

Foster Care Negligence and Wrongful Adoption:

A Survey of Civil Remedies

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Photo: Getty Images

Child abuse is a disheartening and intractable problem. Social services agencies charged with protecting children are often hobbled by inadequate resources. Too many agencies are understaffed, undertrained, and underfunded, with limited options for the treatment and placement of children in their care. Given these systemic problems, it is perhaps not surprising that in some cases, agencies end up harming the very children they are supposed to protect. Recent class action lawsuits have exposed appalling practices—children being abused or killed in foster homes that were known to be dangerous; children left in, or returned to, abusive family situations; children denied the treatment and services they

need; children who are themselves dangerous foisted onto unsuspecting and unprepared families.

As awareness of this problem grows, courts are more willing to provide civil remedies to children and families injured by the system. This article provides an overview of potential causes of action for harm that arises in foster care and adoption situations.

State Law Claims

State law claims relating to the protection of children are grounded in the common law of negligence, fraud, and other traditional torts, as well as in statutes creating affirmative duties of protection on the part of social services agencies. These

duties often find reinforcement in agency regulations and procedure manuals. North Carolina's Child Protective Services Manual, for instance, provides that when an agency removes a child from his or her home, "the agency shall provide safe, nurturing substitute care."¹ Such a provision, though it lacks the force of statutory law, can be persuasive evidence against an agency that fails to protect a foster child.

Children Abused in Foster Care

In most jurisdictions, social services agencies may be liable if they negligently place children in abusive foster homes or fail to supervise the placements.² Some courts have even held that an agency's

duty to protect children in its custody is non-delegable.³ In Louisiana, the non-delegable duty has been interpreted to mean that an agency may be vicariously liable for abuse inflicted by foster parents.⁴

Children Abused outside Foster Care

Even children who are not in protective custody may have claims against social services agencies that fail to carry out statutory duties to investigate and respond to reports of child abuse.⁵ Because these cases arise outside foster care and the agency-child relationship is thus more attenuated, proof requirements are more rigorous. The plaintiff must establish that the defendant agency owed the child a special duty of care beyond whatever duty it owed to the public at large. Generally, such proof entails:

- a statute that mandates agency protection of a specific class of people;
- the agency's knowledge of danger to particular persons within that class;
- the plaintiff's reliance on representations or undertakings by the agency; and
- negligence by the agency resulting in an increased risk of harm to the plaintiff.⁶

Injuries Inflicted by Foster Children

A social services agency that negligently places or leaves a foster child in a setting in which the child poses a danger to others may incur liability if the child inflicts injury. The agency's liability may extend to those with whom it has a special relationship by virtue of the placement, including foster families⁷ and even, in some instances, their guests.⁸ Liability may arise from negligence in the placement decision itself or from the agency's failure to warn the foster family of the danger posed by the child.

Affirmative Defenses

Agencies sued for their wrongful conduct in dealing with foster families routinely attempt to shift the blame for any resulting injuries to the foster parents. In *Moore v. Nebraska*, a social services agency failed to disclose a foster child's criminal background to his foster parents, and the child molested the parents' seven-year-old daughter.⁹ In the family's action for damages, the court held that because the agency had failed to warn the

plaintiffs—first-time foster parents—of the need for heightened supervision of the foster child, the parents' claims were not barred by contributory negligence or assumption of risk.

Wrongful Adoption

With foster care, an agency's duty to disclose background information is typically considered part of its general duty to care for children in its custody. Sometimes this duty is articulated in the agency's contracts with its foster parents, but rarely is it spelled out by statute. With adoption, on the other hand, where placements are intended to be permanent, the duty of disclosure is more specific and exacting. Most states have enacted legislation imposing on adoption agencies, public and private, the duty to disclose the social and medical histories of children being placed for adoption to their prospective adoptive parents.¹⁰ Particular disclosure requirements vary by state. For example, in North Carolina disclosure

may be liable to those families for "wrongful adoption." Wrongful adoption is not a cause of action in itself, but a term that refers collectively to traditional causes of action that arise in the adoption setting. This is a relatively new and still developing area of law. When first confronted with these cases, courts were reluctant to impose liability on adoption agencies for fear of turning the agencies into insurers of the health of the children they place.¹²

In 1986, the Ohio Supreme Court decided *Burr v. Board of County Commissioners*, generally cited as the first wrongful adoption case.¹³ In *Burr*, the adoptive parents of a disabled child sought to recover damages for fraud against the county welfare agency that had placed the child. Before the adoption, a social worker had told the plaintiffs that the child was a "nice big, healthy baby boy" born in a city hospital to an eighteen-year-old unwed mother who could not care for him. Years later, after

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must be made in writing, and the document must include, in addition to certain enumerated details,

all reasonably available nonidentifying information about the health of the minor, the biological parents, and other members of the biological parents' families that is relevant to the adoption decision or to the minor's health and development. This . . . shall include each such individual's present state of physical and mental health, health and genetic histories, and information concerning any history of emotional, physical, sexual, or substance abuse.¹¹

Adoption agencies that misstate or fail to disclose relevant background information about children to their adoptive parents

the boy had suffered a myriad of diseases and developmental problems, the plaintiffs obtained his records and learned that he was in fact the child of mental patients and that the background information provided by the agency had been fabricated. On these facts, the court was compelled to find for the plaintiffs.

