



# Children's Advocacy Institute

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M.P.H.  
Blair L. Sadler  
Gloria Perez Samson  
Alan Shumacher, M.D.  
Owen Smith

November 4, 2002

*Via Federal Express*

California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-3600

Re: Letter of *Amici Curiae* National Association of Counsel for Children and the Children's Advocacy Institute in Support of Real Party in Interest's Petition for Review in ***County of Los Angeles v. Superior Court***  
Second Appellate District, Division Five, No. B157850  
[Los Angeles County Superior Court No. BC235677]

To Chief Justice Ronald M. George and the  
Associate Justices of the California Supreme Court:

The National Association of Counsel for Children (NACC) and the Children's Advocacy Institute (CAI) submit the following letter in support of Plaintiff and Real Party in Interest, Terrell R.'s, Petition for Review in the above-entitled case as *amici curiae*, and seek leave of this Court for their consideration as such. It has been drafted solely by *amici* NACC and CAI and without compensation from any party, and has been served on all parties (proof of service attached).

The National Association of Counsel for Children (NACC) was founded in 1977 and is the nation's umbrella association of attorneys representing the interests of children in juvenile and other court proceedings. It consists of over 2,000 professionals from all fifty states. NACC's Board of Directors includes national leaders in education, pediatrics, psychology, and law. Over the past twenty years, the NACC Amicus Committee has contributed briefs and argument on behalf of the children its members represent to numerous courts, including this Honorable Court.

Founded in 1989 as part of the University of San Diego School of Law, the Children's Advocacy Institute (CAI) is an academic and advocacy center dedicated to improving the health, safety, and well-being of California's children. CAI advocates in the legislature to make laws, in the courts to interpret laws, before administrative agencies to implement laws, and before the public to educate and build support for laws to improve the status of children statewide and nationwide. CAI educates policymakers about children's needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury. CAI engages in legal and budget research relevant to children, which is published in several sources, including *Child Rights & Remedies* (a law school text), the annual *California Children's Budget*, and the *Children's Regulatory Law Reporter*.

University of San Diego  
School of Law  
5998 Alcalá Park  
San Diego, CA 92110  
(619) 260-4806  
(619) 260-4753 (Fax)

926 J Street  
Suite 709  
Sacramento, CA 95814  
(916) 444-3875  
(916) 444-6611 (Fax)

Reply to:  
 San Diego  
 Sacramento

Plaintiff and Real Party in Interest, Terrell R., is a foster child over whom the juvenile court took jurisdiction. The County of Los Angeles placed Terrell in a foster family home although the County's social worker knew that the "family friend" with whom Terrell was placed, Robert Poole, was not properly certified by the foster family agency, and was not authorized by the County program manager to take any children. Terrell's four siblings were placed together with a different foster family. Terrell was repeatedly raped and molested by Poole. During the three-month placement, the County's social worker did not visit Terrell at his home, and allegedly did not become aware of the sexual abuse until notified by the foster family agency social worker that had pulled Terrell from the placement.

The trial court denied the County's motion for summary judgment, holding: (1) a triable issue of fact existed as to whether the County social worker knew the certification of Poole as a foster parent by the foster family agency was a "sham"; and (2) the County social worker had a ministerial duty to place Terrell with a licensed foster family agency for placement in a certified foster family home. The Second District Court of Appeal reversed the lower court on both grounds, and further held that -- aside from the duty of a social worker to visit the foster child one time per month, and a very general duty to place a foster child in a certified foster family home (even if the foster family home is not properly certified at the time of placement) -- the County and its employees owe no other duties to the child, and have complete immunity for failing to ensure that the child is placed and maintained in a safe environment.

While the Court of Appeal properly described the basis for liability as requiring a duty, it made the baffling assertion that it is the intent of the legislature in enacting the many provisions of child welfare law not to prevent sexual abuse of children or to protect them, but rather to encourage family reunification. While family reunification is an important consideration, and is part of both federal and state child welfare law, it is not the exclusive focus of state mandates or of legislative intent -- as our summary excerpts of California law below indicate.

