper, but…

Daniel Pollack and Ian Bauer | October 27, 2023

Imagine you are the director of your state's foster care licensing division. Three applications arrive on your desk.

The first is a single, 23-year-old heterosexual male with a college degree in psychology. He is a part-time primary school teacher. In his application he asks to foster girls between the ages of 5-8. The home study worker and supervisor find no obvious red flags, but say they are "uneasy" about this applicant.

The second is a lesbian couple, both 26-years old, with degrees in gender studies. They both have full-time jobs that allow them to work remotely. In their application they ask to foster girls between the ages of 7-12. Here, too, the home study worker and supervisor detect no particular red flags, but say they are "hesitant" about the applicants.

The third is a single, 34-year-old queer person with a sociology degree. Working remotely, the applicant wishes to foster boys, no more than 4 years-old. Once again, the home study worker and supervisor find no deficiencies in the application, but say that, "Something just doesn't feel right."

In reviewing each application, you are pleased that the staff involved is top notch. All of them have been doing their respective jobs for many years, with only praise coming from all quarters about each one of them. Their annual evaluations corroborate this. In short, you have no significant thoughts that the staff are biased in any way.

So, how do you handle these situations? How much weight can you, and should you, legally give to your staff's instincts and intuition that something may not be right with each of the applications? Will it tip the balance in favor of turning down the application?

Ralph Waldo Emerson wrote, "Trust instinct to the end, even though you can give no reason." Or, is instinct just that – inexplicable? Agatha Christie said, "Instinct is a marvelous thing. It can neither be explained nor ignored."

On one hand, needless to say, any overt or covert discrimination should not be tolerated, overtly or covertly. There is also the practical reality: There is an enormous shortage of foster families. On the other hand, there are too many stories and lawsuits of children who were sexually abused while in foster care. The basis of their lawsuits often stresses the allegation that they should not have been placed with the perpetrator initially because the placing agency knew or should have known that the foster parent had predatory tendencies.

Generally speaking, there is no legal right to be a foster parent, let alone a right to be a foster parent to a particular dependent child.[1] Rather, state foster programs are all about providing what children in foster care need.[2] That being said, we return to our question: How much weight should be given to the gut feelings of a home study investigator and their supervisor? Enough to trump the presumption that an otherwise qualified applicant should be given a license?

Let's start by acknowledging the obvious – these hypothetical scenarios are intentionally uncomfortable, purposefully provocative and ambiguous.

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[1] *See, e.g., Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842-47 (1977) (distinguishing between biological and foster families, declining to recognize a constitutionally-protected liberty or property interest in the relationship between a foster parent and dependent child); *Spielman v. Hildebrand*, 873 F.2d 1377, 1384 (10th Cir. 1989) ("Foster care agreements … typically involve temporary care during a transitional period of a child's life, and for this reason some courts have refused to accord constitutional protection to foster family relationships.") (citations omitted).

[2] *See, e.g., Smith*, 431 U.S. at 824-25 (recognizing that the fundamental purpose of foster care is to allow for placement "when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for children for some limited period").

Again, the law provides that foster parents have no enforceable, unilateral right to be foster parents, much less a "right" to the companionship and fostering of a specific dependent child that might be placed in their home.[3] State child welfare agencies, acting in the state's *parens patriae* capacity, must always be guided by the fundamental principle that the health, safety and well-being of the dependent child is the paramount concern. In other words, the agency's emphasis and focus must always be on promoting the child's right to a safe, stable, and supportive home.[4]

There are various, overlapping layers of protection in child welfare systems intended to guide the agency's decision-making process. Among other layers, these protections include thorough, comprehensive home studies of prospective foster parents, with an array of minimum licensing requirements to ensure that certain, fundamental safeguards are in place.

Similarly, policy and procedure require that caseworkers conduct frequent, recurring health and safety visits with the children on their caseload. These

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[3] *See, e.g., Smith*, 431 U.S. at 842-47; *Spielman*, 873 F.2d at 1384.

[4] *See, e.g., DeShaney v. Winnebago County Dep't of Social Servs*., 489 U.S. 189 (1989) ("when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"). *See also, e.g., Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) ("Once the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child.") (citations omitted); *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (When the state exercises its parens patriae interests and intervenes to protect the health, safety and well-being of vulnerable children, "the State has a statutory and constitutional duty to ensure that those children are free from unreasonable risk of harm, including a risk flowing from the lack of basic services while under the State's care and supervision" and must "provide conditions free of unreasonable risk of danger, harm or pain, and must include adequate services to meet the basic needs of the child").

policies typically reflect that these visits must be private, and/or that some visits occur away from the foster home. The purpose is to generate rapport between the caseworker and child, to ensure that the child is comfortable disclosing abuse, neglect, or other concerns related to placement.

More importantly, statutes, policy and procedure uniformly mandate prompt investigation and intervention to protect the dependent child if there are licensing violations or health and safety concerns after placement.

Stepping back to the 30,000-foot level, what we see is that a properly functioning child welfare agency provides three layers of protection around a dependent child in a foster home: (1) licensors, charged with screening, assessing and monitoring the home's initial and ongoing compliance with minimum licensing standards; (2) caseworkers, charged with monitoring and supervising the child's placement; and (3) investigators, charged with investigating allegations of abuse, neglect or other risks of harm in the home.

While this article focuses on the first category – licensors – the same principles surrounding child safety must guide the analysis at every turn. After all, the question in civil litigation surrounding an abusive placement will necessarily be: "Did the agency act reasonably under the circumstances?"[5]

[5] *See, e.g., Tamas v. State of Washington*, 630 F.3d 833, 842-43 (2010) (recognizing a "special relationship" between a state child welfare agency and vulnerable, dependent children, describing the corresponding duty of protection as "the quintessential responsibility of the social workers assigned to safeguard the well-being of this helpless and vulnerable population"); *H.B.H. v. State of Washington*, 192 Wn.2d 154, 168-178, 429 P.3d 484 (2018) ("Under well-established common law tort principles, [the State] owes a duty of reasonable care to protect foster children from abuse at the hands of their foster parents."). *See also, e.g., Barnes v. Nassau County*, 108 A.D.2d 50 (N.Y. 1985) ("The overriding weight of appellate authority in this country is in agreement that a State

This is the question in our uncomfortable hypotheticals. Although liability can result from a single, isolated decision that breaches the standard of care, headlines are generated when there are systemic failures across multiple layers of this protective scheme.

Consider a foster home that did not meet minimum licensing standards, but was nevertheless issued a license. Consider the issuance of a waiver, to allow placement of more children than the license allows, or children with particular needs that cannot be met in the home. Consider how missed health and safety visits (or caseworker turnover) will impact rapport with and the trust of a dependent child in harm's way.

More broadly, consider how the three layers of protection noted above – licensing, ongoing casework, and investigation – communicate and collaborate in the child welfare agency. Historically, all three functions were performed by individual social workers. The modern trend, however, is to compartmentalize and specialize in each of these areas, for myriad reasons. It is imperative, however, that workers in these three realms communicate and collaborate. If the right hand does not know what the left hand is doing – or knows what the other has learned about risks facing children in placement – children are at risk.

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or its subdivisions may be answerable for injuries suffered by children as a result of negligence in the placement or supervision of children in their charge.") (citations omitted).

That being said, the law does not hold child welfare agencies to a standard of perfection. Liability can be found, however, when agencies deviate from accepted, standard practices, no matter how pure the decision maker's intentions may be.

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