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Licensed Foster Parents Have a Right to Due Process Before State Recoups Foster Care Payments, Alaska Supreme Court Rules

Foster parents are integral to every state's child protection system. Without them a state would have nowhere to place the hundreds of children in need of aid.

Alaska, like most of the states in the country, has a dire shortage of foster homes. This is and has been a long-term problem. The reasons for this shortage are not mysterious: Alaska has an ineffective foster-parent recruitment campaign, and foster parenting is emotionally challenging and financially difficult. The individuals who suffer because of this foster-parent shortage are the most vulnerable: foster children.

Too often a state's child protection agency—the agency that is supposed to recruit and retain foster parents—runs roughshod over putative foster parents and over able and willing foster parents. As for putative foster parents, too many child-protection agencies fail to assist and encourage potential foster parents in becoming licensed foster parents. Licensing itself is intimidating. This is more so in a multicultural state such as Alaska, where large portions of the population speak languages other than English.

As for licensed foster parents, any advocate who has practiced in this field has heard stories (and represented foster parents) who have had their foster children summarily removed from their home, with little or no notice. Advocates in this field have represented foster parents who have had children placed with them *sans* any of the children's world possessions or have had their request for a basic need (new schoolbooks) rejected as being "unnecessary" or have had both occur.

In 2007 the Northern Justice Project, a private civil rights law firm, was contacted by one committed foster mother who had had enough. Robin Heitz, a long-term foster mother, had opened her home to many of the state's foster children for years. In fact, when she contacted the Northern Justice Project, she had five foster children living with her. The problem, as Heitz explained it, was that the state had summarily reduced her foster care stipend by over 50 percent when she had done nothing wrong and even though the reduction would leave her and her foster children without enough money to pay for that month's necessities. Our legal representation of Heitz culminated in the Alaska Supreme Court's ruling that the state must give foster parents notice of its intent to recoup foster care payments and an opportunity to contest the state's decision to do so (*Heitz v. State*, 215 P.3d 302 (Alaska 2009)).

Preliminary Investigation

In speaking with Heitz we learned that the state had summarily reduced her foster care stipend by over 50 percent because, over a year ago, one of Heitz's foster children had run away. Although Heitz promptly reported the runaway's status to the state, the state concluded, a year after the fact, that Heitz was overpaid while this foster child was in runaway status. In order to rectify this perceived overpayment, the state decided to reduce her current foster care stipend by

over 50 percent, notwithstanding that this would leave Heitz and her foster children without enough money to pay for that month's necessities and notwithstanding that the foster children who were now going to be punished for the alleged overpayment were children other than those in Heitz's care in the previous year.

Heitz was particularly upset that she did not receive from the state any kind of explanatory letter setting forth the reason for what it was doing. Instead she simply received a stipend check that had been halved. She had to call the state to ask why her check had been halved before she learned the details. That the state never allowed Heitz to contest the 50 percent reduction was also aggravating. As a matter of law, state law showed that, because Heitz's foster child had been in runaway status, and because she had promptly reported it, she was not, in fact, ever overpaid.

We believed that the conundrum in which Heitz found herself was too bizarre to be systemic. We checked with attorneys who regularly practiced in child-protection proceedings and with guardians who regularly worked with foster children. The story we heard was the same: Alaska regularly summarily recouped foster benefits without notice and without the right to any hearing.

We contacted Alaska's Office of the Attorney General to inquire whether Heitz's situation was an anomaly and whether the state would be willing to give her due process so that she could contest the state's "recoupment." We were told that Heitz's situation was not an anomaly and that she would not be given any due process because, in the state's analysis, Heitz had no property interest in the foster care stipends.

We were stunned. Basic due process has, since *Goldberg v. Kelly*, 397 U.S. 254 (1970), required the government to give all citizens an adequate notice and a hearing of some sort to contest any kind of "taking" by the government. However, with regard to foster parents, it appeared that the state was "taking" their stipend without first giving them any sort of due process.

Litigation Commenced with a Loss

We filed a class action on behalf of all of Alaska's foster parents. The question we posed was straightforward: do foster parents have a right to due process before the state reduces or recoups a foster care payment? Heitz successfully moved for class certification. Heitz and the State of Alaska thereafter cross-moved for summary judgment.