Indeed, the primary intent of the state's child welfare laws is child protection. These are children over whom the court has taken "jurisdiction" through formal hearing and order. That judicial and state oversight of these children in public charge is buttressed by numerous and specific statutory and rulemaking commands guiding their safekeeping (discussed below). Importantly, the courts who assume this special *in loco parentis* role must and do rely on the operation of these mandates by social workers and other officials to be certain these children are safe.

The tragic outcome of the case could have been avoided if the County social worker had followed the rules, and not allowed a placement with an improperly certified foster parent. Statutes and rules are promulgated to ensure that children are properly placed within the foster care system. The appellate court's decision is sweeping, and would irresponsibly negate the intent of the law. The decision would allow a county to escape liability for breach of the *mandatory* statutory provisions and rules assuring the safety of these children. The court's disenrollment of much of the state's child welfare system has the puzzling exception of continued accountability for periodic social worker visits. That anomaly is not the result of statutory analysis, but picks a rather isolated mandate due to a recent decision by the same district holding such visits to be mandated.<sup>1</sup> However, it then unwrites over 19 major sections of California law and applicable judicial precedents (see recitation below).

This decision, if left standing, would be detrimental to the interests of foster children and is contrary not just to a single case, but to a body of law directly on point. The decision has led to shock and

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<sup>1</sup> See, e.g., *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 142.

disbelief among child advocates from the several states, and no small degree of embarrassment for those from California. Of special concern, it portends much mischief for the juvenile courts of the state who count on these mandates -- as obligatory mandates -- to assure the safety of the 110,000 children now in their charge. NACC is well familiar with the angst of counsel for children and the courts responsible for their safety in Florida and other jurisdictions, where such mandates do not even exist or are not followed or enforced. Begging the Court's indulgence for a comment that may seem melodramatic -- children will die as a result of the weakening or overriding of these hard won mandates. Children under the protection of the courts will die. Lest this Honorable Court consider such a statement to be hyperbole in a venue where overstatement may replace normal discourse, *amici* invite this Court to review the case at hand -- the repeated and brutal rape of a small child. Or *amici* would ask this Honorable Court to review the tragic and substantial record of the deaths of foster children in California over the past decade -- a fire that warrants quenching, not gasoline.

This case is not about money, or hypothetical rights. It is about the protection of our most vulnerable children. It is about the safety of the children of this Honorable Court, upon whom *amici* most depend for benevolent assistance and support. This Court oversees the juvenile judges who have invoked court jurisdiction and then place and supervise these children *in loco parentis*. In a sense then, these are your grandchildren -- the children of your children. Is no mandatory duty of protection owed to them, notwithstanding the 19 major provisions cited below using the terms "shall" and "must"?

This decision goes beyond *DeShaney v. Winnebago County Dep't of Social Services* (1989) 489 U.S. 189. In the much criticized *DeShaney* case, the U.S. Supreme Court held that where children are returned to parents and are badly injured by them, the county is not liable (even where a parent fails to attend required classes or where the social worker should have known of continuing harm to the child). The Court found no affirmative duty of protection for children no longer within state jurisdiction and custody. The *DeShaney* Court implied that a different outcome would follow if the child were in county/state custody and control.<sup>2</sup> The court in Terrell's case held that even if the child is a ward of the state, the only mandatory duty a county social worker has with regard to a foster child is to visit the child one time per month. What good does it do to hold the county accountable for monthly visits to a foster child without any obligation as to what the social worker does or does not do with the information obtained?