Courts were slower to allow recovery based on negligent conduct.¹⁴ The first wrongful adoption case based on negligence was *Meracle v. Children's Service Society of Wisconsin*, in 1989.¹⁵ In *Meracle*, adoptive parents sued an agency for negligent infliction of emotional distress and medical expenses after their daughter was diagnosed with Huntington's Disease. A social worker for the agency had disclosed that the child's biological grandfather had the disease, but misinformed the plaintiffs about the way the

disease is passed down, and mistakenly told them there was no way this child could develop the disease. The parents' claim for emotional distress was dismissed because they had suffered no physical injury as required under state law. However, they could recover medical expenses for their child, including future expenses, "because of the adoption which they allege was induced by . . . misrepresentation"¹⁶

In *Meracle*, liability was predicated on the defendant's having voluntarily assumed the duty of informing the plaintiffs about their child's chance of developing a disease and then breaching that duty. The decision did not address the issue of whether agencies have a duty to investigate and discover health information about children they place for adoption. To date, no court has been willing to impose such a duty in the absence of specific legislation.¹⁷

In the years since *Burr*, courts have allowed wrongful adoption claims based on a variety of torts: fraud or intentional misrepresentation,¹⁸ negligent misrepresentation,¹⁹ intentional and negligent infliction of emotional distress,²⁰ breach of contract,²¹ and breach of fiduciary duty.²²

To succeed on a wrongful adoption claim under any theory, the plaintiffs must allege and prove that:

- they relied on the agency's representations or omissions;
- the information misrepresented or withheld by the agency was material to the adoption; and
- the misrepresentation or omission was a proximate cause of the plaintiffs' damages.²³

Damages will vary according to the facts of the case and the theory of recovery asserted. In most wrongful adoption cases, adoptive parents are confronting child-raising expenses that are substantially more than they anticipated, and seek to recover those extraordinary costs.²⁴ They may also seek damages for emotional distress, including expenses for counseling and treatment necessitated by the agency's wrongful conduct.²⁵ Where an agency's nondisclosure or misrepresentation causes a delay or error in the diagnosis or treatment of a child's condition, and a

worsening of that condition, the child himself may have a claim against the agency for personal injury.²⁶

Failure to Disclose Abusive History

Among the most disturbing wrongful adoption cases are those in which a child has a history of abuse that is concealed from the adoptive parents, and the child's problems become so unmanageable or dangerous that the adoption has to be disrupted. The case of *Gibbs v. Ernst* involved a boy who, as a very young child, had been severely abused, physically and sexually.²⁷ He had been placed in ten different foster homes and had developed a habit of aggression toward younger children. Although the adoptive parents had pointedly questioned the placement agency, the agency did not disclose any of this background information. Soon after the adoption became final, the boy's emotional problems escalated. He tried to kill two of his cousins and started a fire that seriously injured another; he tried to amputate the arm of a five-year-old; and he burned his mother's hands with Clorox. When his parents sought help, they were advised that his violence was unlikely to improve, and in fact, he failed to respond to intensive treatment. Ultimately he was transferred to a state hospital, declared dependent, and returned to social services custody. The court concluded that these facts supported the parents' wrongful adoption claims based on fraud, negligent misrepresentation, and breach of fiduciary duty.²⁸

Child Plaintiffs

Adopted children are often included as plaintiffs in wrongful adoption cases,²⁹ and their standing to sue has rarely been challenged. In *J.A. v. St. Joseph's Children's and Maternity Hospital*,³⁰ the court recognized a wrongful adoption claim on behalf of an adopted child who alleged that by providing misinformation about his medical history, the defendant hospital caused him to be placed with a couple who could not care for his special needs. In these circumstances, the court said, the hospital owed a legal duty to the child arising from its special relationship not only with his adoptive parents but "most especially the child himself."³¹

Liability for Abuse Occurring after Adoption

Tort liability in a wrongful adoption case is measured no differently than tort liability in other situations—by applying traditional concepts of duty and foreseeability.

A placement agency's duty to deal openly with adoptive parents is made explicit by statute in most states, and agency liability for nondisclosure or misrepresentation should be at least as extensive in the adoption setting as in foster care—arguably more so, given the compelling public policies underlying adoption statutes.

In gauging the foreseeability of harm, courts look to the *time of placement* to ascertain what the agency knew and what it should have anticipated based on its knowledge.³² For example, agencies can fairly be charged with the knowledge that children who have been sexually abused often reenact that abuse on other, usually younger or smaller children; thus it is arguably foreseeable that placing an abused child with younger children will put the younger children at risk. This was the case in *Jeffrey BB v. Cardinal McCloskey School and Home for Children*, in which the defendant was aware that one of several children it was placing for adoption with the plaintiffs had a history of sexual abuse, but failed to disclose that history, and the girl subsequently abused two of her adoptive siblings.³³ In that case, the adoptive parents were allowed to maintain claims for the harm resulting to their injured children.

When a child is placed for adoption with parents who are known to be abusive, the child may have a claim against the agency for negligent placement, rather than nondisclosure or misrepresentation. Applying a traditional foreseeability analysis should yield the same result as if the child had been negligently placed in foster care. But the issue of duty—what was the agency's relationship with the child, and what level of protection did it owe?—may prove more difficult. Arguably, a child who has been in agency custody until being placed for adoption should have the same rights as if the agency had placed him in an abusive foster home, even though the adoption, if it has



been finalized, has severed that relationship. In other words, an agency should not be allowed to avoid liability for a dangerous placement on the ground that the placement is final rather than temporary. Whether the courts will take this view remains to be seen.

Claims against Public Agencies: Limits on Liability

Foster care and adoption cases often involve governmental defendants that historically have been accorded legal protections not available to private individuals and agencies. Though these protections are not always absolute, they create special challenges for plaintiffs.

