TRIAL LAWYERS QUARTERLY

OFFICIAL PUBLICATION OF
NEW YORK STATE TRIAL LAWYERS ASSOCIATION

CONTENTS FOR SPRING/FALL 1972

Vol. 8, Nos. 3/4
Spring/Fall 1972

This article examines those decisions and their judicially enunciated rationale. The authors assert the rights of the child as an independent human being, a United States citizen and a citizen of at least one of the several United States, and suggest protection of the natural human rights of the child under the Ninth, Thirteenth and Fourteenth Amendments of the Constitution of the United States and the common law of equity.

Towards a New Strategy

The attorney who represents any party in a custody dispute will soon discover one terrifying fact: there can be no settlement. There can be no compromise with the life of a child. The professional amenities which usually characterize litigation among skilled counsel appear strangely absent in custody disputes. Counsel is also morally obligated to carefully weigh the equities of the client's position against the "best interests" of the child.

Counsel representing foster parents in the New York courts are severely disadvantaged. To enter the thicket of *stare decisis* is to court disaster for client and child. In the *Baby Lenore* case the Courts even denied the adoptive parents standing to raise the fundamental issue of the child's best interests.[4]

The alternative approach is to commence an action on behalf of the child in the federal courts invoking the general equity jurisdiction of the federal courts and seeking judgment declaring the rights of the child as a human being and citizen under the Ninth, Thirteenth and Fourteenth Amendments of the Constitution of the United States. The action should also seek judgment declaring that enforcement of certain statutes of the State of New York, and similar statutes of other states, which ignore the fundamental human and Constitutional rights of the child as an independent human being, infringe upon those Constitutional and human rights of

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See: Scarpetta, supra, note 1; Matter of Spence-Chapin Adoption Service, supra, note 2; Jewish Child Care Association v. Cahn, N.Y.L.J. at 4, cols. 7, 8 (May 2, 1972); People ex rel. Moffet v. Cooper, 63 Misc. 2d 1005, 314 N.Y.S.2d 248 (1970). People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953); People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952).

Proof of unfitness, surrender, or abandonment will lead to a finding for the nonparent. In re T., 28 N.Y.2d 391, 322 N.Y.S.2d 231 (1971) (unfitness); Isaacs v. Murcin, 38 A.D.2d 673, 327 N.Y.S.2d 126 (4th Dept. 1971) (abandonment); State v. Lascaris, 37 A.D.2d 128, 322 N.Y.S.2d 426 (4th Dept. 1971) (unfitness). People ex. rel. Wessel v. New York Foundling Hospital, 36 A.D.2d 936, 321 N.Y.S.2d 417 (1st Dept. 1971) (surrender).

Prior to the 1972 session of the N.Y. Legislature, there was no distinction at law between prospective *adoptive* parents caring for the child during the six month waiting period before the consummation of adoption (N.Y. Dom. Rel. § 112 (6)) and *foster* parents. Chapter 639 of the Laws of 1972 amending N.Y. SOC. SERV. LAW § 383 and N.Y. Dom. Rel. § 115-a now provide that once a natural parent executes a written surrender for adoption, a subsequent revocation of the surrender will not guarantee the return of the child albeit the natural parent is "fit, competent, and able . . . The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition." It is to be observed that the new statutory provisions address only surrenders for adoption.

4 The New York Legislature has just overruled the courts on this very point. Foster parents having continuous care of the child for more than 24 months have standing to intervene. Chapters 645, 646 of the Laws of N.Y. (1972) amending § 383 of the N.Y. SOC. SERV. LAW. The same holds true for prospective adoptive parents according to L. 1971, C. 1142 also amending § 383.

Modern codes recognize that infants may wish to sue their guardians, and Federal Rule 17(c) provides in part:

> "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."[9]

Under normal circumstances an application should be made for the appointment of a guardian ad litem for the infant prior to commencement of any action on behalf of the infant, however, as is often the case in custody disputes, time is of the essence and application must be made for provisional remedies and extraordinary relief. In such cases the application for appointment of a guardian ad litem should be made simultaneously with the application for temporary relief. In the event that the legal guardian of the infant is not the applicant for relief on behalf of the infant, service of the application should be made upon the legal guardian. It is wise practice to give some notice to the legal guardian under such circumstances and recite the fact of such notice in the moving papers.