This decision goes beyond the Sixth District Court of Appeal's holding in *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450. In *Becerra*, the plaintiff alleged that the county violated its duty under former Welfare and Institutions Code section 16501.1, by failing to place her in "the environment best suited to meet the child's special needs and best interests, or both." (Since that time, section 16501.1(c) has been amended to read "the decision regarding choice of placement shall be based upon *selection of a safe setting*" (emphasis added), which makes the *Becerra* court's analysis of this statute inapplicable). The court in *Becerra* held that although the statute did not specify the ultimate placement that must be made, it did impose a mandatory duty to evaluate the stated criteria prior to making a placement selection. The facts of *Becerra* are distinct because the foster home was properly licensed, the family was qualified to take the foster child, and the county program manager had approved the placement. Even under the *Becerra* standard, the conduct alleged in Terrell's case would not pass muster. The disputed facts show the County social worker knew of the foster parent's failure to meet the training

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<sup>2</sup> The Court noted, for example, that the State must provide adequate medical care to incarcerated prisoners because of state custody and control. 489 U.S. 189, 198. Although not technically incarcerated, Terrell and other foster children are similarly dependent upon the state for basic necessities.

requirements, and thus, the placement could not be properly certified. She decided to make the placement notwithstanding. Finally, the *Becerra* case left untouched the issue of finding additional ministerial duties within the regulations. That court did not foreclose this result by opining that the only mandatory duty was the one found in a prior decision, as the court has here.

The Terrell court's ruling implies that while there is a duty for county social workers to conduct monthly face-to-face meetings with a foster child, there is no corresponding duty to ensure the basic safety and well-being of the child. All children have a fundamental right to be safe, as guaranteed in Article 1 of the California Constitution, which states “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and *pursuing and obtaining safety, happiness, and privacy*” (emphasis added).<sup>3</sup> By construing the referenced statutes and regulations as being solely intended to preserve familial relationships, instead of preventing sexual abuse, the Court of Appeal essentially upholds a right to parent, while ignoring the child's constitutional right to safety (which implicitly includes freedom from sexual abuse).

There is a wealth of mandatory language set forth in both statutes and regulations regarding duties of the state toward foster children and the prevention of abuse as a stated purpose of the child welfare system. Contrary to the implication of the Terrell decision, these provisions do not contradict -- and are fully coextensive with -- state and federal mandates to provide reasonable efforts for parental reunification. The major provisions ignored by the legal conclusion of the Second District include the following (emphasis added *seriatim*):

Welfare and Institutions Code section 16500 provides:

“The Legislature hereby declares its intent, in providing for this statewide system of child welfare services, that ***all children are entitled to be safe and free from abuse and neglect.***”

Section 16001.9(a), recently added to the Welfare and Institutions Code, reads “[i]t is the policy of the state that all children in foster care shall have the following rights:

(1) ***To live in a safe, healthy, and comfortable home where he or she is treated with respect.*** (2) ***To be free from physical, sexual, emotional, or other abuse, or corporal punishment...***” This section lists 21 separate rights of foster children and is implemented by section 27 of the Welfare and Institutions Code, which states “each agency and department responsible for listing in regulations the rights of children under this division shall incorporate the rights of foster children as listed in Section 16001.9...”

Section 300.2 of the Welfare and Institutions Code provides “***[n]otwithstanding any other provision of law, the purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.***

This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and ***to prevent reabuse of***

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<sup>3</sup> This Court has relied upon Article 1 of the California Constitution to uphold a person's fundamental rights and liberty interests. See, e.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal 4th 307, 66 Cal Rptr 2d 210.

**children.** The focus shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child...”<sup>4</sup>

Section 1530.91(a) of the Health and Safety Code provides that “...any care provider that provides foster care for children pursuant to this chapter shall provide each schoolage child and his or her authorized representative, as defined in regulations adopted by the department, who is placed in foster care, with an age and developmentally appropriate orientation that includes an explanation of the rights of the child, as specified in Section 16001.9 of the Welfare and Institutions Code, and addresses the child's questions and concerns.”

The legislative intent supporting Welfare and Institutions Code sections 27 and 16001.9 and Health and Safety Code section 1530.91 provides “[i]t is the intent of the Legislature that **the rights of children in out-of-home placement are not infringed upon**, and when a foster child's rights conflict with the health or safety of the child or others, the Legislature urges counties and foster care providers to find a way to preserve the child's rights in a manner that maintains the health and safety of the child and others.”

