
Bruce A. Boyer

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr
Part of the Family Law Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol54/iss2/5

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
JURISDICTIONAL CONFLICTS BETWEEN JUVENILE COURTS
AND CHILD WELFARE AGENCIES: THE UNEASY
RELATIONSHIP BETWEEN INSTITUTIONAL
CO-PARENTS

Bruce A. Boyer*

I. INTRODUCTION

Both juvenile courts responsible for adjudicating charges of child
abuse and neglect and child welfare agencies commonly called upon
to act as legal guardians for displaced children increasingly have be-
come overwhelmed by the enormity of their respective tasks. The
number of neglected, abused and dependent children coming under
the auspices of juvenile courts and state and local child welfare agen-
cies nationwide has soared in the last decade, placing heavy burdens
on both institutions. Juvenile courts, particularly in large urban areas,
have been swamped by increasing caseloads that challenge their abil-
ity to provide effective oversight of dependent, neglected, and abused
children. Child welfare agencies have been perennially underfunded
and increasingly beset by litigation, reflecting growing concerns

* Clinical Instructor and Supervising Attorney, Children and Family Justice Center,
Northwestern University School of Law. The author wishes to thank Annette Appell, Julie
Biehl, Bernardine Dohrn, Thomas Geraghty, and Victor Rosenblum for their helpful com-
ments on earlier drafts of this Article.

1. Nationally, between the years 1980 and 1986, reported cases of child maltreatment
increased by approximately 66%. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, STUDY
FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT 3-2
to 3-3 (1988). Since 1986, both the total number and the per capita rate of reported
cases of child maltreatment have risen steadily. NATIONAL COMM. TO PREVENT CHILD
ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE
1993 ANNUAL FIFTY STATE SURVEY 5 (1994). The National Committee to Prevent Child
Abuse estimated that, in 1993, almost three million cases of child maltreatment were re-
ported—roughly 4.5% of all children in the United States. Id. In Illinois, the number of
children in foster care statewide increased from approximately 25,000 in 1991 to more
than 41,000 in 1994. Susan Kuczka, DCFS Questioned on Reform Vows; Judge, ACLU Say It's
Too Slow on Change, CHI. TRIB., June 28, 1994, at Chicagoland 1.

2. For a five-year period ending in 1992, new petitions in dependency, neglect, and
abuse cases in 27 reporting states rose almost 20%, from approximately 229,000 to more
than 271,000. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATIS-
TICS, ANNUAL REPORT 1992 30 (1994); see also Leonard P. Edwards, Improving Implementation
3, at 3, 16-19 (1994) (describing problems faced by judges monitoring child welfare agen-
cies responsible for neglected, abused, and dependent children).

3. See, e.g., Angela R. v. Clinton, 999 F.2d 320, 326 (8th Cir. 1993) (vacating consent
decree entered in a class action suit challenging the administration of child welfare pro-
about the ability of such agencies to manage the burdens placed upon them.


The recent decision of the Supreme Court in Suter v. Artist M., 112 S. Ct. 1360 (1992), may signal a limitation of federal court review for systemic problems in child welfare. *Suter* involved a class action suit against the Illinois Department of Children and Family Services for failure to provide services to children who were the subjects of neglect, dependency, or abuse petitions. The action was based on the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§ 620-628, 670-79a (1988 & Supp. V 1993)), which requires child welfare agencies funded under the Act to make reasonable efforts to avoid the need to place children in foster care. 42 U.S.C. § 671(a)(15); *Suter*, 112 S. Ct. at 1362. In reversing the decision of the Seventh Circuit, the Supreme Court concluded that "42 U.S.C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf." *Id.* at 1370.

However, it is not clear whether the Supreme Court's decision in *Suter* eliminates completely the private right of action under the Adoption Assistance and Child Welfare Act. *Compare* Wildauer v. Frederick County, 995 F.2d 369, 373 (4th Cir. 1993) (per curiam) ("[T]here is no private right of action under the [Adoption Assistance and Child Welfare Act].") and Baby Neal v. Casey, 821 F. Supp. 320, 327 (E.D. Pa. 1993) (ruling that "[p]laintiffs may not bring an action under the Adoption Act itself or 42 U.S.C. § 1983 for alleged failures of the Commonwealth to implement any feature of its plan which has been approved by the Secretary [of Health and Human Services"] with Howe v. Ellenbecker, 8 F.3d 1258, 1263 (8th Cir. 1993) (distinguishing *Suter* as referring only to the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act in holding that a class of Native Americans had a private cause of action against the State for failure to provide certain benefits required under the Aid to Families with Dependent Children program pursuant to 42 U.S.C. §§ 651-669) and Albiston v. Maine Comm'r of Human Servs., 7 F.3d 258, 267 (1st Cir. 1993) (distinguishing *Suter* as referring only to the "reasonable efforts" clause of the Adoption Assistance and Child Welfare Act in holding that a private cause of action exists against the State under § 1983 to enforce prompt disbursements of child support under 42 U.S.C. §§ 601-687) and Angela R. *ex rel.* Hesselbein v. Clinton, 999 F.2d 320, 323-24 (8th Cir. 1993) (describing *Suter* as "holding that 42 U.S.C. §§ 671(a)(9) and (15), portions of the Adoption Assistance and Child Welfare Act, do not create private rights enforceable under § 1983," but leaving open the question of whether a private right of action might be created by other sections or subsections of the Adoption Assistance and Child Welfare Act).
These trends provide a pointed and pressing context for analyzing dispute resolution mechanisms in child welfare, and for determining where lies ultimate responsibility for making critical decisions about the welfare and future of abused and neglected children in foster care. Once a court has determined through the adjudicatory process that state intervention is necessary to protect a child from neglect or abuse, the responsibility for developing and implementing an appropriate long-term dispositional\(^4\) plan is commonly shared by child welfare agencies and juvenile courts, both of which are increasingly called upon to play the awkward role of institutional substitute parent.

At its best, the relationship between these institutions functions smoothly, with both recognizing their mutual dependence and sharing an understanding of the boundaries of their responsibilities. Yet when conflicts arise over which institution has ultimate authority for managing the lives of foster children, there is little consistency in the application of doctrinal tools for resolving the conflicts. The nature of this relationship—with juvenile courts and child welfare agencies carrying continuing and overlapping responsibilities—not only distinguishes it from the typical relationship between an executive agency and a supervising court, but it also renders the application of traditional tools of public and administrative law to the field of child welfare awkward and ineffective.

It is the purpose of this Article to consider the tensions that arise from this realm of shared responsibility, and to suggest an analytical framework for resolving these institutional conflicts that is better suited to the needs of juvenile law and practice than many of the tools commonly applied to the resolution of jurisdictional disputes.\(^5\) The stakes over such conflicts are high. Dispositional issues encompass critical decisions about matters such as the placement and support of neglected and abused children, and the harm to children when these systems fail is often irreparable. To provide some context for this discussion, the following hypothetical account illustrates one of the most

\(^4\) The term "dispositional" is used herein to refer to the range of issues that must be addressed in developing an appropriate plan for a child who has been found to be neglected, abused, or dependent. Such issues most commonly include the determination of where the child shall live, who shall act as the child's legal guardian, what is the most appropriate long-term goal (i.e., "permanency plan" for the child), and what services should be provided to the family or the child or both to move toward the designated permanency plan.