The applicant should be a reputable and articulate "friend" of the infant, and ideally should be a lawyer-child psychiatrist-sociologist, or a representative of some other hyphenated discipline. If there are matters already pending involving the infant, the application must be made by counsel not already representing an adult party in such other proceedings such as foster parents, natural parents or child welfare agency, otherwise a substantial and irreconcilable conflict of interest will exist. The petitioner should establish in moving papers that the person nominated to represent the infant is of good character and has the ability to assert the rights of the infant. Careful attention should be paid to establishing that the interests of the person nominated to act as guardian ad litem or "next friend" of the infant has no interests adverse to the "best interests" of the infant.[10]

It is quite possible that someone other than the nominee of the moving party may be appointed guardian ad litem, particularly if the legal guardian can show bias on the part of the moving party's nominee in favor of any of the parties to the custody dispute. The court may also deny the motion for appointment of any guardian ad litem by holding that the infant's interests can be

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list of early English laws, including Magna Carta, see TAYLOR, supra, note 7.

9 Federal Rules of Civil Procedure 17(c). The capacity of the guardian ad litem to sue is controlled by the law of the state in which the District Court is held. F.R.C.P. 17(b); Constantine v. Southwestern Louisiana Institute, 120 F. Supp. 417 (W.D. La., 1954). But the appointment of the guardian is procedural and therefore governed by the Federal Rules of Civil Procedure and not state law. Bengston v. Travelers Indemnity Co., 132 F. Supp. 512, aff'd 231 F.2d 263 (W.D. La., 1955); First National City Bank v. Gonzalez W. Suer Corp., 308 F. Supp. 596 (D.P.R. 1970).

10 Walter v. Bernheimer, 225 App. Div. 343, 233 N.Y.S. 90 (1929). Selection standards for guardians ad litem in Surrogate's Courts in New York can be found in the New York Surrogate's Court Procedure Act §§ 402 and 403. The appointed guardian ad litem must be an attorney. S.C.P.A. § 404.

In the *Matter of Spence-Chapin Adoption Service* the Court-appointed psychiatrist, the Family Court Judge, and later the Commissioner of Social Services for the City of New York, agreed that Angela should remain with her foster parents, the only real parents she had known during her first three years of life. Nevertheless, the New York Court of Appeals refused to consider the best interests of Angela and chided the Family Court in a thinly disguised attempt to impose an extraordinary constraint upon the exercise of equitable jurisdiction of a trial court,

> "The Family Court misconceived the nature of the proceedings and considered itself free to determine conscientiously in whose custody the child would fare best, the foster care custodian, the natural mother, or some future adoptive couple of Chinese extraction. The Appellate Division correctly determined that the Court was without power, absent abandonment of the child, statutory surrender outstanding, or the established unfitness of the mother, to deprive the mother of custody. Since none of these factors was present the natural mother was entitled to obtain the custody of her child, and the child was entitled to be returned to its mother."[17]

The Court of Appeals then blandly asserted, ". . . Of course, this does not mean the child's rights and interests are subordinated."[18]

Baby Lenore, in the *Scarpetta*[19] case, was another victim of this *Dred Scott*[20] reasoning. Although the equities were not as pronounced in *Scarpetta* as they were in *Matter of Spence-Chapin Adoption Agency,* the New York Court of Appeals held that there could be no consideration of Lenore's relationship with her prospective adoptive parents. Instead there was the usual reaffirmation of the primacy of some natural custodial right of possession vested in the biological parent, justified by reliance upon the assumption that custody in the natural parent serves the best interests of the child.[21]

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17 29 N.Y.2d at 199; 324 N.Y.S.2d at 940.

18 29 N.Y.2d at 204; 324 N.Y.S.2d at 944.

19 Supra, note 1.

20 Dred Scott v. Sanford, 19 How. 393 (1857). In that case, Dred Scott, a freed slave, sued a white man for damages in an assault and battery action. Chief Justice Taney announced that Dred Scott lacked standing as a "citizen" to sue in a Federal Court, explaining:

> "The question before us is: whether the class of persons [Negroes] described in the plea . . . constitute members of the sovereignty? We think they are not . . . and therefore can claim none of the rights and privileges . . . secure(d) to citizens of the United States."