Welfare and Institutions Code section 16501.1(b) states “[t]he Legislature further finds and declares that **a case plan ensures that the child receives protection and safe and proper care** and case management, and that services are provided to the child and parents or other caretakers as appropriate in order to improve conditions in the parent's home, to facilitate the safe return of the child to a safe home or the permanent placement of the child, and to address the needs of the child while in foster care.” Section 16501.1(c) states “[w]hen out-of-home placement is used to attain case plan goals, the decision regarding choice of placement **shall be based upon selection of a safe setting** that is the least restrictive or most familylike and the most appropriate setting that is available and in close proximity to the parent's home, consistent with the selection of the environment best suited to meet the child's special needs and best interest, or both. **The selection shall consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment** pursuant to Section 7950 of the Family Code.”

Welfare and Institutions Code section 16507.5 clarifies the county's duty regarding placement as follows:

“(a) When a minor is separated or is in the process of being separated from the minor's family under the provisions of a voluntary placement agreement, the county welfare department or a licensed private or public adoption agency social worker **shall make any and all reasonable and necessary provisions for the care, supervision, custody, conduct, maintenance, and support of the minor**, including medical treatment.

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<sup>4</sup> The Court of Appeal cites to *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 741, to support its statement that “[a] county is not the insurer of a child's physical and emotional condition, growth and development while in foster care placement.” However, the facts presented in the *Jordy* decision -- a 16-year old foster child takes an ATV belonging to the foster parents out on a joyride and is injured by a third party -- are easily distinguishable from the facts in Terrell's case. The court in *Jordy* found that the state does have a significant interest in the welfare of children, and that “interest is in the prevention of egregious parental abuse and neglect, not in interposing the state between parent and child in every aspect of the day-to-day tasks of child care.” 11 Cal.App.4th 735, 745.

**Responsibility for placement and care of the minor shall be with the social worker** who may place the minor in any of the following:

- (1) The approved home of a relative or the approved home of a nonrelative extended family member as described in Section 362.7.
  - (2) A suitable licensed community care facility.
  - (3) With a foster family agency to be placed in a suitable licensed home or other family home which has been certified by the agency as meeting licensing standards.
  - (4) A home or facility in accordance with the federal Indian Child Welfare Act.
- (b) The granting of a community care license or approval status does not entitle the caregiver to the placement of a specific child or children. **Placement is based on the child's needs and best interests.**

The legislative intent behind the amendments to section 16507.5, implemented through Assembly Bill 1695 (Chapter 653, Statutes of 2001), is as follows:

“It is the intent of the Legislature to continue to promote the successful implementation of the statutory preference for foster care placement with relative caregivers as set forth in Section 7950 of the Family Code. **Placement of a child with a relative caregiver most closely meets the statutory requirement of Section 16000 of the Welfare and Institutions Code that a child live in the least restrictive and most familylike setting possible. California's clear mandate for an exhaustive search for available relatives and primary consideration of these relatives for placement is in accord with federal Title IV-E requirements that the 'State shall consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child.'**”

Section 16000 of the Welfare and Institutions Code explains the intent of the foster care system as follows: “It is the intent of the Legislature to preserve and strengthen a child's family ties whenever possible, removing the child from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. In any case in which a child is removed from the physical custody of his or her parents, preferential consideration shall be given whenever possible to the placement of the child with the relative as required by Section 7950 of the Family Code. **When the child is removed from his or her own family, it is the purpose of this chapter to secure as nearly as possible for the child the custody, care, and discipline equivalent to that which should have been given to the child by his or her parents.**” (If a child may be taken away from his parents due to abuse or neglect, the child is certainly not expected to endure the same misconduct from his foster parents.)