Public Duty Doctrine

Most states recognize the common law rule known as the public duty doctrine, under which governments and their agents are said to act for the benefit of the public, and their nonperformance or faulty performance of a public duty is generally considered “a public and not an individual injury.”³⁴ There are various exceptions to the doctrine. A governmental defendant is not excused by the doctrine when (1) it has a *special relationship* with the injured party, such as the custodial relationship between a social services agency and a foster child,³⁵ or (2) it has assumed a *special duty* to that party.

To establish either exception in a claim against a placement agency, the plaintiff must show:

- the agency’s “affirmative duty” to act on behalf of the plaintiff;
- the agency’s knowledge that inaction could result in harm;
- direct contact between the agency and the plaintiff; and
- the plaintiff’s justifiable reliance on the agency.³⁶

A statute that imposes a duty to protect a specific class of plaintiffs, such as a statute requiring investigation of suspected child abuse, may support an exception to the doctrine.³⁷ An exception may also arise from the facts of a particular case. In *Hobbs v. N.C. Dept. of Human Resources*, the plaintiffs, inexperienced foster parents with a two-year-old daughter, agreed to foster an adolescent boy based on the defendant agency’s assurances that the boy would be safe in their home.³⁸ The agency failed to disclose the boy’s history of sexual abuse, and the boy subsequently molested the plaintiffs’ daughter. The plaintiffs’ claims, the court said, arguably met both exceptions—special relationship and special duty—to the public duty doctrine. The agency’s extensive direct contact with the plaintiffs, including a visit to their home, suggested not only a special relationship, but also a special duty in that “plaintiffs specifically asked and specifically were given assurances that the foster child would not be a threat to their small daughter.”³⁹

Sovereign Immunity

Under the common law doctrine of sovereign immunity, states are exempt from liability for the torts of their officers and employees committed during their performance of governmental functions.⁴⁰ The doctrine is available to state social services agencies and, in jurisdictions that extend immunity to county and municipal governments, to local agencies as well. When it applies, the doctrine operates as a complete bar to tort liability unless the plaintiff can prove a waiver or an exception to immunity.

When the defendant is a state agency, the plaintiff may be able to proceed under a state tort claims act—a statute by which the state consents to suit. These statutes typically set forth detailed procedural requirements and impose limits on monetary awards. Because they represent a departure from common law, tort claims acts tend to be strictly construed.⁴¹

A government agency may also waive immunity by the purchase of liability insurance.⁴² The scope of such a waiver is generally defined by the scope of insurance coverage.

In some instances, immunity may be abrogated by statutes that impose civil liability for the breach of specific duties. For example, in a child’s action against a county for negligently placing him with abusive foster parents, a New York court found the county’s claim of immunity “vulnerable” in the face of a statute imposing civil liability on social workers who fail to report abuse.⁴³ Likewise, a recent North Carolina law authorizing adoptive parents and adoptees to bring civil actions “for equitable or monetary relief or both against a person who fraudulently or intentionally misrepresents or fails to disclose” required background information would seem to create an exception to immunity in wrongful adoption cases, although the statute has not yet been tested in the appellate courts.⁴⁴

Qualified Immunity for Public Officials

Government workers sued in their official capacities are entitled to the same immunities, subject to the same exceptions, as the agencies for which they act. However, when workers are sued in their individual capacities, the rules become more complicated.

Public officials—those whose jobs are created by constitution or statute, and whose duties involve the exercise of judgment and discretion—are entitled to qualified immunity: they may not be held individually liable for mere negligence. To overcome the immunity, a plaintiff must prove that the official engaged in aggravated misconduct that placed him outside the scope of his official duties.⁴⁵

Public employees, by contrast, are those whose jobs are ministerial; that is, their duties are “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.”⁴⁶ Unlike public officials, they may be individually liable for negligence in the performance of their duties.

Social services directors act as policy-makers and clearly are public officials, entitled to qualified immunity when sued in their individual capacities. Likewise, supervisors and social workers who are called upon to exercise judgment and discretion in making decisions about the care, protection, and placement of children generally qualify for public official immunity.⁴⁷

Federal Civil Rights Claims

In some cases, §1983 of the Civil Rights Act may provide a legal basis for holding public agencies and employees liable for injuries to children for whom they have responsibility. The statute states, in pertinent part:

Every person who, under color of law . . . subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action, suit in equity, or other proper proceeding for redress.⁴⁸

The remedies afforded by §1983 include equitable and monetary relief and attorney fees.

In *Monell v. New York City Dept. of Social Services*, the Supreme Court held that local government agencies and officials are “persons” within the meaning of §1983.⁴⁹ However, the court held,

their liability cannot rest on allegations of mere negligence; rather, the plaintiff’s injury must have resulted from the execution of an official policy that is constitutionally offensive.

The statute does not support claims based on *respondeat superior*.⁵⁰ However, direct claims may lie against supervisors who fail to intervene to prevent constitutional violations by their subordinates in a manner which amounts to deliberate indifference to the rights of persons with whom the subordinates come in contact, or when they create policies and practices pursuant to which the constitutional deprivation was carried out.⁵¹

In contrast to local governments, states—including state agencies and state officials acting in their official capacities—cannot be liable for damages under §1983.⁵² The basis for this distinction is the Eleventh Amendment, which protects states but not local governments against suit in federal court.