The Civil War resolved this issue forever and made all those born in this country citizens of the United States. Later the Fourteenth Amendment to the Constitution insured due process and equal protection of the law to all citizens of every state.

Any court which denies standing to a child as a citizen and human being in an action involving custody of that child is in effect affirming the doctrine of DRED SCOTT and nullifying the sacrifice of those who fought our Civil War and suffered through the subsequent Reconstruction.

21 But the N.Y. Court of Appeals was second guessed in Scarpetta v. De Martino, 254 So. 2d 813 (Fla. 1971), rehearing denied. When the N.Y. Court of Appeals ordered the return of Baby Lenore to the natural mother (Olga Scarpetta), the foster parents (the De Martinos) fled the jurisdiction to Florida. The District Court of Appeals of Florida

that two sixteen year old twins must be given to their natural father despite the twins' express desire to remain with their stepfather with whom they had been residing with for ten years. The Court chose to override the unchallenged opinions of the court-appointed psychiatrists and invoked the superior right of the natural father.

In *Jewish Child Care Ass'n v. Cahn*,[27] the Nassau County Supreme Court, citing all of the above cases for support, ordered the foster parents (the Cahns) to surrender nine year old Adrianne to her natural parents. This decision has been affirmed without opinion by the 2nd Dept. Appellate Division and Chief Judge Fuld has refused to stay the order. Amid the glare of t.v. cameras, Adrianne was hysterically separated from the Cahns on July 18, 1972.

Adrianne had been surrendered at infancy for foster care because her natural parents were heroin addicts. Nine years later, the natural parents achieved rehabilitation and demanded the return of the child. Jewish Child Care Ass'n, the legal guardian, agreed and instituted habeas corpus proceedings when the Cahns balked.

In reaching its decision, the Court noted its favorable impression of the natural parents and chose to reject the opinion of the court psychiatrist and gave approval to only the adoption agency's expert. Adrianne's plea to remain with the Cahns went unheeded. The superior right of the natural parent was again invoked.

The common rationale for these decisions is the assumption that the best interests of the infant are expressed in the paramount right of custodial possession vested by some legal formalism in the natural parent:

> "... [T]he more important considerations of the child's best interests, the recognition of her mother's primary and custodial interest, and the future life of the mother and child together are paramount."[28]

The philosophical proposition underlying all these rulings is the belief that a child is an object of personal property during its minority, a human chattel, in which the natural parents, or at least one natural parent, is entitled to assert a custodial right of possession.

Although this theory provides justification for making the decision as to whether to abort a fetus is the sole prerogative of the mother, it can hardly be denied that upon birth, a child becomes a citizen of the United States and a citizen of at least one of the several United States and as such a citizen is entitled to the full protection of the Constitution. A child cannot be considered an object of property subject to private custodial possession, any more than a *n*egro can be so considered. Although the Law recognizes that children require protection during the period of their minority, the supervision of such protection, and the determination of custodial status during the

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[27] Noted in the N.Y.L.J. at 4, cols. 7, 8 (May 2, 1972).

[28] Matter of Jewish Child Care Ass'n, 5 N.Y.2d at 229, 183 N.Y.S.2d at 70, 156 N.E.2d 703.

ment authorizing adoption of the child. Her motivation to institute *habeas corpus* proceedings six months later was considered dubious by the Family Court Judge who awarded custody to the foster parents after hearing all the evidence tested in the crucible of cross examination.

The natural mother in *Matter of Jewish Child Care Association*[34] visited the child twice in four years, hardly displaying unswerving maternal dedication. The natural mother in *Scarpetta,* however, repented her surrender of Lenore within a few weeks and perhaps a more convincing case can be made out for her love of the child, as her own child, but, unfortunately, the Court in *Scarpetta*[35] made no attempt to evaluate any psychological evidence.