The term "child welfare services" is defined in Welfare and Institutions Code section 16501(a) to mean “public social services which are directed toward the accomplishment of **any or all** of the following purposes: **protecting and promoting the welfare of all children**, including handicapped, homeless, dependent, or neglected children; **preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children**; preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible; restoring to their families children who have been removed, by the provision of services to the child and the families; identifying children to be placed in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate; and **assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot**

***be placed for adoption.*** 'Child welfare services' also means ***services provided on behalf of children alleged to be the victims of child abuse, neglect, or exploitation.***"

Welfare and Institutions Code section 16002(a) states "[i]t is the intent of the Legislature to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child's family ties by ensuring that when siblings have been removed from their home, either as a group on one occurrence or individually on separate occurrences, the ***siblings will be placed in foster care together***, unless it has been determined that placement together is not in the best interest of one or more siblings." Section 16002(b) finds that "[t]he responsible local agency ***shall make a diligent effort in all out-of-home placements of dependent children***, including those with relatives, ***to develop and maintain sibling relationships***. If siblings are not placed together in the same home, the social worker shall explain why the siblings are not placed together and what efforts he or she is making to place the siblings together or why those efforts are not appropriate.

Section 16516.5(a) of Welfare and Institutions Code finds "[n]otwithstanding any other provision of law or regulation, all foster children placed in group homes by county welfare departments or county probation departments ***shall be visited at least monthly by a county social worker or probation officer. Each visit shall include a private discussion between the foster child and the county social worker*** or probation officer."

Section 11400 of the Welfare and Institutions Code defines certain provisions for the AFDC-FC program as follows: "For the purposes of this article, the following definitions shall apply: ..." (k) ***'Placement and care'*** refers to ***the responsibility for the welfare of a child vested in an agency or organization by virtue of the agency or organization having (1) been delegated care, custody, and control of a child by the juvenile court, (2) taken responsibility, pursuant to a relinquishment or termination of parental rights on a child, (3) taken the responsibility of supervising a child detained by the juvenile court pursuant to Section 319 or 636, or (4) signed a voluntary placement agreement for the child's placement; or to the responsibility designated to an individual by virtue of his or her being appointed the child's legal guardian.***"

Welfare and Institutions Code section 361.3 sets forth the following: "(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, ***preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative.*** In determining whether placement with a relative is appropriate, ***the county social worker and court shall consider, but shall not be limited to, consideration of all the following factors: (1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. (2) The wishes of the parent, the relative, and child, if appropriate... (4) Placement of siblings and half-siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002... (7) The ability of the relative to do the following: (A) Provide a safe, secure, and stable environment for the child... (8) The safety of the relative's home.***"

In *Scott v. County of Los Angeles*<sup>5</sup> the court held that: "[t]he actual delivery of public social services, such as foster care, to abused, neglected or exploited children is governed by division 9 of the

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<sup>5</sup> (1994) 27 Cal.App.4th 125, 143 (emphasis added).

Welfare and Institutions Code, respecting public social services, in particular part 4 of that division, respecting services for the care of children. (§§ 10001, subd. (c); §§ 16501.) **The delivery of such services is a county function, which is subject to the regulations of the State Department of Social Services and of the State Department of Health Services respecting all services for which state and federal funds are provided. (Welf. & Inst. Code section 10800).**”

Following upon these statutes and the *Scott* reference to the implementing regulations are a series of mandatory rules intended to flesh out and assure foster child protection. The Department of Social Services' Manual of Policies and Procedures (MPP) contains numerous mandatory duties to be fulfilled by counties and social workers. Section 31-001 states “[*t*]he requirements specified in Sections 31-005 through 31-525 shall be met by the county in the administration of child welfare services.”

Section 31-301.2 states “[*t*]he county shall meet the requirements specified in Welfare and Institutions Code section 16501(c) when purchasing services. Counties shall not contract for case management services and any activities which are mandated by the Division 31 regulations to be performed by the social worker.” (Even if the county uses a foster family agency for placement, the county social worker must still fulfill her responsibilities under the MPP.)