However, states and state officials may be sued under §1983 for prospective injunctive relief.⁵³ And §1983 claims for damages may lie against state officials in their individual capacities where their conduct violates “an established statutory or constitutional right of which a reasonable person would have known.”⁵⁴

Substantive Due Process

Generally, when a plaintiff seeks redress for injury resulting from a breakdown in the social services system, the constitutional right implicated is the substantive due process right under the Fourteenth Amendment, a “liberty interest to be free from unreasonable risk of harm.”⁵⁵

Non-Custodial Situations: The DeShaney Case

Even in cases of extreme abuse resulting from social services malfeasance, not every plaintiff can rely on §1983 for redress. In *DeShaney v. Winnebago County*, the Supreme Court held that a four-year-old boy had no substantive due process claim against his county department of social services for failing to protect him from abuse by his father.⁵⁶ During a two-year period, the social services agency failed to adequately

respond to reports that the boy was being beaten by his father. Eventually, the father beat the boy so brutally that he lapsed into a coma and suffered permanent brain damage.

In a §1983 action, the Court considered the issue of whether a county’s failure to protect an individual citizen from private violence can amount to a due process violation. In general, states and their subdivisions have no duty under the Constitution to provide their citizens with private protection. However, such a duty may arise if there is a “special relationship” with the plaintiff. In this case, the court expressly limited the “special relationship” doctrine to circumstances in which the plaintiff is in state custody against his will—where, for example, the plaintiff is a prison inmate⁵⁷ or a mental patient committed to a state facility.⁵⁸ Because the four-year-old had not been taken into social services custody at the time of his injuries, he had no due process right to protection.

Foster Children

Reasoning by analogy from prisoner and mental patient cases, lower courts have consistently held that foster children—children who have been removed from their natural families and placed involuntarily into substitute care—are entitled to the substantive due process protections of the Fourteenth Amendment.⁵⁹

Liability under §1983 does not require intentional misconduct, but it does require more than mere negligence. Different jurisdictions have employed different standards.

Some courts have imported the “deliberate indifference” standard articulated by the Supreme Court in *Estelle v. Gamble*, an Eighth Amendment prisoner case.⁶⁰ In the first circuit-level case to recognize foster care abuse as a due process violation, *Doe v. New York City Department of Social Services*, the court held that agency supervisors who failed to monitor the plaintiffs’ foster homes would be liable under §1983 only if their state of mind reflected deliberate indifference to the plaintiffs’ constitutional rights.⁶¹ The court went on to define “deliberate indifference” in the context of foster care. Supervising foster parents, the court said, is not the same as supervising

other employees. A foster placement agency, “given its goal of approximating a normal family environment for foster children,” may feel “constrained to respect [a] foster family’s autonomy and integrity and pressured to minimize intrusiveness.”⁶² At the same time, an agency’s sustained failure to monitor a foster home may be evidence of indifference.

Of course, such indifference cannot exist absent some knowledge triggering an affirmative duty to act on plaintiff’s behalf, but actual knowledge of a specific harm is not the only type of knowledge that will suffice. Defendants may be held liable under §1983 if they, or in the case of an agency, its top supervisory personnel, exhibited deliberate indifference to a known injury, a known risk, or a *specific duty*.⁶³

Foster care supervisors have a statutory duty to monitor the safety of foster homes. When they repeatedly fail to carry out that duty—when their conduct reveals a “pattern of omissions”—they may be charged with deliberate indifference under §1983.⁶⁴

Other courts, persuaded that children in foster care should be entitled to better treatment than prisoners,⁶⁵ have rejected the deliberate indifference standard in favor of the standard set forth by the Supreme Court in *Youngberg v. Romeo*, in which a mental patient in a state institution claimed due process violations by his caretakers.⁶⁶ The court held that the plaintiff could sue public officials in their individual capacities for their *failure to exercise professional judgment*—that is, by proving their actions to be “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”⁶⁷

The court in *Yvonne L. v. New Mexico Department of Human Services* tailored the “professional judgment” standard to foster care.⁶⁸ When officials place children into dangerous foster care settings, the court said, the officials’ “failure to exercise professional judgment . . . implies abdication of the duty to act professionally in making the placements.”⁶⁹

The “State-Created Danger” Exception

The *DeShaney* Court, emphasizing that the state had not created the danger to the boy, noted in dicta that it may well be that by voluntarily undertaking to protect the boy against a danger it concededly played no part in creating, the state acquired a duty under state tort law to provide him with adequate protection against that danger.⁷⁰

Some lower courts have interpreted this language to mean that a state actor may be liable for constitutional deprivations under §1983 in situations in which the state has affirmatively created or exacerbated a danger to the plaintiff.⁷¹ The “state-created danger” theory has been used most successfully in police cases—cases in which police intervention actually leaves the plaintiff in greater peril.⁷² To date, courts have been reluctant to apply this theory to social services agencies that fail to remove children from abusive parents.⁷³ However, one court relied on this theory in allowing a claim against an agency that released a child from protective custody and returned her to her abusive father, who then killed her.⁷⁴