\(^5\) The expanding numbers of state wards nationwide and the gravity of the task of institutional parenting do more than provide texture to the discussion of this tension. The measure of the efficacy of any framework of analysis is its ability to accommodate the realities of child welfare systems which, in many localities, are strained almost to the breaking point.
common subjects of jurisdictional disputes between juvenile courts and child welfare agencies: the placement of children in substitute care.

A. "Patrick"

At age six-and-a-half, shortly after he was freed for adoption, Patrick was placed in the pre-adoptive foster home of Ms. Glenn, a newly-licensed and unmarried woman with no children of her own. In the three years prior to this placement, Patrick had lived continually under the legal custody of the state child welfare agency, which had placed him in a total of six separate foster homes. His frequent changes in placement had occurred for a variety of reasons, including physical abuse by a foster parent, the reluctance of another foster parent to adopt him, and problems arising from the boy's difficult behavior. As is common with children raised under such circumstances, Patrick was very guarded with adults and found it difficult to form relationships. With dramatic understatement, a social assessment summarizing Patrick's condition prior to his placement with Ms. Glenn reported that he had "no significant emotional attachments."

Ms. Glenn stayed at home with Patrick, devoting considerable time and attention to his care. Like many foster parents, she quickly became dissatisfied with the level of involvement and the quality of case management offered by the agency. As a result, she took pains to reach her own conclusions about Patrick's needs and about the appropriate level of agency involvement necessary to meet those needs. Her assessment of Patrick was bolstered by the gradual abatement of the behavioral problems that had contributed to several prior placement changes. Because Patrick seemed to respond to her attentions, Ms. Glenn eventually reached the conclusion that, although Patrick was

6. The following account of the life of "Patrick" is fictitious. The story represents a composite description of a child's life in foster care, drawn from the author's experience in representing clients in neglect and abuse proceedings.


8. Studies and commentators repeatedly have identified loyalty conflicts, identity confusion, and difficulty in forming emotional attachments as maladies often associated with children raised in foster care. These problems are prevalent among children who have experienced multiple placement changes. See Michael S. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625, 667-74 (1976) (discussing harm caused to children by multiple temporary placements); Pelton, supra note 7, at 58 (same).
troubled, he had been unfairly labeled as behaviorally disordered and subjected to a battery of intrusive tests and counseling sessions. His needs, she felt, could best be met by an involved parent figure offering a loving home, tempered by a healthy dose of authoritarianism. After twelve months, Ms. Glenn was able to develop a bond that was unprecedented in Patrick's life.

While Ms. Glenn's relationship with Patrick evolved in a generally positive way, her relationship with Patrick's caseworkers was oppositional from the outset. Ms. Glenn felt that the agency was unresponsive to Patrick's needs, and Patrick's caseworkers felt that Ms. Glenn understood neither the severity of the disruption of his early childhood nor the depth of his behavioral and emotional difficulties. Because of Patrick's continued disciplinary problems at school, his caseworkers attributed his relatively compliant demeanor at home to manipulative skills he learned as an aid to emotional survival in foster care. The agency also became increasingly concerned about Ms. Glenn's repeated failure to transport Patrick to his counseling sessions on a regular basis. Because her relationship with the boy seemed generally positive, however, the agency continued to move forward toward finalizing an adoption.

One year after his placement with Ms. Glenn, Patrick set fire to his school auditorium and caused considerable damage. The agency responded by hospitalizing Patrick in a diagnostic inpatient psychiatric program. Patrick's current caseworker—the third since he was placed with Ms. Glenn—visited the foster parent at her home to inform her of this development. Ms. Glenn berated her caseworker, Ms. Turner, for grossly overestimating the severity of Patrick's condition. Upon returning to her office, Ms. Turner promptly called the hospital and instructed the staff not to permit contact between Patrick and Ms. Glenn, because of her volatility and out of concern that she might try to remove him from the hospital. Ms. Glenn attempted to visit Patrick, but was not allowed to see him. Over the next few days, she repeatedly and unsuccessfully attempted to speak with Ms. Turner, leaving increasingly angry and threatening messages.

Five days after Patrick's hospitalization, Ms. Turner, her supervisor, and the hospital's staff social worker, met to discuss Patrick's future. They felt that, despite his obvious attachment to Ms. Glenn, Patrick should not return to her home because of her inability to ensure that his emotional and psychological needs could be met, and because of her lack of cooperation with the agency. The team was heavily influenced by Ms. Turner's emotional account of her contacts with Ms. Glenn, and by her statement expressing concern for her
physical safety during her last visit to Ms. Glenn's home. The team concluded that placement in a highly-structured residential facility would be most appropriate. Ms. Turner identified a suitable group home two hundred miles away, with an opening available in two weeks, and promptly notified Ms. Glenn and Patrick's law guardian\(^9\) of the agency's decision to place Patrick in this home and to suspend adoption proceedings.

Upon learning of the agency's decision, Patrick's law guardian met with Patrick and Ms. Glenn and was persuaded that, despite Ms. Glenn's difficulties with the agency, Patrick's best interests lay in returning to Ms. Glenn's home. The law guardian also concluded that the residential placement contemplated by the agency was unnecessarily restrictive. Accordingly, the guardian contacted Ms. Turner and requested that the agency delay Patrick's placement and reinstate contact with Ms. Glenn. The agency refused.

The law guardian considered seeking review of the agency's decision through its internal administrative appeals process.\(^10\) She rejected this tactic, however, out of fear that Patrick would be moved out of state before such an appeal could be resolved and would be harmed irreparably as a result. Instead, she applied to the juvenile court judge for an order barring Patrick's placement in the distant group home and directing the agency to allow Ms. Glenn to visit Patrick in the hospital while a more detailed evaluation was being completed. The guardian received support from Patrick's psychologist of three years, who was prepared to testify that the boy would be devastated by separation from Ms. Glenn.

The agency objected to the law guardian's request, arguing to the judge that it had been given responsibility for managing Patrick's care and placement when it was assigned as his legal custodian; that it was within the agency's discretion to decide where Patrick should live; and that the court lacked any authority to interfere with the exercise of that discretion. The agency also argued that both Patrick and Ms. Glenn could seek review of the decision to change the boy's placement through its internal administrative review processes, and that judicial review circumventing these processes would be premature and

\(^9\) Law guardians, or guardians *ad litem*, are commonly appointed by juvenile courts in neglect and abuse proceedings to represent the interests of children who are subjects of such proceedings. *See*, e.g., ILL. ANN. STAT. ch. 705, para. 405/2-17 (Smith-Hurd 1993).

constitute undue interference with the agency's authority. The law guardian responded that Patrick would be moved before any administrative review could be completed; that once moved, the boy would be irreparably harmed; and that the juvenile court, as the institution ultimately responsible for safeguarding Patrick's best interests, was both able and bound to take steps to protect those interests when the agency failed to do so.

With Patrick anxiously awaiting the outcome of his case, the court is thus confronted with a fundamental challenge to the scope of its legal authority: should it, by virtue of its statutory obligation to protect Patrick's well-being, consider a request either to bar the agency from placing Patrick in the chosen group home or to direct the agency to return Patrick to Ms. Glenn?