In addition to the monthly county social worker visitation requirement found in section 31-320.41, section 31-320.2 states “*the social worker shall visit the child at least three times in the first 30 calendar days, including the initial in-person response.*”

Under the section heading “Social Workers Responsibilities for Placement”, section 31-405 provides “[*w*]hen arranging for a child's placement the social worker shall:..(j) *monitor the child's physical and emotional condition, and take necessary actions to safeguard the child's growth and development while in placement.*”

Section 31-420.1 states “[*t*]he foster care placement shall be based on the following needs of the child including, but not limited to: [.11] The least restrictive, most family-like environment... [.14] Capability of the foster parent(s) to meet specific needs of the child... [.17] *The child's health and emotional factors*... [.19] *The most appropriate placement selection.*”

Under section 31-420.2, “[*w*]hen selecting a foster care placement for the child, the social worker shall adhere to the following priority order:... [.21] *The home of a relative,..in which the child can be safely placed* as assessed according, but not limited to, the requirements specified in Welfare and Institutions Code Section 361.3...[.211] *Preferential consideration for placement of the child shall be given to a non-custodial parent, then an adult who is a grandparent, aunt, uncle or sibling of the child*...[.22] *A licensed foster family home, licensed small family home, or a licensed foster family agency for placement in a family home which has been certified by the foster family agency*...”

The overall population of children in foster care has doubled since the late 1980s, from approximately 50,000 to the current number of about 110,000. It is projected that the actual foster care population will rise to over 167,000 by 2005.<sup>6</sup> A recent report by the agency responsible for

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<sup>6</sup> See Little Hoover Commission, *Now In Our Hands: Caring for California's Abused & Neglected Children* (Sacramento, CA; August 1999) at 5.



implementing the foster care system in California, the Department of Social Services, indicates that one of the four most frequent allegations against **certified family homes is sexual abuse**.<sup>7</sup>

On December 22, 2000, the federal Department of Health and Human Services released its audit on California's performance in complying with federal minimum standards in the protection of her children in foster care.<sup>8</sup> The audit focused on the smaller population of foster care children so designated through the delinquency side of juvenile court, as here. The audit found a general lack of oversight by the state's Department of Social Services, and more specifically concluded “[w]e found significant problems in the **mandatory foster care protections provided to federally funded foster care children**...the State plan requirements for the case review system were, in large part, not met.<sup>9</sup> The federal DHHS announced that in 2002 it would conduct a comprehensive inquiry to measure the quality of foster care in California, including the safety of foster children.<sup>10</sup>

An Arizona appellate court in *Weatherford v. State of Arizona* (2002) 2002 Ariz. App. LEXIS 136; 382 Ariz. Adv. Rep. 18, found that **the minor had a right to be free of unnecessary and unreasonable harm while in state-regulated foster care** based upon facts showing the minor had been sexually assaulted while in a state shelter and the state had failed to fulfill its statutory duties to visit the minor at specified times and properly assess his needs. Further, the court in *Weatherford* cites to eight federal courts, including the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> circuits, which have supported “the assertion of a clearly established right to reasonable safety while in foster care.” 2002 Ariz. App. Lexis 136, p.16-18 (citations omitted).

Under the common law theory of misfeasance, a defendant may be held liable when it is responsible for making the plaintiff's position worse, or creating a greater risk of damage or injury, as the County social worker did here. If a person is not required to perform services for another, but nevertheless undertakes to do so, that person is under a duty to exercise due care in performance of those services.<sup>11</sup> “Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, *our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.*”<sup>12</sup>

California courts have imposed duties on professionals in situations similar to this. How can it be that a psychologist employed by the state/county to provide mental services to a child can be liable for a

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<sup>7</sup> See Department of Social Services, *Report to the Legislature on Investigation of Complaints Against Certified Family Homes and Foster Family Agencies* (Sacramento, CA; June 2001) at ii (emphasis added).

<sup>8</sup> See June Gibbs Brown, Office of Inspector General, *Audit of Protections Provided to Foster Care Children through the Juvenile Justice System in California* (Department of Health and Human Services, A-09-99-00057; December 2000) at i-ii.

<sup>9</sup> *Id.* at i (emphasis added).