Statutory Violations, Generally⁷⁵

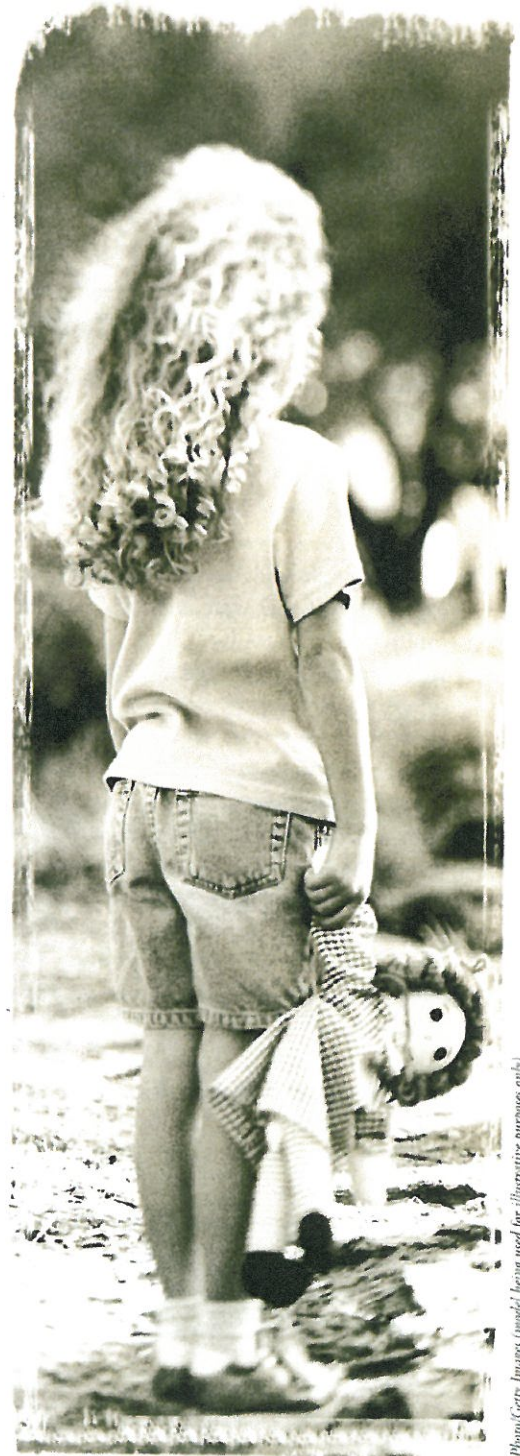
It is well settled that §1983 can provide a private right of action for the violation of a federal statute.⁷⁶ Plaintiffs in child protection cases have sought to impose liability under a number of federal statutes, with mixed results.

The Adoption Assistance and Child Welfare Act

One statute often relied upon is the Adoption Assistance and Child Welfare Act of 1980.⁷⁷ The AACWA requires states receiving federal funds for foster care programs to establish a plan that, among other things,

- sets standards for foster homes and institutions in accordance with national standards,
- provides for development of case plans for all foster children,
- establishes a case review system, and
- provides for the reporting of known or suspected abuse.⁷⁸

Certain sections of the AACWA have been held privately enforceable while others have not—for example, it has been held that the Act does *not* create a privately enforceable right “to care in a foster home with standards reasonably in accord with those of national organizations.”⁷⁹ Therefore, a plaintiff seeking to enforce the Act in a private action must specifically identify the section to be enforced.⁸⁰



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The Child Abuse Prevention and Treatment Act (CAPTA)

Enacted in 1974, CAPTA gives grants and technical assistance to states, which must in turn

provide that upon receipt of a report of known or suspected instance of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect.⁸¹

States must also have procedures and personnel in place to “ensure that [they can] deal effectively with child abuse and neglect cases.”⁸²

To date, most courts addressing the issue have ruled that CAPTA does not create a private right of action enforceable under §1983.⁸³ However, a few courts have been willing to grant injunctive relief under the statute. In *Jeanine B. v. Thompson*, a large class of children who were, or should have been, in the Milwaukee foster care system sued for injunctive relief under CAPTA, claiming violations by state and local social services officials who allegedly failed to adequately investigate reported abuse or to offer services.⁸⁴ The complaint included allegations of insufficient staff and a routine failure to observe professional standards in investigating and acting on reports of abuse. The court ruled that the language of CAPTA was “not so vague and amorphous as to be nonjusticiable” and allowed the plaintiffs to proceed on their statutory claims.⁸⁵

Adoption and Safe Families Act

One federal judge has ruled that the Adoption and Safe Families Act of 1997⁸⁶ creates enforceable federal rights to a speedy adoption and that children in foster care can sue a state for failing to make them legally available for adoption in a timely manner.⁸⁷

Disability Statutes

Disabled foster children who are denied appropriate services and accommodations while in state custody may have claims under the federal disability statutes. The Americans with Disabilities Act (ADA) provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.”⁸⁸ The Rehabilitation Act⁸⁹ contains a similar provision, but the coverage of the ADA is broader because it applies to state agencies regardless of whether they receive federal funding.

One of the plaintiffs in *Marisol A. v. Giuliani* was an HIV-positive foster child whose medical condition was not promptly assessed, who was transferred “from one inappropriate placement to another including a group home that lacked the medical staff needed to monitor his condition” and who ultimately died of an AIDS-related illness.⁹⁰ Another was a child with a seizure disorder who was placed in a group home unequipped to address his neurological problems. Their allegations, said the court, raised “serious questions” as to whether the child welfare agency had met “even its most fundamental obligation to provide meaningful access [to foster care] as required by the ADA and the Rehabilitation Act.”⁹¹

Foster children with serious emotional problems resulting from abuse and neglect may also be entitled to enforce these statutes, under which not only physical but also emotional impairments are considered disabilities if they “substantially limit one or more major life activities,” such as learning and self-care.⁹²

Federal versus State Claims: Practical Considerations

When the facts of a plaintiff’s case support both federal and state claims, counsel must decide whether to pursue all possible claims in a single action. Federal civil rights claims under §1983 can be filed in either federal or state court; however, including federal claims in a state court action will probably result in removal to federal court.⁹³ So in this sense, the choice of claims is also a choice of forum.