B. The Conflict of Institutional Co-Parents

As suggested by Patrick's case, the relationship between juvenile courts and child welfare agencies is not always easy, and the boundaries of their respective responsibilities are not always clear. Statutory schemes typically designate certain functions that are either distinctively judicial or distinctively administrative. In cases of child abuse and neglect, juvenile courts normally bear sole responsibility for adjudicating charges against parents and, in the "dispositional" realm, for appointing a legal guardian for a child under court jurisdiction. For many dispositional issues, however, the statutorily-defined boundaries of responsibilities between court and agency are ambiguous and marked by significant overlap. Commen-

11. See, e.g., ILL. ANN. STAT. ch. 705, para. 405/2-21 (Smith-Hurd 1993) (describing juvenile court's authority to adjudicate charges of abuse, neglect, or dependency); id. para. 405/2-22 (providing juvenile courts with the power to determine "the proper disposition best serving the interests of the minor and the public").

12. See, e.g., Abused and Neglected Child Reporting Act, ILL. ANN. STAT. ch. 325, para. 5/1 to 5/11.7 (granting the Illinois Department of Children and Family Services the power to investigate charges of neglect and abuse and to provide protective services); id. ch. 225, para. 10/4 (giving the Illinois Department of Children and Family Service the authority to issue licenses to child care facilities); see also id. ch. 20, para. 505/5 (describing general authority of Department of Children and Family Services).

13. The Arkansas Supreme Court has stated:

The jurisdictions of the juvenile court and DHS overlap in numerous and varied areas. One such area involves family services, which is defined in the Juvenile Code . . . as . . . "including, but not limited to: child care; homemaker services; crisis counseling; cash assistance; transportation; family therapy; physical, psychiatric, or psychological evaluation; counseling; or treatment, provided to a juvenile or his family."
tators often assume that the jurisdiction of juvenile courts over the more specific aspects of the implementation of a dispositional plan is limited, and indeed many courts have refused to interfere with specific dispositional decisions of administrative agencies, characterizing them as falling within a protected realm of agency discretion. Other courts, however, interpreting notably similar statutory schemes, have recognized that juvenile courts are vested with broad dispositional powers that include the power to second-guess—or even direct—agency action on specific dispositional matters.

What accounts for this variance of views on the proper scope of juvenile court powers? Differences among specific statutory schemes, while significant in some cases, do not adequately explain this dissonance. To some extent, the range of views among appellate courts called upon to resolve these turf wars may be attributed to the awkward application to the juvenile context of conventional tools of administrative and public law, including the separation of powers doctrine and the prudential administrative doctrine of exhaustion of remedies. Many reviewing courts have sought to apply these principles to the unique relationship between juvenile courts and child welfare agencies within the context of broad and imprecisely drawn statutory schemes. The result is often a prohibition on juvenile courts making decisions in areas considered within the agency's discretion.

Where agency judgments generally can be relied upon to meet the needs of the children and families they serve, a high degree of deference to child welfare agencies is a desirable end. However, as a practical reality, such deference may become a significant cause for concern when state or local child welfare agencies—for whatever reason—prove unable to provide adequate or appropriate attention or resources to the children and families they serve. Under these cir-


14. See, e.g., Alice Shotton & Marcia Henry, Despite Statutory Mandate, Child Welfare Fair Hearings are Rare, 12 YOUTH L. NEWS, Sept.-Oct. 1991, at 1, 2 (arguing that administrative fair hearings offer opportunities to resolve issues that are not appropriate for resolution in juvenile courts).

15. See infra Part II.A., discussing judicial deference to agency decisions.

16. See infra Part II.B., discussing judicial intervention.

17. See infra Part II.A.

18. Patrick's story suggests one way in which considerations apart from the best interests of the individual child—such as conflicts between workers and caretakers—can affect an agency's judgment. Budgetary limitations can also constrain an agency's ability to serve its charges, even to the point where an agency is unable to discharge its legislatively mandated duties. In the last several years, litigation has proliferated charging agencies nationwide with a failure to provide minimal services for children and families enmeshed in the child welfare system. See supra note 3.
cumstances, the results of judicial abdication have ranged from fostering sluggishness in moving toward permanency plans that are either created or sanctioned by the courts,\textsuperscript{19} to judicial misfeasance in protecting the welfare of state wards.\textsuperscript{20} Stated simply, the doctrinal tools used to resolve tensions between administrative agencies and their judicial monitors have failed to take adequate account of either the peculiarities of juvenile law or the practical problems that plague the field of child welfare.

It is the thesis of this Article that ultimate responsibility should rest with the juvenile court for determining when deference to administrative decisionmaking is appropriate, and that decisions over when to exercise such deference must account for the full range of circumstances that inform each case. While deference in many circumstances is essential to the court's smooth operation, juvenile courts must answer finally for the welfare of children assigned to the care of state agencies and must be given powers commensurate to discharge that responsibility effectively. Though jurisdictional tensions may become manifest through a wide range of dispositional issues, this Article focuses on the resolution of a specific dispositional question: where lies ultimate responsibility for the placement of children who are subject to juvenile court jurisdiction and who are under the legal guardianship of a state child welfare agency?\textsuperscript{21} Amidst a range of


\textsuperscript{20} See, e.g., \textit{In re J.S.}, 571 A.2d 658 (Vt. 1989) (finding that Juvenile Court lacked the authority to enjoin the agency from placing the minor child in a residential home plagued by incidents of sexual abuse of younger children) (discussed infra notes 163-174 and accompanying text); see also Edwards, \textit{supra} note 2, at 3 ("[M]any social service agencies do not effectively deliver preventive and reunification services to families, ... juvenile court oversight of social service delivery has been ineffective or nonexistent, and ... many juvenile courts do not ensure that children in out-of-home care attain a permanent home in a timely fashion.").

\textsuperscript{21} Questions regarding the parameters of juvenile court/agency relationships have arisen in a variety of other contexts, such as the power of a juvenile court to order an agency to provide it with extraordinary reports, compare \textit{In re F.B.}, 564 N.E.2d 173, 181-82 (Ill. App. Ct. 1990) (vacating court order requiring Illinois Department of Children and Family Services to provide information regarding abused, neglected, and dependent children to the Juvenile Court) with \textit{In re J.A.}, 406 N.W.2d 372, 375 (Wis. 1987) (holding that Wisconsin Juvenile Court Judge had the power to order reports and investigations relating to foster care placements provided the reasons for the court's request are delineated); to direct an agency with respect to the provision of specific services, see Arkansas Dep't of Human Servs. v. Clark, 802 S.W.2d 461, 462-64 (Ark. 1991) (upholding the power of the Arkansas Juvenile Court to require the Department of Human Services to provide prescription medication not covered by Medicaid, access to food, financial assistance, and transportation services); \textit{In re Lawrence M.}, No. 1-93-3115 et al., 1995 Ill. App. LEXIS 33, at *9 (Jan.
complex and interrelated issues bearing on the development of an appropriate dispositional plan, the question of placement offers a comparatively discrete and straightforward context in which to consider how best to resolve jurisdictional tensions between courts and administrative agencies.

Part II of this Article describes the statutory context in which juvenile courts and child welfare agencies operate, outlining the significant common elements of governing statutory schemes. Part III describes the two principal schools of thought applied in resolving jurisdictional tensions between juvenile courts and administrative agencies, and reviews the dominant considerations that have guided appellate decisions. Part IV offers an analysis and critique of the reasoning that has moved some courts toward a view favoring judicial restraint. Finally, Part V proposes a framework for resolving jurisdictional tensions that heeds legitimate concerns for administrative autonomy and judicial economy, and, at the same time preserves the flexibility that is an essential component of effective judicial oversight. Part V also suggests several basic criteria that might be utilized by a court in determining when judicial review of a particular issue should preempt available administrative review processes. This discussion, it is hoped, will guide both legislative and judicial efforts to define the complex relationship between these two institutional coparents.