Granting summary judgment to the state, the trial court held that any interest that foster care *parents* had in foster care subsidies was minimal and insufficient to trigger due process protection.

An Appeal to the Alaska Supreme Court

After consulting with our client, we decided to appeal to the Alaska Supreme Court. We first pointed out to the court that foster parents did not become foster parents to get rich off foster payments. Indeed, if foster care were a field where one *could* obtain personal economic gain, the state would have a surplus of willing foster parents rather than a dire shortage.

To the contrary, the position of the foster parents in this case was that, given how difficult, underappreciated, and underpaid foster care was already, the least that the state could do was to treat its licensed foster parents with some modicum of basic fairness before it “recouped” foster funds from them.

We explained that the state treated its licensed foster families in a medieval way: it gave them a notice declaring that monies would be seized, did not explain why, did so sometimes months or years after the fact, and offered no fair means to contest the state’s fiat. The licensed foster parent was left with whatever monies were not recouped and with what was hoped was enough to care for the foster children still in her care (who might or might not be the same foster children who were in the foster parent’s care when the facts underlying the “recoupment” occurred).

We then focused on bedrock due process. Both the U.S. and Alaska Constitutions, we pointed out, prohibit the state from depriving its citizens of life, liberty, or property without due process of law. An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case. The types of property interests that are protected by due process, we further explained, are expansive and varied; they extend to any significant property interest, including statutory entitlements. Thus, for example, a person’s interest in the zoning of property is protected by due process, as is a person’s interest in having a driver’s license, a business license, and even a commercial fishing permit.

Ultimately a court should look to state and federal law in determining whether a foster parent has a protected property interest in foster care payments: “Property interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits” (*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Viewed in this context, foster care payments to licensed foster parents clearly are protected property interests, we argued. According to the governing state regulations, the state will provide payment for a child placed in foster care (ALASKA ADMIN. CODE tit. 7, §§ 53.010, 53.090, 53.080).

Federal law confirms that foster parents have due process rights vis-à-vis foster care payments (42 U.S.C. §§ 670–79; 45 C.F.R. §§ 1355.30(p), 205.10(a)). 42 U.S.C. § 671(a)(12) provides that a state must grant “an opportunity for a fair hearing before the State agency to *any individual* whose claim for benefits available pursuant to [the Federal Adoption Assistance and Child Welfare Act] is denied or is not acted upon with reasonable promptness” (emphasis added). 45 C.F.R. § 205.10(a)(5) provides that “a hearing shall be granted to ... *any recipient* who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance”

In the state’s primary argument, if foster care payments are a protected property interest, the property right belongs solely to the foster children. We pointed out the illogic of this argument: while foster care payments are intended to benefit fos-

ter children, not all foster children in the legal custody of the state are eligible for foster care benefits. Rather, the licensed status of the *foster parent* triggers eligibility for foster care benefits. Moreover, foster care benefits are paid directly to the *foster parent*, not the foster child. And, when there is an alleged overpayment in foster care benefits, as there was with Heitz, the state recoups the money from the *foster parent*, not the foster child.

Federal law, we pointed out, flatly contradicts the state’s position that foster parents have neither a right to a notice nor a right to a predeprivation hearing before their foster care benefits may be terminated, suspended, or reduced. Foster care payments are reimbursed, in part, by the federal government pursuant to Title IV-E of the Social Security Act. In order to be eligible for reimbursement for foster care payments under the Social Security Act, a state receiving Title IV-E assistance must “provide ... an opportunity for a fair hearing ... to any individual whose claim for benefits ... is denied or not acted upon with reasonable promptness” (42 U.S.C. § 671(a)(12)). 45 C.F.R. § 205.10 further provides that a timely and “adequate” notice, and the right to an administrative hearing, must be granted whenever the state intends to “discontinue, terminate, suspend or reduce assistance.” These federal statutes and regulations do nothing more or less than to embody the fundamental due process requirements of *Goldberg*. These federal statutes and regulations thus further confirm that foster parents, not just foster children, have a protected property interest in foster care benefits.