Federal civil rights law governing the rights of abused children is more complex and fluid and less predictable than state tort law. But the possibility of an attorney fee award under §1983 is reason alone to at least consider a federal claim. Moreover, in a case involving a local government agency that is immune under state law, §1983 may offer the only avenue for redress. **W**

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1. N.C. Department of Health and Human Services, CHILD PROTECTIVE SERVICES MANUAL '1201, <http://info.dhhs.state.nc.us/olm/manuals/dss/esm10/man/CSs1201x-A-08.htm>.

2. The first case so holding was *Elton v. County of Orange*, 3 Cal.App.3d 1053, 84 Cal.Rptr. 27 (4th Dist. 1970). In most states, statutes supervising the supervision of children in foster care provide a basis for tort liability. See Carolyn A. Kubitschek, Annotation, *Social Worker Malpractice for Failure to Protect Foster Children*, 41 Am. Jur. Trials 1 (2004), and cases cited therein; see also Sonja A. Soehnel, Annotation, *Governmental Tort Liability for Social Service Agency's Negligence in Placement, or Supervision after Placement, of Children*, 90 A.L.R.3d 1214 (1979).

3. See, e.g., *Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906 (1980)(county's duty to supervise the care and welfare of foster children "must be deemed . . . nondelegable in the sense that the [county is] required to exercise due care in the selection of foster parents and to oversee diligently the rendition of proper care by the foster parents.")

4. *Miller v. Martin*, 838 So.2d 761 (La. 2003).

5. See, e.g., *Sabia v. State*, 669 A.2d 1187 (1995); *Manno v. State*, 675 P.2d 1347 (Ariz. Ct. App. 1983); *Turner v. District of Columbia*, 532 A.2d 662 (D.C.App. 1987); *Department of Health & Rehabilitative Services v. Yamani*, 529 So.2d 258, 261-62 (Fla.1988); *Coleman v. Cooper*, 366 S.E.2d 2, 8 (1988); *Brodie v. Summit County Children Services Board*, 554 N.E.2d 1301, 1308 (1990); *Jensen v. Anderson City Dept of Social Services*, 403 S.E.2d 615, 619 (1991) (child abuse statute imposes special duty to investigate and intervene in cases in which child abuse has been reported). See generally Michael R. Flaherty, *Tort Liability of Public Authority for Failure to Remove Parentally Abused or Neglected Children from Parents' Custody*, 60 A.L.R.4th 942 (1988). But see *Radke v. Freeborn*, 676 N.W.2d 295 (Minn. App. 2004)(no private right of action under child protection statute for failure to investigate or intervene in reported abuse); *accord, Nelson v. Missouri Div. of Family Services*, 706 F.2d 276, 277 (8th Cir. 1983), later proceeding, 688 S.W.2d 28 (Mo. App. 1985).

6. *Sabia v. State*, 669 A.2d 1187, 1191(1995)(citing W. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS §53, at 358 (5th ed. 1984)). See discussion of public duty doctrine and its exceptions below.

7. See, e.g., *Johnson v. State*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968)(foster mother assaulted by teenage parolee five days after placement); *Snyder v. Mauer*, 272 N.E.2d 627 (1971)(foster father murdered by foster child); *Hauscholtz v. State*, 485 N.W.2d 180 (1992)(natural children sexually abused by fifteen-year-old foster child); *Hobbs v. N.C. Dept. of Human Resources*, 520 S.E.2d 595 (1999)(foster parents' infant daughter molested by foster child).

8. See *Anderson v. Nebraska*, 538 N.W.2d 732 (1995)(mother of minor plaintiffs, visitors in foster home, had specifically asked social worker if it would be safe to allow her daughters to visit and social worker did not disclose threat of sexual abuse).

9. 515 N.W.2d 423 (1994).

10. D. Marianne Blair, *Liability of Adoption Agencies and Attorneys for Misconduct in the Disclosure of Health-Related Information* in Hollinger, J. (ed.), *Adoption Law and Practice* (New York: Matthew Bender, 1999). For an overview of wrongful adoption litigation, see generally Harriet Dingar Milks, Annotation, "Wrongful Adoption" Causes of Action against Adoption Agencies Where Children Have or Develop Mental or Physical Problems that are Misrepresented or Not Disclosed to Adoptive Parents, 74 A.L.R.5th 1 (1999); see also *Wrongful Adoption and Agency Liability*, National Adoption Information Clearinghouse, http://naic.acf.hhs.gov/pubs/h_wrong.cfm (Aug. 2000).

11. N.C. Gen. Stat. §48-2-305(a).

12. See, e.g., *Richard P. v. Vista Del Mar Child Care Services*, 106 Cal.App.3d 860, 165 Cal. Rptr. 370 (1980), in which the adoptive parents of a child who developed neurological disease sought damages from the adoption agency, which had told them the child was healthy. The California Court of Appeals rejected the claim on public policy grounds, finding that it would be "unreasonable . . . to make the adoption agency a guarantor of the infant's future good health. . . . After all, such a guarantee is unavailable to natural parents. . . ." 106 Cal. App.3d at 867.

13. 491 N.E.2d 1101 (1986).

14. In *Michael J. v. Los Angeles County Department of Adoptions*, 201 Cal.App.3d 859, 247 Cal. Rptr. 504 (1988) the court held that while public policy did not bar claims based on intentional conduct, adoption agencies would not be liable for negligent misrepresentation. 15. 437 N.W.2d 532 (1989).

16. 437 N.W.2d at 536.

17. See *Gibbs v. Ernst*, 647 A.2d 882 (1994)(adoption agencies have no statutory or common-law duty to investigate the health histories of the children they place).

18. See, e.g., *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354 (1992)(fraud claim allowed against private agency); *Parham v. Iredell County Dept. of Social Services*, 489 S.E.2d 610 (1997)(public agency).