II. STATUTORY CONTEXT

Responsibility for the delineation of shared authority between juvenile courts and child welfare agencies lies in the first instance with state legislatures. Indeed, there can be no doubt either that state legislatures retain a great deal of flexibility in fashioning the parameters of court/agency relationships, or that courts are bound to follow the mandates of the legislature when those mandates can be clearly discerned. An understanding of the legislative context in which court/agency relationships are defined is thus a prerequisite to comprehending the general principles of governance in this arena.

20, 1995) (upholding juvenile court orders directing agency to provide inpatient drug treatment); or to order an agency to consent to an adoption, see Bland v. Department of Children & Family Servs., 490 N.E.2d 1327, 1332 (Ill. App. Ct. 1986) (ruling that adoption petition should be granted if the refusal of the Department of Children and Family services to consent to an adoption was "arbitrary, capricious, or unreasonable and without merit"); In re Adoption of Savory, 430 N.E.2d 301, 302-03 (Ill. App. Ct. 1981) (holding that the refusal of the State Guardian to consent to an adoption did not automatically divest the court of jurisdiction to review that decision).
Typically, statutory schemes governing juvenile courts share several common elements which help to define court/agency relationships. First, juvenile courts generally are charged with a broad responsibility to safeguard the welfare of dependent children. In Illinois, for example, this charge is reflected both in a general statement of the purpose and policy of the act governing juvenile courts and in a broad statement of the court’s responsibility to fashion an appropriate dispositional plan. The former provision, which is characteristic of many state statutory schemes, provides that:

The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor’s family ties whenever possible, removing him or her from the custody of his or her parents only when his or her welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his or her own family, to secure for him or her custody, care and discipline as nearly as possible equivalent to that which should be given by his or her parents, and in cases where it should and can properly be done to place the minor in a family home so that he or she may become a member of the family by legal adoption or otherwise.\(^2\)

Somewhat more germane to the scope of the court’s authority to enter specific dispositional orders is the provision regarding dispositional hearings, which states in part:

At the dispositional hearing, the court shall determine whether it is in the best interests of the minor and the public that he be made a ward of the court, and, if he is to be made a ward of the court, the court shall determine the proper

\(^2\) ILL. ANN. STAT. ch. 705, para. 405/1-2 (Smith-Hurd 1993); see also COLO. REV. STAT. ANN. 19-1-102 (West 1988 & Supp. 1994) (setting forth legislative intent of Colorado General Assembly in enacting the Children’s Code); MO. ANN. STAT. § 211.011 (Vernon 1983) (declaring that the purpose of the Juvenile Courts chapter should be “liberally construed” so that “each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child’s welfare and the best interests of the state”); 42 PA. CONS. STAT. ANN. § 6301(b)(1) (1982) (stating that the purpose of the Juvenile Act is “[t]o preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children”).
disposition best serving the interests of the minor and the public.\textsuperscript{23}

Second, once the jurisdiction of the court over the child has been established through the adjudicatory process, the court generally continues to oversee the child’s case beyond the hearing at which a dispositional plan for the child is first formally established. Continuing oversight provides an opportunity for the court to account for changes in the circumstances of the child or the parents, for evolving relationships with individuals significant to the child, for new information coming to light, and for deficiencies in a dispositional plan that become apparent over time, all of which may have an impact on the continuing efficacy of the original dispositional plan.\textsuperscript{24} For children placed in foster care, the court’s responsibility may include not only oversight of agency decisions, but also direct responsibility for making certain dispositional decisions even after an agency has been assigned guardianship of a child.\textsuperscript{25} Such jurisdiction normally continues until the child has been satisfactorily returned to the parent or guardian, an adoption has been finalized, or the child has reached his or her age of majority.\textsuperscript{26} The juvenile court thus carries a continuing and dynamic responsibility to safeguard the interests of its wards.

\textsuperscript{23} ILL. ANN. STAT. ch. 705, para. 405/2-22(1) (Smith-Hurd 1993); see also CAL. WELF. & INST. CODE § 362(a) (West 1984 & Supp. 1994) (authorizing courts to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support” of a child); COLO. REV. STAT. ANN. 19-3-507 (West Supp. 1994) (describing court’s authority to determine disposition serving best interests of minor); ME. REV. STAT. ANN. tit. 22, § 4036 (West 1992) (providing that the court should “[p]rotect the child from jeopardy” and act “in the best interests of the child” in determining the disposition of a child’s custody).

\textsuperscript{24} The federal statutory scheme governing state child welfare systems, the Adoption Assistance and Child Welfare Act of 1980, directs states to establish a case review system governing every child in substitute care covered by the Act. The case review system must provide for each case to be reviewed by a court or an administrative agency at least once every six months to determine the continuing necessity for the placement, 42 U.S.C. § 675(5)(B), and for a court or court-appointed body to conduct a searching dispositional review no later than eighteen months after an initial placement to ensure the development and execution of an appropriate permanent plan for the child. \textit{Id.} § 675(5)(C); see also Radcliffe, \textit{supra} note 19, at 189 (“The dispositional plan should never be considered frozen. . . . At the dispositional hearing, the court works out the best plan according to what is known and available at the time. However, the knowledge may be imperfect or incomplete; deficiencies will develop as the casework proceeds. The child changes; such is the very basis for the juvenile court.”).

\textsuperscript{25} In Cook County, Illinois, for example, all critical decisions regarding parent-child visitation—including whether or not visitation must be supervised by a third party—must be approved by the juvenile court.

\textsuperscript{26} See, e.g., COLO. REV. STAT. ANN. 19-3-205 (West 1988) (authorizing jurisdiction of juvenile court until child reaches age 21); ILL. ANN. STAT. ch. 705, para. 405/2-31 (Smith-Hurd 1994) (establishing that duration of wardship and discharge of proceedings automat-
Third, and most critical to the delineation of shared responsibilities, are provisions describing the power of the court, as among its dispositional options, to appoint a child welfare agency as the legal custodian of a dependent child. Occasionally, statutory provisions specifically address the scope of the court's authority over an administrative child welfare agency. Such provisions may either expressly limit judicial oversight of discretionary agency decisions, or expressly authorize judicial direction of agency decisions. More typi-
cally, however, statutory schemes simply authorize the assignment of legal responsibility for a child to the child welfare agency. Even where statutes expressly vest in the agency the right to make initial placement or other dispositional decisions, they generally do not address the scope of the court's authority to limit agency discretion on placement or other dispositional matters. Moreover, statutes typically require some level of continuing judicial oversight of agency decisions, which may encompass approval of specific placement plans.

In sum, juvenile courts are statutorily responsible not only for initially assigning a legal guardian for a child in need of substitute care, but also for the continuing supervision and monitoring of the child, consistent with the child's best interests. Thus, while an agency assigned legal guardianship normally is responsible for making at least an initial placement decision, the juvenile court at a minimum carries responsibility for approving a dispositional plan and for continuing oversight of children assigned to the agency's legal custody. It is this continuing and overlapping responsibility of juvenile courts and child welfare agencies that, more than anything, sets their relationship apart from other more traditional court/agency relationships.