In *People* ex rel. *Grament* v. *Free Synagogue Committee,* Justice Botein relied upon the testimony of three psychiatrists, and concluded that the natural mother did not demonstrate that special kind of love that would justify moving the child from his present happy home and returning him to his natural mother;

> "And it is in just this that the [natural mother] is found wanting. She is a person of intelligence and socially acceptable character. She is in my opinion a person no more unstable than a multitude of other persons. But she gave up her child of her own free will to implement a reconstruction of her personal life; Not after her last dollar had been spent and her last resource drained, but with a sizable sum at her disposal. Regretting her action thereafter, for five months she nevertheless time and again faltered in her resolution. Her letters reveal periods in which she envisaged with equanimity a future without this child. Such conduct does not reflect the attributes required in law and morals to regain custody of a child in a proceeding of this nature.
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> "With the well-being of the infant paramount and uppermost in my mind, and despite my deep sympathy for the petitioner, I am constrained to direct that the child remain in his present custody [with the prospective adoptive parents]."[36]

The Fourteenth Amendment: Is the Child a Non-Citizen?

The Fourteenth Amendment bestows upon all human beings born in the United States all the privileges and immunities of citizenship. No State may deprive any citizen of life, liberty or property without due process of law nor may any State deny equal protection of the Law to any citizen.[37] Nevertheless, in New York, children trapped among foster parents, natural parents and social welfare agencies in a kind of no-man's land created during custody battles are subjected to the withering cross-fire of the

34 Supra, note 22.
35 Supra, note 1.

36 194 Misc. 332, 85 N.Y.S.2d 541, 551, 552.
37 Amendment XIV, United States Constitution.

Adoption Service[40] the Court appointed psychiatrist supported the position that Angela needed to remain with her foster parents in order to attain her full potential as a human being. The Court in *Matter of Jewish Child Care Association*[41] discounted psychiatric testimony favoring custody in the foster parents, and in *Scarpetta*[42] the Court sought no expert medical or psychological assistance at all.

The individual personal human rights of the child are generally unrepresented during a custody battle. The competing adult claimants have full control over all aspects of such litigation. The adults may choose counsel; they may choose the forum; they may choose to call or not to call witnesses; they may even negotiate a settlement or seek to establish the criteria for judicial resolution of the dispute. Under such circumstances, there should be little doubt that the Court has an obligation to appoint a guardian ad litem charged solely with the duty of asserting the natural human rights of the innocent child. Although a custody dispute appears to be a civil action in form, the subject matter of the litigation—the child—will effectively "do life" with whomever is selected by the Court as custodian. The custody decision will be one of the most crucial in the life of the child, yet there stands the child, helpless and alone, without advocate or champion and generally unable to communicate their own personal feelings to the Court.[43] Is it any wonder that the children in custody disputes often cry?

Parens Patriae: Court v. Legislature

The origin of the judicial role in deciding custody disputes is found in the Common Law doctrine of *Parens Patriae* (or *Pater Patriae*) under which it was the duty of the Court of Chancery in England to protect infants by virtue of a general right delegated by the Crown, and where necessary, to interfere in matters for the benefit of persons incapable of protecting themselves.[44]

> "The King is bound of Common Right, and by the laws, to defend his subjects, their goods and chattels, lands and tenements, and by the law of the realm, every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are uncapable to take care of themselves are provided for by the King as *Pater Patriae* and

40 Supra, note 2.
41 Supra, notes 22, 23.
42 Supra, note 1.

43 Certainly representation must be the very least of the "essentials of due process and fair treatment." In re Gault, 387 U.S. 1, 30, 87 S. Ct. 1428, 1445, 18 L.Ed. 2d 527 (1967). The estrangement of the child in custody proceedings is best described by the medieval adage, "children should be seen not heard." M. Inker v. C. Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAMILY LAW QUARTERLY 108 (1971).

44 Butler v. Freeman, 3 Amb. 301, 27 Eng. Rep. 207 (Ch. 1756); Wellesley, Wellesley, et al., infants, under the Age of Twenty-one Years, by the Hon. Philip Pusey, their next Friend v. Duke of Beaufort, 2 Rus. 1, 38 Eng. Rep. 236 (Ch. 1826); Ex parte Hopkins 3 P. Wms. 152, 24 Eng. Rep. 1009 (Ch. 1732); Blissets case, Lofft 748, 98 Eng. Rep. 899 (K.B. 1774); Reynolds v. Tenham, 9 Mod. 40, 88 Eng. Rep. 302 (Ch. 1723).