We also explained to the Alaska Supreme Court that the trial court’s analysis based on *Mathews v. Eldridge*, 424 U.S. 319 (1976), was flawed for one main reason: the most critical administrative and fiscal burden facing the state’s foster care system is not the costs it might incur if it gave licensed foster parents adequate notices and fair hearings. To the contrary, the most critical administrative and fiscal burden facing the state’s foster care system is that very, very few Alaskans are willing to become licensed foster parents for the state. Insofar as the state can and does “recoup” monies from its licensed foster parents, such as Heitz, without rhyme, reason, notice, or hearing, it is not mysterious that so few Alaskans are willing to join the ranks of licensed foster parents. The costs of requiring notices and hearings for licensed foster parents who might contest “recoupments” are dwarfed by the costs to the state in having foster children without foster homes in which to place them. Indeed, the long-term societal costs that a community incurs when its at-need children are warehoused at institutions (such as the Salvation Army facilities in Alaska) or bounced from unlicensed home to unlicensed home are incalculable.

In any event, we explained, the *Mathews* framework is relevant in considering *how much* due process is required. *Mathews* assists a court in deciding whether, for example, a full-blown evidentiary hearing should be required or whether something less might suffice. The relevant factors, in short, are the nature of the “interest” involved, the likelihood of an erroneous governmental decision, and the burden that might be imposed on the government in giving more due process. While these *Mathews* factors help determine the extensiveness of the process that must be provided by the government in a given context, certain safeguards are *always required* by

due process: *at a minimum* due process requires that the parties receive notice and an opportunity to be heard. Here the class of foster parents was given neither due process prerequisite.

Victory in the Alaska Supreme Court

In August 2009 the Alaska Supreme Court issued its ruling, reversed the trial court, and recognized foster parents' clear constitutional protections *vis-à-vis* their foster care payments.

The court started with these first principles: "Before property rights can be taken or infringed upon by government action, there must be notice of the action proposed to be taken and an opportunity to be heard" (*Heitz v. State*, 215 P.3d 302, 306–7 (Alaska 2009)). The reason was to give citizens "'an effective opportunity to defend' before their benefits are reduced or terminated, in order to afford them protection from 'agency error and arbitrariness'" (*id.*). To the court, foster parents' stipends were akin to reimbursement by the state for the foster parents' care of the state's foster children. While these stipends might not be a matter of life and death (as could Medicaid or food stamps), they were still entitled to a high level of protection. As the court explained, "[w]e previously have held that people receiving welfare benefits or 'personal care attendant' services (assistance with daily functions like eating and bathing provided to disabled, low-income individuals) have a 'brutal need' for those benefits. Foster parents' need for reimbursement may not be as pressing in all cases, but a failure to receive reimbursement payments may hinder their ability to provide for the foster children in their care. Their interest in these payments is therefore substantial" (*id.* at 307).

Once the court found that foster parents' stipends were protected property interests, due process rights came into play: "Because foster parents have a protected property interest in receiving foster care reimbursement payments for their previous care of foster children, we hold that [the state] must provide notice of its intent to recoup funds and an opportunity to contest its decision before a recoupment occurs" (*id.*).

The Alaska Supreme Court directly rejected the state's argument that to give foster parents basic due process would be too burdensome. As the court explained, "[w]e do not perceive any great burden to [the state] in supplying this additional information. In *Allen* we observed that providing 'more detailed calculations' than the difference between the beneficiary's asserted entitlement and the amount received was not an unreasonable burden. It does not seem unduly burdensome for [the state] to include specific dates and figures in its letters notifying foster parents of a planned recoupment, especially in light of their interest in foster care funds and the utility of this information in resolving recoupment disputes" (*id.* at 307–8).

Postremand

On remand, the state has agreed to revise the notices that it sends to foster parents so that foster parents are told of the basis for the state's proposed adverse action, and foster parents are given the right to a hearing to contest the state's proposed adverse action, *before* that adverse action occurs. Class counsel is still insisting that the state provide a remedy to the hundreds of class members who were victimized by the state's unconstitutional takings. That issue will likely only be resolved with further motion practice.

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—The Editors



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