19. See, e.g., *Mohr v. Commonwealth*, 653 N.E.2d 1104 (1995) (recognizing claims for material misrepresentations and omissions concerning child's medical and emotional history).

20. See, e.g., *Price v. State*, 57 P.3d 639 (Wash. App. 2002)(adoption agency's relationship with adoptive parents is not merely economic, and parents' emotional distress is foreseeable result of agency's breach of duty).

21. See, e.g., *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902 (11th Cir. 1996), cert. denied, 519 U.S. 1110 (1997)(court analogized adoption contract to contract for sale of goods). But see *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354 (1992)(no contract claim); *Allen v. Children Services*, 567 N.E.2d 1346, 1349 (Ohio App. 1990), cert. denied, 561 N.E.2d 944 (1990)("a bargained-for exchange with respect to the life of a child is repugnant.")

22. See *Taeger v. Catholic Family and Community Services*, 995 P.2d 721 (1999)(recognizing claim for breach of fiduciary duty); *accord, Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994).

23. See *Jeffrey BB v. Cardinal McCloskey School and Home for Children*, 257 A.D.2d 21, 689 N.Y.S.2d 721 (1999)(discussing elements of claim); see also *McKinney v. State*, 950 P.2d 461 (Wash. 1998)(jury finding of no causation upheld where evidence showed that agency's negligent failure to disclose background information did not influence plaintiffs in their adoption decision).

24. See, e.g., *Juman v. Louise Wise Services*, 254 A.D.2d 72, 678 N.Y.S.2d 611 (1997)(adoptive parents allowed to recover their pecuniary losses).

25. See, e.g., *Price v. State*, 57 P.3d 639 (Wash. App. 2002)(recognizing claims for emotional distress resulting from wrongful adoption). But see *Juman v. Louise Wise Services*, 254 A.D.2d 72, 678 N.Y.S.2d 611 (1997)(damages for wrongful adoption do not include emotional distress).

26. See discussion of child plaintiffs below.

27. 647 A.2d 882 (Pa. 1994).

28. *Gibbs v. Ernst*, 647 A.2d 882 (1994), *passim*.

29. See, e.g., *Mohr v. Commonwealth*, 653 N.E.2d 1104 (1995); *Jackson v. Montana*, 956 P.2d 35 (Mont. 1998); *Gibbs v. Ernst*, 647 A.2d 882 (1994).

30. 52 Pa. D. & C.4th 142 (2001).

31. *Id.* at 150-151.

32. *Gibbs v. Ernst*, 647 A.2d 882, 891 (1994).

33. 257 A.D.2d 21, 689 N.Y.S.2d 721 (1999).

34. *Brodie v. Summit County Children Services Board*, 554 N.E.2d 1301 (1990).

35. See Carolyn A. Kubitschek, Annotation, *Social Worker Malpractice for Failure to Protect Foster Children*, 41 Am. Jur. Trials 1, §28 (2004)("What constitutes a special relationship is variously interpreted, but virtually all of the interpretations are broad enough to include foster children.")

36. *Brodie*, 554 N.E.2d at 1308.

37. *Id.*

38. 520 S.E.2d 595 (1999).

39. *Id.*, 520 S.E.2d at 601.

40. See generally 57 Am.Jur.2d§ §1-86, *Municipal, County, School and State Tort Liability* (2004).

41. *Hallman v. Charlotte-Mecklenburg Board of Education*, 477 S.E.2d 179 (1996).

42. See, e.g., N.C. Gen. Stat. §115C-42.

43. *Bartels v. County of Westchester*, 76 A.D.2d 517, 522-23, 429 N.Y.S.2d 906, 910 (1980).

44. N.C. Gen. Stat. §48-10-104. The statute's legislative history reflects that it is to be given a liberal construction to facilitate its purposes, which include the protection of minors from unsuitable placements and the protection of adoptive parents from "assuming responsibility for a child about whose heredity or mental or physical condition they know nothing." 1995 N.C. Sess. Laws Ch. 457.

45. *Meyer v. Wallis*, 489 S.E.2d 880 (1997).

46. *Id.*, 489 S.E.2d at 889.

47. *Hobbs v. N.C. Dept. of Human Resources*, 520 S.E.2d 595 (1999). For the most part, social workers who investigate reports of abuse and make decisions about the protection and placement of children are considered public officials who cannot be sued for mere negligence. Only in the rare case will a social worker be viewed as a public employee. See *Gonzalez v. Avalos*, 866 S.W.2d 346 (Tex.App. 1993), appeal dismissed, 907 S.W.2d 443 (Tex. 1995)(social services employee who failed to open file in response to a report of child abuse could be sued for negligent failure to perform a ministerial duty).

48. 42 U.S.C.A. §1983.

49. 436 U.S. 658 (1978).

50. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

51. *Jeanine B. v. Thompson*, 877 F.Supp. 1268 (E.D.Wis. 1995)(emphasia added).

52. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

53. *Ex Parte Young*, 209 U.S. 123 (1908); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

54. *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 890 (10th Cir. 1992), citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

55. *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)(*en banc*), cert. denied 489 U.S. 1015 (1989). The Fifth and Eighth Amendments do not apply in foster care cases. *McCall v. Department of Human Resources*, 176 F.Supp.2d 1355 (M.D. Ga. 2001).

56. 489 U.S. 189 (1989).

57. *Estelle v. Gamble*, 429 U.S. 97 (1976)(state has duty to provide adequate medical care to prison inmates).