<sup>10</sup> See Sonia Krishnan, *California Scrambles to Improve Foster Care*, L.A. Times, March 6, 2001.

<sup>11</sup> See Rest.2d Torts, §§323, 324; *Williams v. State of California* (1983) 34 Cal.3d 18, 23.

<sup>12</sup> See *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46.

failure to warn third persons of a risk of harm posed by a patient<sup>13</sup>, while a County social worker, who is by statute responsible for the safety and well-being of a child, can escape liability for failing to properly place a child with a foster family according to the clear mandate of the law?

The Second District decision would remove California from the mainstream, indeed from any known tributary, in its disavowal of duty to protect children under the jurisdiction of the court. Rather than seek its own course in that direction, *amici* urge this Honorable Court to steer toward responsibility, accountability, and duty -- to assuage what the dissenters in *DeShaney* referred to caustically as lack of "moral ambition." California can and should correct *DeShaney* for her children. The state has the responsibility to do so on multiple grounds, ranging from its unique constitutional assurance of safety, to its own extensive system of legislatively-directed protection of children.

The departure from *DeShaney* *amici* here urge has important recent precedent in New York. That state -- by judicial decision -- now imposes liability against the state/counties who fail to protect children beyond direct court jurisdiction. In *Boland v. State*<sup>14</sup>, the New York court held that the state had an intrinsic "special relationship" with the victims of child abuse through its enactment of a statutory scheme to protect children and was not entitled to immunity for a failure to report child abuse for further investigation. In the *Boland* case, the child was not a ward of the state. Nevertheless, the court found that once a qualified "abuse report" was made to the state's child protection worker, that worker assumed a duty to protect the children, and a failure to discharge it could be a basis for state liability where such a failure to act was a proximate cause of the child's injuries. In other words, as the Second District opinion would free the state from responsibility even for children under the court's jurisdiction, *Boland* would reverse *DeShaney* for New York and **extend** the state's responsibility to all children -- as child advocates nationally argue is the legally and ethically correct holding.

Where a state has created a system of mandatory reporting, hot lines, immediate response, removal, *et al.*, and where the citizenry understandably relies on such a system, a duty to protect the children involved in the system properly lies. Having so dispositively assumed the burden and spawned reliance on its performance, the state is properly estopped from disavowing the concomitant duties flowing from its assumption. California's system of mandated reporting, hot lines, immediate response, *et al.*, is no less extensive than is New York's.

As noted above, California's foster care system is rated among the most dangerous to children in the nation. By lowering the standards for social workers and the agencies responsible for these children, and interpreting mandatory language as optional, the court does not serve its children, its ethical aspirations, or the law. These children are dependents of the state, whose lives depend on the actions of the state's employees and officials. If the state takes on the role of parent, it must assume that duty with gravity, responsibility, and accountability. The Court of Appeal's decision is one of irresponsible abnegation. We are better than that. Shall means shall, must means must. If one is to evade their meaning, let it not be to escape responsibility for the safety of a child.

Finally, if this Court is considering depublication of the Second District's opinion, the regrettable impact of this decision would not be assuaged by its unpublished status. Children's

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<sup>13</sup> See, e.g., *Tarasoff v. Regents* (1976) 17 Cal.3d 425.

<sup>14</sup> (1996) 218 A.D.2d 235; 638 N.Y.S.2d 500.

advocates and counsel throughout the state are well aware of the decisions made in these cases, and are compelled to adjust their decisions to take cases and pursue them accordingly. For those calculating risks and costs, the decision has a *de facto* precedential effect.

For the reasons cited above, NACC, CAI, and the undersigned respectfully request that this Honorable Court grant review and reverse the decision of the Court of Appeal.

Respectfully submitted,

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Debra Back [State Bar #204842]  
Staff Counsel  
For the Children's Advocacy Institute

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Robert C. Fellmeth [State Bar #49897]  
Price Professor of Public Interest Law  
University of San Diego School of Law;  
For the National Association of Counsel for Children