> does not concern itself with such disputes in their relation to the disputants. Its concern is for the child."[49]

However, in *People ex rel Kropp v. Shepsky*, the New York Court of Appeals attempted to limit the inherent power of a Court of Equity to separate a child from a natural parent stating, without justification in law or science,

> "It has often been said that a child's welfare is the first concern of the court upon a *habeas corpus* proceeding where the court acts as *parens patriae* to do what is best for the interest of the child. (Citations omitted.) However valid this statement may be in a contest for custody involving the parents alone, it cannot stand without qualification in a contest between parents and nonparents. The mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood." (Citations omitted.)[50]

It appears that this decision was the justification for the decisions of the majority of the Court of Appeals in *Scarpetta*[51] and *Matter of Spence-Chapin Adoption Service*.[52] The Court of Appeals extended this principal even to the case of contest between adoption agencies and foster parents, and although an adoption agency does not have any superior custodial possessory right in the infant, according to the Court of Appeals, that Court will not substitute its policies or opinions for those of the agency, reasoning that the State may validly delegate what the Court of Appeals believes are exclusive legislative powers over infants to the Commissioner of Social Welfare or authorized adoption agencies. The Court is willing to extend jurisdiction only to the extent of determining whether there has been an abuse of discretion by the Commissioner or agency. The New York Court of Appeals will not grant *de novo* review to foster parents of administrative decisions. Administrative decisions are apparently to be judged solely by the substantial evidence rule. It is obvious that the Court of Appeals believes that the sovereign power that was once wielded by the King in Parliament[53] has descended to the legislative and executive branches of government, rather than to the People. The error of this belief has been clearly denounced by the Supreme Court of the United States. In the United States it is the People who are the sovereign and government is by consent of the people governed.[54]

In *Matter of Spence-Chapin Adoption Service* the Commissioner of Social Services, who later reversed his original decision to return the child to the natural

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49 Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

50 People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953).

51 Supra, note 1.

52 Supra, note 2.

53 YANNACONE, COHEN, DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES, V. 1, ch. 2, 7 (1972).

54 Chisolm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793).

present in the care of a child, must necessarily occur so long as human nature remains in its present state."[56]

Notwithstanding the cases cited to the contrary, the practicing attorney should note that the limitations imposed by the New York Court of Appeals well nigh make it impossible for foster parents to prevail in any contest with an adoption agency or a natural parent in the Courts of the State of New York. On the other hand, if action is initiated on behalf of the infant in the Federal Courts asserting the individual personal human rights retained by the child under the Ninth Amendment,[57] and protected by the Thirteenth and Fourteenth Amendments of the Constitution of the United States, there is hope that the Federal Courts will provide the forum wherein the best interests of the child will determine the issue of custody, just as human rights ignored by the States have been vindicated by the Federal Courts during the long history of the Civil Rights struggle.

Conclusion: The Problem of Solomon

The distraught judge searching for divine enlightenment in resolution of a tragic custody dispute should consider the oldest reported custody battle.

Before the Court of King Solomon in ancient Israel stood two women, each claiming the living new born babe now before the King. Each of the women had just borne a child, but one of the children had been stillborn. It was up to King Solomon to award custody of the living child, and incidently, perhaps, to determine who was the natural mother of the living child. As a criteria for judgment, Solomon devised the splitting-the-child-in-two-test, and prior to its application, one of the women before the King begged that the child be spared and given to the other woman. The other woman, however, did not object to division of the child. To the woman who showed concern for the life of the child, Solomon awarded custody of the baby, holding, that in his opinion, she was the real mother of the child. It should be noted that Solomon had before him no tangible evidence of which woman was the natural mother, yet it was the wisdom of Solomon that the woman who most loved the child was to be judicially awarded custody and charged with the delicate and difficult task of rearing the child to its majority. It was Solomon who first held that the best interests of the child should determine custodial status and it was Solomon's determination that the best interests of the child are served by awarding custody to the petitioner most concerned with the welfare of the child.[58] The dilemma of Solomon is repeated in every child custody dispute before the courts today. It is for the court to determine, on the evidence taken before it, which custodian will best rear a whole child, rather than heeding the plea of those who would rend the child into emotional pieces.