29. See, e.g., CAL. WELF. & INST. CODE § 361.2(b) (West Supp. 1994) ("When the court orders removal . . . , the court shall order the care, custody, control, and conduct of the minor to be under the supervision of the probation officer who may place the minor . . . [w]ith a foster family agency . . . ."); MINN. STAT. ANN. § 260.191, subd. 1(a) (West 1992) ("If the court finds that the child is . . . neglected . . . , it shall enter an order making any of the following dispositions of the case: . . . (2) transfer legal custody to . . . (i) a child placing agency . . . ."); NEB. REV. STAT. § 43-284 (1993) ("[T]he court . . . may make an order committing . . . [a juvenile adjudged neglected, dependent or abused] to the . . . (5) care and custody of the Department of Social Services.").

30. See, e.g., COLO. REV. STAT. ANN. § 19-1-115(3)(a) (West Supp. 1994) (authorizing courts to give legal custody to an agency that shall have the right to determine "where and with whom the child shall live"); GA. CODE ANN. § 49-5-3(12) (1994) (indicating that "legal custody" includes "[t]he right to determine where and with whom" the child shall live); N.M. STAT. ANN. §§ 32A-1-4(N) (Michie Supp. 1993) (allowing child found abused or neglected to be placed in the legal custody of an agency, with legal custody including the "right to determine where and with whom a child shall live"); OKLA. STAT. ANN. tit. 10, § 1116(B) (West Supp. 1994) ("[W]here the court commits the child to the Department, it shall vest the Department with authority to place the child . . . ."); OR. REV. STAT. § 419B.337 (Supp. 1994) (providing that if the court places a child under legal custody of the agency for "care, placement and supervision," then the court "may specify the particular type of care, supervision, or services," but actual planning and provision of care remains the responsibility of the agency).

III. Court Against Agency

In states where legislative direction is broad and ambiguous, reviewing courts lack uniformity in their treatment of the juvenile court/child welfare agency relationship. Despite this variability, opinions can be grouped generally into two categories, following dichotomous approaches loosely labeled as "judicial deference" and "judicial intervention." While each of these categories encompasses a significant range of views as to the appropriate scope and timing of judicial oversight of agency decisions, slightly more than half of the court opinions surveyed by this Article favor the view of judicial deference.

A. Judicial Deference

Typically, opinions favoring the view of judicial deference invoke traditional principles of administrative law encouraging reliance on agency fact-finding, expertise, and initial decision-making, and minimize the peculiarities of a juvenile court that distinguish it from a typical court sitting in review of agency action. The case of In re B.L.J., decided by the Alaska Supreme Court, represents a good example of the traditional mode of administrative law analysis applied to a juvenile setting. In B.L.J., three siblings were placed, following an adjudicatory hearing, under the legal custody of the Alaska Department of Health and Social Services after the trial court entered a finding that the stepfather had beaten one of the children. However, while assigning legal responsibility to the agency, the trial court's initial order directed that physical custody remain with the children's mother and stepfather, subject to limitations on unsupervised contact between the abusive stepfather and the children.

When the children's caretakers subsequently failed to comply with the requirements of a treatment plan, the agency caseworker became concerned with their placement and recommended that they be moved to live with their father until the provisions of the plan were satisfied. Because it had been granted "legal custody," the agency

32. See supra notes 29-31 and accompanying text.
33. Where a legislative scheme adequately explains the outcome of a case, the core issues regarding the optimal division of administrative and judicial responsibilities, though addressed in a legislative rather than a judicial forum, remain the same. See supra notes 27-28 and accompanying text.
34. 717 P.2d 376 (Ala. 1986).
35. Id. at 377.
36. Id.
37. Id.
sought to invoke its right to determine the appropriate placement for the children, notwithstanding the court's order specifying where the children should reside.\textsuperscript{38} To support its claim, the agency relied upon the statutory provision delineating its rights as a legal custodian, which provided in part that legal custody encompasses "the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, train and discipline the child, and the duty of providing the child with food, shelter, education, and medical care."\textsuperscript{39} Believing such a change of placement to be unwarranted, the judge of the juvenile court refused to grant the agency permission to change the placement, affirming his earlier order leaving physical custody with the children's mother and stepfather.\textsuperscript{40}

The agency appealed the order to the Alaska Supreme Court. At the outset of its opinion, that court noted that the trial judge's bifurcation of legal and physical custodial responsibilities did not conform with the statutory provisions allowing the trial court to award custody to either the agency\textsuperscript{41} or the child's parents.\textsuperscript{42} Determining first that the order in question should be treated as an assignment of custody to the agency rather than to the children's mother and stepfather,\textsuperscript{43} the Alaska Supreme Court then invoked traditional principles of administrative law to conclude that the agency's power to make placement decisions was not intended to be shared with the judiciary:

The court can only substitute its judgment for that of the agency when the agency's decision involves a question of law which is not within the agency's expertise. The legislature has committed placement decisions to the Department's discretion. The various statutory provisions indicate that the Department, not the court, has expertise on the availability and suitability of placements for minors in its legal custody.\textsuperscript{44}

Though the principles of law at work in this decision remain unlabeled, they are readily identifiable as among the core principles on which administrative gatekeeping doctrines, such as the doctrines of exhaustion and primary jurisdiction, are grounded. The notions of

\textsuperscript{38} Id. at 378-79.
\textsuperscript{39} Id. at 379 (quoting ALASKA STAT. 47.10.084(a) (Supp. 1994)) (emphasis added)).
\textsuperscript{40} Id. at 378.
\textsuperscript{41} ALASKA STAT. § 47.10.080(c)(1) (Supp. 1994).
\textsuperscript{42} Id. § 47.10.080(c)(2).
\textsuperscript{43} B.L.J., 717 P.2d at 378 n.1.
\textsuperscript{44} Id. at 380 (citation omitted).
deference to agency expertise and preservation of administrative autonomy are central principles in a long line of cases defining judicial oversight authority in this area.\textsuperscript{45}

Other courts have relied on related principles of public law derived more clearly from separation of powers doctrine. In \textit{O'Bryan v. Eighth Judicial District Court},\textsuperscript{46} the Nevada Supreme Court reached essentially the same conclusion as the court in \textit{B.L.J.}, invoking a somewhat different rationale to support the result. In \textit{O'Bryan}, the minor was a sixteen-year-old neglected girl who suffered from severe depression, substance abuse, and antisocial behavior.\textsuperscript{47} After several attempts to treat her at public mental health institutions failed, the judge of the juvenile court assigned legal custody of the child to a state mental health agency and ordered her to be placed in an out-of-state residential facility.\textsuperscript{48} The agency objected to the order, which expressly directed it to make payments supporting an expensive placement.\textsuperscript{49} In reversing the trial court's order, the Nevada Supreme Court concluded that the juvenile court, upon assigning custody to the responsible agency, lost jurisdiction under applicable statutes to substitute its judgment as to the most appropriate placement.\textsuperscript{50} The opinion's obeisance to the separation of powers doctrine is clear:

\begin{quote}
Although the juvenile division of the district court possesses independent authority to directly place minors in an out-of-state facility, once the court grants custody of the child to the Division, the court loses jurisdiction to substitute its determinations, appraisals and conclusions for those of the Division. In \textit{Galloway v. Truesdall}, this Court said: "The courts must be
\end{quote}

\textsuperscript{45} See, e.g., Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305 (1973) (determining that prior adjudication by federal agency "familiar with the customs and practices of the industry" would be a "material aid" in deciding whether applicable law allowed antitrust suit over revocation of a seat on the defendant's exchange); United States v. Western Pac. R.R., 352 U.S. 59, 70 (1956) (holding that Interstate Commerce Commission had primary jurisdiction to consider which of two tariff schedules should be applied to rail shipment of incendiary devices); Far E. Conference v. United States, 342 U.S. 570, 576 (1952) (ruling that court could not exercise jurisdiction over dispute regarding steamship rate systems without prior submission of the question to the Federal Maritime Board); Order of Ry. Conductors v. Pitney, 326 U.S. 561, 567 (1946) (holding, in a labor dispute between two competing unions and railroad, that if the factual question presented was "intricate and technical" and an "[a]gency especially competent and specifically designated to deal with it has been created by Congress," then the court "should exercise equitable discretion to give that agency the first opportunity to pass on the issue").