58. *Youngberg v. Romeo*, 457 U.S. 307 (1982)(state has duty to provide for "reasonable safety" of mental patients).

59. The earliest circuit-level case to address the issue, *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983), held that a child in state custody has a constitutional right not to be placed in a foster setting known to be unsafe. See also *Norfleet v. Arkansas Department of Human Services*, 989 F.2d 289 (8th Cir. 1993)(foster child has right to medical care while in custody); *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992)(right to safety); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990), cert. denied, 498 U.S. 867 (1990)(safety); *K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990)(constitutional right "not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child"); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)(*en banc*), cert. denied, 489 U.S. 1015 (1989)(freedom from abuse); *McCall v. Department of Human Resources*, 176 F.Supp.2d 1355 (M.D.Ga. 2001)(defendants could be charged with knowledge that a foster child has a due process right to safety, that right having been "clearly established" in 1987 by *Taylor v. Ledbetter*); *Jeanine B. v. Thompson*, 877 F.Supp.

1268 (E.D.Wis. 1995)(constitutional claims based on allegations of numerous failures in Milwaukee's foster care system).

60. 429 U.S. 97 (1976).

61. 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983).

62. *Id.*, 649 F.2d at 142.

63. *Id.*, 649 F.2d at 145.

64. *Id.* This standard, the court said, is more akin to gross negligence than to intentional misconduct. While the two are "not literally coextensive, . . . gross negligent conduct creates a strong presumption of deliberate indifference." *Doe*, 649 F.2d at 143. For further discussion of the "deliberate indifference" standard, as well as other standards the courts have applied in foster care cases, see Carolyn A. Kubitschek, Annotation, *Social Worker Malpractice for Failure to Protect Foster Children*, 41 Am. Jur. Trials 1, "20-23.5 (2004), and cases cited therein.

65. *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883, 894 (10th Cir. 1992).

66. 457 U.S. 307 (1982).

67. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

68. *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992).

69. *Id.*, 959 F.2d at 894. See also *Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 372 (E.D. Pa. 1994)("professional judgment" standard applied to claims against city worker for failure to protect foster child from sexual abuse). In *K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990), the Seventh Circuit interpreted the professional judgment standard as follows: Only if without justification based either on financial constraints or on considerations of professional judgment [state welfare workers and their supervisors] place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.

70. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201-202, citing RETENEMENT (SECOND) OF TORTS §323 (1965)(one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion) and W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS §56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort).

71. See, e.g., *Kneipp v. Ledder*, 95 F.3d 1199 (3d Cir.1996)(police created danger to drunken woman by abandoning her after allowing her husband to leave her unattended). But see *C.A. v. Louwides Co. Dept. of Family and Children Services*, 93 F.Supp.2d 744 (N.D. Miss. 2000)(foster parent whose grandchild was sexually assaulted by foster child could not maintain §1983 claim against county department of family and children services; Fifth Circuit does not recognize "state-created danger" theory).

72. See, e.g., *Wood v. Ostrander*, 897 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990)(police impounded plaintiff's car and abandoned her in dangerous area late at night); see also *Bowers v. Devino*, 686 F.2d 616, 618 (7th Cir. 1982)("if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.")

73. See generally Joseph M. Pellicciotti, "State-Created Danger," or *Similar Theory as Basis for Civil Rights Action under 42 U.S.C.A. §1983*, 159 A.L.R. Fed. 37 (2000).

74. *Ford v. Johnson*, 899 F.Supp. 227 (W.D. Pa. 1995).

75. For an overview of statutes that may offer redress in the adoption and foster care setting, see MaryLee Allen, M.S.W., and Mary Bissell, J.D., *Safety and Stability for Foster Children: The Policy Context, in Children, Families, and Foster Care*, The David and Lucille Packard Foundation, Los Altos, CA 2004, available at www.fosterchildren.org.

76. *Jeanine B. v. Thompson*, 967 F.Supp. 1104, 1109 (E.D.Wis. 1997), citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

77. 42 U.S.C.A. §670 et seq.

78. 42 U.S.C.A. §671(a)(1983)(as amended by Pub. L. No. 98-378 §11(e), 1984 U.S.C.A.A.N. (98 Stat.) 1318).

79. *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883, 889 (10th Cir. 1992).

80. *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883, 889 (10th Cir. 1992); *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638, 647-48 (E.D.Pa.1999).

81. 42 U.S.C. §5106a(b)(2).

82. 42 U.S.C. §5106a(b)(3).

83. See *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638, 648-49 (E.D.Pa.1999) and cases cited therein (CAPTA is merely a funding statute and does not create a private right of action); see also *Tony L. v. Childers*, 71 F.3d 1182, 1189 (6th Cir. 1995)(although CAPTA is intended to benefit foster children and obliges states to investigate and ameliorate child abuse, the statute does not specify how this is to be done and is thus too "vague and amorphous" to allow private enforcement).

84. *Jeanine B. v. Thompson*, 877 F.Supp. 1268 (E.D.Wis. 1995).

85. *Id.* at 1286.

86. 42 U.S.C. §675 (5)(E).

87. *Jeanine B. v. McCallum*, 2001 WL 748062 (E.D.Wis 2001).

88. 42 U.S.C. §12132.

89. 29 U.S.C. §794(a).

90. *Marisol A. v. Giuliani*, 929 F.Supp. 662 (S.D.N.Y. 1996).

91. *Id.* at 685.

92. 29 C.F.R. §§1630.2(h)(2), (i).

93. A federal court may, in its discretion, exercise pendent jurisdiction over state claims provided they are factually connected to federal claims such that the entire action presents a single "constitutional case." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1976).