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[56] People ex rel. Converse v. Derrick, 146 Misc. 73, 78, 261 N.Y.S. 447, 452 (1933).

[57] YANNACONE, supra, note 53, V. 1, ch. 5 (Ninth Amendment).

[58] I Kings, 3:16-28.

of Congress providing for the protection of civil rights. . . ."

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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 at law, suit in equity, or other proper proceeding for redress."

DECLARATORY JUDGMENT

4. This proceeding seeks a Declaratory Judgment under Title 28, United States Code, §§ 2201, 2202, declaring the rights and legal relations of the parties to the matter in controversy specifically:

DECLARING the rights of ANGELA, the infant plaintiff herein, and all other infants so unfortunate as to be similarly situated, to be free of the incidents of slavery abolished by the provisions of the Thirteenth Amendment of the Constitution of the United States.

DECLARING the rights of ANGELA, the infant plaintiff herein, and all other infants so unfortunate as to be similarly situated to have their best interests determined and general welfare considered primary in matters involving their care and custody during the period of their infancy.

DECLARING the rights of ANGELA, the infant plaintiff herein, and all other infants so unfortunate as to be similarly situated, to be brought up in a home in which they are loved and accepted as a child of the family.

DECLARING that the provisions of sections 383 and 384 of the Social Services Law of the State of New York are unconstitutional to the extent that they limit and infringe the rights of the infant plaintiff, ANGELA, and all other infants so unfortunate as to be similarly situated.

DECLARING that there is no property right in any human being, in particular ANGELA, the infant plaintiff herein and all other infants so unfortunate as to be similarly situated.

DECLARING that the right to the care and custody of the infant plaintiff, ANGELA, and all other infants so unfortunate as to be similarly situated shall be determined only in furtherance of the best interest of such infants.

CLASS ACTION

The infant plaintiff, ANGELA, is three years old and was born on June 13, 1968 in the City of New York. She has been the object of litigation involving her custody since June 30, 1970, and after a trial on the merits was awarded to her foster parents, Herbert Polk and Pearl Polk, his wife by order of the Family Court of the State of New York, Nassau County, on April 8, 1971. On July 6, 1971, the Appellate Division of the Supreme Court of the State of New York, Second Department awarded her to the defendant Spence-Chapin Adoption Service for return to her natural mother. At the present time the infant plaintiff Angela is still in the care and custody of her foster parents, Herbert and Pearl Polk.

Stanley Posess, her next friend, by whom this action is brought is the brother of Pearl Polk, the foster mother of Angela, the infant plaintiff herein. Stanley Posess is an attorney duly licensed to practice law in the State of New York and is fully familiar with the facts and circumstances surrounding the litigation involving the custody of the infant plaintiff herein, Angela.

Herbert Polk and Pearl Polk, his wife, are the foster parents of ANGELA, the infant plaintiff herein, and have maintained a home for ANGELA and cared for her as their own daughter since November 7, 1968, at which time the defendant Spence-Chapin Adoption Service placed Angela with the Polks.

The members of the class are all those infants so unfortunate as to be situated similarly to ANGELA, the infant plaintiff herein, and the members of such class are so numerous as to make it impracticable to bring them all before this court. There are substantial questions of law and fact common to the class and common relief on behalf of all members of the class is sought.

This action is brought by the plaintiffs as representatives of, and on behalf of, all those people not only of this generation but of those generations yet unborn, entitled to relief similar to that demanded by Angela, the infant plaintiff herein.

The claims of the representative are typical of the claims of the members of the class, and the actions of the defendants have substantial effect upon all members of the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole, in a proper class action under Rule 23(b)(2), Federal Rules of Civil Procedure.

The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, so that this action is a proper class action under Rule 23(b)(1)(A).

Adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members of the class not party to this litigation so that this action is a proper class action under Rule 23(b)(1)(B).

The members of the class are fairly and adequately represented by these plaintiffs and the plaintiffs have no interest adverse to that of any individual who might be entitled to the relief sought herein.