\textsuperscript{46} 594 P.2d 739 (Nev. 1979).
\textsuperscript{47} \textit{Id.} at 740.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
wary not to tread upon the prerogatives of other departments of government or to assume or utilize any undue powers. If this is not done, the balance of powers will be disturbed and that cannot be tolerated for the strength of our system of government and the judiciary itself is based upon that theory.\(^{51}\)

While decisions favoring judicial restraint most commonly rest on concerns of administrative autonomy and deference to agency expertise, courts also have struck the related theme of judicial efficiency.\(^{52}\) One such example is the opinion in *In re Danielle W.*\(^{53}\) In that case, the agency responsible for several children in foster care restricted visitation between the children and their mother. The mother then challenged the court’s order allowing visitation to occur at the discretion of the agency as an improper abdication of judicial authority.\(^{54}\) While the bulk of the court’s opinion was devoted to a discussion of the limits of the separation of powers doctrine, the court ultimately concluded that the delegation of some quasi-adjudicatory powers to the executive branch was compelled by the “interests of judicial economy.”\(^{55}\)

Judicial restraint, in its most extreme form, completely insulates agency placement decisions from judicial review. Under this view, a court’s authority to respond when it disapproves of the agency’s management of the child’s case is limited to removing the child from the legal guardianship of the agency and entering an alternative dispositional order.\(^{56}\) Indeed, at least one court has suggested that when an agency is assigned permanent custody of a child, even the court’s authority to keep abreast of the child’s development may be circumscribed:

> When the department is granted permanent custody of a child, it has virtually free rein to place that child in a foster

---

51. *Id.* at 741 (citations omitted).

52. *See* McKart v. United States, 395 U.S. 185, 194-95 (1969) (indicating that “practical notions of judicial efficiency” are fundamental to the doctrine of exhaustion); *see also* 4 Kenneth C. Davis, *Administrative Law Treatise* § 26.1, at 415 (2d ed. 1983) (including “conservation of judicial energy by avoiding piecemeal or interlocutory review” as a fundamental basis for deferring to administrative agencies).


54. *Id.* at 345.

55. *Id.* at 350.

56. *See, e.g., In re G.B.*, 418 N.W.2d 258, 260 (Neb. 1988) (“[I]f the juvenile court finds that the placement selected by the department is not in a child’s best interests and that some other placement would better serve those interests, the court is free to remove the child from the custody of the department and place the child wherever the court concludes best meets the child’s needs.”).
home of its own choosing, to decree whether, how much, and what sort of family visitation there should be, and to decide whether to have the child adopted. This discretion is subject only to a petition for review which cannot be filed more than once every six months.57

Juvenile courts lacking the authority to direct an agency to place a child in a specific location may nevertheless exercise some degree of oversight of agency placement decisions. The level of this oversight may range from the authority to dictate a type of placement to the more limited power of accepting or rejecting an agency's choice of placement. An example of the former reasoning is In re C.D.P., a case involving a challenge by the agency to a court order directing it to place a youth in a specific residential facility.59 While holding that the juvenile court could not specify a placement, the Iowa Supreme Court concluded that the juvenile court could have indicated what sort of placement—such as a private foster home, custodial home, or residential facility—was appropriate, or even could have held that the boy's best interests demanded placement in a facility meeting the general description of a specific placement.60

The Vermont Supreme Court's decision in In re G.F. exemplifies the more restrictive view of judicial authority that recognizes a limited power in the juvenile court to accept or reject a specific placement, but does not grant the greater power to describe the general parameters of a desired placement.62 The court in G.F. considered a statute that assigned to the designated legal custodian the right to determine "where and with whom a juvenile should live," concluding that this language indicated a legislative intent to create within the agency a protected realm of discretion.64 The juvenile court's author-

58. 315 N.W.2d 731 (Iowa 1982).
59. Id. at 732.
60. Id. at 733. Other courts holding that responsible agencies may not be ordered to place children in a specific location simply have construed trial court language directing such placements as exhortatory. See, e.g., In re Cynthia A., 514 A.2d 360, 366 (Conn. App. Ct. 1986) ("The trial court's placement of the child with the paternal grandmother was, in legal effect, a suggestion to the . . . [agency]."); In re R.L.M., 321 S.E.2d 435, 437 (Ga. Ct. App. 1984) (holding that juvenile court restrictions on placement of child committed to the custody of agency were not binding); In re Smith, 811 P.2d 145, 146-47 (Or. Ct. App. 1990) (holding that court was not authorized to order agency repeatedly to change placement until agency got "the right one").
61. 455 A.2d 805 (Vt. 1982).
62. Id. at 810.
63. Id. at 809 (citing VT. STAT. ANN. tit. 33, § 632(a)(10) (recodified at tit. 33, § 5502(a)(10) (1990))).
64. Id.
ity was likened to that of a highway commission, which may pass on a recommendation but has "no authority to lay out an alternate route."^65^6

Whether cast in terms of a legislatively mandated division of responsibility, or in terms of limited deference, opinions that adopt the judicial restraint model^66^ describe several fundamental concerns: (1) preserving the legislatively endowed autonomy of child welfare agencies; (2) respecting the agency's experience and expertise, particularly with respect to fact finding; and (3) limiting the inefficiencies inherent in two overlapping and potentially duplicative review processes.

**B. Judicial Intervention**

The view favoring more active judicial oversight of agency decisions typically rests upon a vision of a court with broad powers and responsibilities derived from an expansive legislative grant of authority to the juvenile court. In the context of placement changes, the decision of the California Court of Appeal in *In re Robert A.*^67^ represents one of the most searching explorations of the relationship between juvenile courts and administrative agencies following this view.

Upon removal from their parents' home, four siblings, including Robert A., were placed in the home of a friend of their parents.^68^ At the dispositional hearing, the court received a social study recommending that the children remain with the family friend and, with agreement from the parties, placed all four children under the legal guardianship of the child welfare agency.^69^ While no party sought to move the children, the agency nevertheless requested that the court enter a general rather than a specific placement order, based on its contention that the court lacked authority to mandate a specific placement.^70^ In support of this request, the agency relied upon the section

---

65. Id. at 810.
66. See *In re K.A.B.*, 483 So.2d 898, 899 (Fla. Dist. Ct. App. 1986) ("It is up to the courts, both trial and appellate, to adjudicate legal rights and responsibilities, it is not within their province to manage the affairs of another branch of government."); *In re Eaton*, 757 P.2d 961, 965 (Wash. 1988) (en banc) (holding that juvenile court lacked authority under the applicable statute to order a minor under the custody of the agency into a particular residential placement); cf. *In re J.M.W.*, 411 A.2d 345, 349 (D.C. 1980) ("To allow the judiciary to revoke parole [of a juvenile delinquent] without regard to assessment of those who retain custody would . . . permit an impermissible encroachment upon the province of the executive.").
68. Id. at 441.
69. Id.
70. Id. at 443.
of the California code describing its placement authority and upon a court rule. The court obliged the request, and again affirmed the agency’s position at a subsequent hearing on a petition by the children’s attorney for clarification of her right to notice prior to a placement change. The children then appealed, arguing that they were entitled to a specific placement order that would protect them against a change in placement without court approval.

The Court of Appeal, reversing the lower court’s decision, relied upon several sections of the statutory scheme describing broad judicial powers. The cited provisions of law respectively enable a juvenile judge to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support” of dependent minors; ensure that children who are in need of protective services “receive care, treatment and guidance consistent with their best interest and the best interest of the public”; and direct that provisions of the statute be construed liberally. The court also emphasized the subordinate role of the agency as a “special arm of the court,” upon which the court could choose, but was not bound, to rely.

71. CAL. WELF. & INST. CODE § 361.2(b) (West Supp. 1994) provides:

When the court orders removal pursuant to Section 361, the court shall order the care, custody, control, and conduct of the minor to be under the supervision of the probation officer who may place the minor in any of the following:

1. The home of a relative, including a noncustodial parent.
2. A foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.
3. A suitable licensed community care facility.
4. With a foster family agency to be placed in a suitable licensed foster family home or certified family home which has been certified by the agency as meeting licensing standards.
5. A home or facility in accordance with federal Indian Child Welfare Act.

The court in Robert A. noted that the reference in this section to “Probation Officer” applies equally under the statute to the actual child welfare agency. Robert A., 5 Cal. Rptr. 2d at 442 n.6.

72. CAL. CIV. & CRIM. RULES, Rule 1456(a), provides in part that “[a]t the disposition hearing, the court may: . . . (5) Declare dependency, remove physical custody from the parent or guardian, and . . . (C) Make a general placement order.”

73. Robert A., 5 Cal. Rptr. 2d at 441.
74. Id. at 441-42.
75. Id. at 442.
76. Id. at 443-45.
77. Id. at 444 (citing CAL. WELF. & INST. CODE § 362(a)).
78. Id. at 444-45 (citing CAL. WELF. & INST. CODE § 202(b)).
79. Id. at 444 (citing CAL. WELF. & INST. CODE § 202(a)).
80. Id at 445.
Most troubling to the Court of Appeal was the deletion of a provision from the applicable legislation which had expressly allowed the juvenile court to make a direct, specific placement order.\textsuperscript{81} Conceding that the legislature must have intended to change the law by this deletion, the court nevertheless concluded that this change was meant simply to clarify the court’s authority to delegate the direct supervision of dependent minors to the Department, and was not meant to “remove the general supervisory power of the juvenile court over the performance of the specified duties by the court’s ‘arm’, the Department.”\textsuperscript{82}

The Court of Appeal explained its understanding of the relationship between the juvenile court and the agency:

\begin{quote}
[T]he Department has a “hybrid responsibility” of representing the state in seeking the best interests of the child, while simultaneously administering the court’s orders, “subject to the supervision of the juvenile court which provides the parent with the required due process.” At the dispositional hearing, the juvenile court is required . . . to have the assistance of the probation officer’s social study and recommendations in making an appropriate disposition of the minor. However, the ultimate decision on disposition is made by the court, in the performance of its duties . . . to ensure that dependent minors “shall receive care, treatment and guidance consistent with their best interest.” . . . [T]he court also must provide for the protection and safety of dependent minors, and seek to preserve and strengthen the minor’s family ties whenever possible. Its order . . . placing the custody of the minor under the supervision of the probation officer remains subject to the continuing duties of the juvenile court to ensure that the activities carried out by its “arm” are consistent with the mission of the juvenile court as a whole.\textsuperscript{83}
\end{quote}

Based on this understanding, the appellate court concluded that it was within the province of the juvenile court to instruct the agency to place a particular child in a particular home.\textsuperscript{84}

Though Robert A. may constitute the most comprehensive treatment of this issue, other courts have followed similar reasoning in reaching the same result. For example, in \textit{In re Daniel T.},\textsuperscript{85} an impris-
JUVENILE COURTS AND CHILD WELFARE AGENCIES

1995

A father of a boy in foster care requested a court order requiring the agency to seek judicial approval before changing the boy’s placement in much the same manner as Robert A.’s attorney had sought to protect her right to participate in decisions affecting the minor’s placement. The agency objected, contending that a statutory provision requiring it to give advance notice of a placement change if “practicable” and “not detrimental to the best interests of the child” described the full extent of its responsibility to the court and the parties. The Maine Supreme Court bluntly rejected the agency’s narrow interpretation of the juvenile court’s oversight authority:

> These arguments ignore the underlying and ongoing statutory role of the District Court under the Child and Family Services and Child Protection Act. This comprehensive statutory treatment of children in need of special care does give the Department extensive power to fulfill its statutory duty to protect neglected children and, wherever possible, preserve family life. But it gives the District Court final say on removing a child from its home and placing it with a new custodian such as the Department. . . . Clearly, therefore, Department decisions concerning placement are open to review.

From this conclusion, the court affirmed the juvenile court’s discretionary authority to impose the limitation contemplated. While the Maine Supreme Court was not faced with the question of whether, at a pre-change hearing, the juvenile court could direct the placement of a child in a specific home, the court noted the juvenile court’s broad power to impose “other specific conditions governing custody” beyond the options specified by statute. This reliance on the court’s residual authority suggests a willingness to sanction judicial micromanagement of the agency’s actions as necessary to protect the child.

The Wisconsin Supreme Court employed similar reasoning in a somewhat different context in In re J.A., which considered the scope of the Juvenile Court’s power to procure information regarding children in foster care from the responsible agency. At age sixteen, J.A. was locked out of her father’s home because of her involvement with a

---

86. Id. at 1303. Specifically, the boy’s father wanted an opportunity for a court hearing before the agency changed his son’s foster care placement. Id.
87. Id. (quoting ME. REV. STAT. ANN. tit. 22, § 4041(1)(A)(2) (West Supp. 1987)).
88. Id. at 1303-04 (citations omitted).
89. Id. at 1304.
90. Id. (quoting ME. REV. STAT. ANN. tit. 22, § 4036(1)(H)).
91. 406 N.W.2d 372 (Wis. 1987).
92. Id. at 372.
thirty-two-year-old man. The agency placed J.A. in a foster home, but removed her after less than a month when the foster parent indicated J.A. was not following rules. After the girl ran from a second foster home, a hearing disclosed that her first foster mother was the sister of her adult paramour, and that the agency had failed to remove her from the home after learning of this relationship.

Upon hearing these facts, the presiding juvenile court judge expressed his "displeasure" with the agency's handling of the case and ordered the agency to furnish the court with certain information about foster parents and children in the county. The agency objected, in part on the grounds that the juvenile court lacked the statutory authority to enter the order. Among the issues considered by the Wisconsin Supreme Court on review was whether the statutory scheme governing both the juvenile court and the responsible child welfare agency gave the court the power to order the agency to prepare a comprehensive report on foster care placements.

In its review of this legislative scheme, the Supreme Court referred to provisions granting the court "exclusive original jurisdiction" over children in need of protection and supervision; authorizing the court to place children in need in foster care; requiring continued supervision of such children by the court; allowing the court to require service providers to make reports; and permitting the court to order the child welfare agency "to perform other functions as ordered by the court." In rejecting the argument that the scope of the challenged order exceeded the authority granted by the legislature, the court noted that "[t]he statute contemplates a substantial role for juvenile courts and judges in implementing the objectives of the statute." Even beyond these responsibilities, the court recognized an affirmative duty of juvenile judges under the statute to make

93. *Id.* at 373.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (quoting Wis. Stat. Ann. § 48.13 (West 1987)).
102. *Id.* (citing Wis. Stat. Ann. § 48.357 (West 1987)).
103. *Id.* (citing Wis. Stat. Ann. § 48.08(1) (West 1987)).
104. *Id.* (citing Wis. Stat. Ann. § 48.069(1)(e) (West 1987)).
105. *Id.* at 375.
inquiries whenever it seems apparent that the services being offered are deficient.106

The unifying theme of decisions favoring a more expansive view of judicial authority recognizes the juvenile court as the entity ultimately responsible for protecting state wards. These decisions, and others adhering to a similar viewpoint,107 rely largely on the general statutory directive to juvenile courts to ensure that the best interests of the child are safeguarded once cause for state intervention has been established.

IV. ANALYSIS AND CRITIQUE

In an environment where judicial resources devoted to child welfare cases are scarce, there is considerable merit to the notion that the role of juvenile court judges should be limited to “judging,” and should not include “social work.”108 Whatever may be the practical implications of such a notion, it rests at bottom on a legitimate sentiment that caseworkers generally are better equipped to manage the details of their cases. In the ideal, caseworkers bring to their work specialized training, knowledge of available resources, skills in family assessments and the development of service-based plans for meeting a family’s needs, and understanding of the individual children and families with which they work. Moreover, such deference comports with the notions of judicial economy and administrative autonomy grounded in traditional principles of administrative law.109 At a mini-

106. Id.
107. See, e.g., K.B. v. Missouri Div. of Family Servs., 672 S.W.2d 710, 711 (Mo. Ct. App. 1984) (holding that the juvenile court did not exceed its authority in ordering a minor placed in a specific residential home); In re F.M., 400 A.2d 576, 579 (N.J. Super. Ct. 1979) (finding that the court was authorized to direct the agency to enroll the child in a special residential school if found to be in child’s best interests); In re Daniel T.C., 532 N.Y.S.2d 474, 479-80 (N.Y. Fam. Ct. 1988) (holding that the family court had authority to direct a specific home for placement of a child under agency responsibility).
108. For example, in a special report prepared in the wake of a particularly notorious child fatality, an independent committee commissioned by the Cook County Circuit Court to recommend changes to the County's juvenile court system opined that "judges should be making the kinds of decisions that they are trained to make, and . . . social work decisions should be made by social workers." The Report of the Independent Committee to Inquire into the Practices, Processes and Proceedings in the Juvenile Court as They Relate to the Joseph Wallace Cases, Oct. 1, 1995, at 72; see also Nathan Glazer, Should Judges Administer Social Services, The Public Interest, Winter 1978, at 64-80 (criticizing judicial involvement in the administration of social services).
109. Professor Davis includes among the main underpinnings of the doctrine of exhaustion of administrative remedies the "protection of agency processes from impairment by avoidable interruption, conservation of judicial energy by avoiding piecemeal or interlocutory review, and providing the agency opportunity to correct its own errors." Davis, supra note 52, § 26.1, at 415.
mum, the reasoned and informed social-work judgments of qualified caseworkers, drawn into question in litigation, should be entitled to some degree of deference.\textsuperscript{110}

On the other hand, acceding to the compelling temptation to apply bright-line rules limiting court review over agency actions can interfere with the court's ultimate responsibility to safeguard the welfare of its wards. Agencies may be influenced by institutional concerns that compete with the objective of developing an optimal plan for an individual child. Moreover, caseworkers may make bad decisions, whether out of inexperience, lack of knowledge, prejudice, or incompetence. Under such circumstances, a judge carrying ultimate responsibility for protecting the interests of a state ward must be able to exercise oversight authority and to respond to a situation where it becomes apparent that the agency is not meeting the needs of the child or family.

How then can a juvenile court strike an appropriate balance between exercising an appropriate degree of deference and restraint and its ultimate responsibility as \textit{parens patriae}? To answer this question, it is necessary first to consider whether constitutional separation of powers doctrine compels the application of bright-line rules dividing judicial and administrative responsibilities. Second, the practical obstacles arising from the substantive overlap of administrative and judicial functions in child welfare must be addressed when implementing any such bright-line rules. The following sections address these two issues.

\textbf{A. Separation of Powers}

It is necessary at the outset to consider whether the rigid compartmentalization of functions often engendered by the judicial restraint model is compelled by constitutionally-grounded considerations of separation of powers. At one extreme, appellate courts have applied sweeping limitations that amount to complete bars against court review of certain types of agency action.\textsuperscript{111} Such decisions, though rarely grounded expressly in constitutional dogma, are commonly cast in terms of jurisdictional limits on court powers that clearly implicate separation of powers concerns. These opinions also typically reflect the view that placement decisions are essentially

\textsuperscript{110} Goldstein, Freud, Solnit and Goldstein, in the third of three seminal treatises on the best interests of the child, caution judges against substituting their own lay instincts for those of experts or professionals in the areas of child development and mental health. \textit{See Joseph Goldstein et al., In the Best Interests of the Child} 21-31 (1986).

\textsuperscript{111} \textit{See supra} Part III.A. discussing judicial deference to agency decisions.
an executive rather than a judicial function, requiring the application of skills, knowledge, and experience unique to the placing agency.

Several decisions, discussing both limits on the court's jurisdiction or authority and reliance on agency expertise, illustrate this reasoning. In In re K.A.B., a Florida appellate court reversed an order of the juvenile court directing the responsible agency to place a child in a specific residential facility, holding that the order was beyond the lower court's authority. In upholding the agency's ultimate authority over placement decisions, the court's opinion strikes both themes:

[I]t is crystal clear that it is within the discretion of the agency to decide where to keep the child who is in its custody. The agency is, of course, better equipped to make day-to-day health and welfare decisions which concern the child. The courts are not given general supervisory power over the Department of Health and Rehabilitative Services under the statutes.

It is up to the courts, both trial and appellate, to adjudicate legal rights and responsibilities, it is not within their province to manage the affairs of another branch of government.

Decisions adopting the judicial restraint model by describing limitations on the court's "jurisdiction" or "authority" invoke similar concerns. For example, in State ex rel. Human Services Department, a New Mexico appellate court held that the trial court had exceeded its statutory authority in ordering that the child in question remain in placement with her current foster parent. The agency had contemplated moving the child to live with her adult brother in California, whose home had been favorably recommended in a home study. Based entirely on the brother's homosexuality, the juvenile court rejected this placement and ordered the child welfare agency to leave the child in her current non-relative foster home. On revers-

113. Id. at 899.
114. On appeal, the court affirmed the lower court order, except for the words directing placement "at Country Acres." Id.; see also O'Bryan v. Eighth Judicial Dist. Court, 594 P.2d 739, 741 (Nev. 1979) (holding that once juvenile court granted custody of the child to the agency, it lost jurisdiction to substitute its determinations, appraisals, and conclusions for those of the agency) (discussed supra notes 46-51 and accompanying text).
115. Id. (citations omitted).
117. Id. at 1328.
118. Id. at 1329.
119. Id.
ing the order, the appellate court relied upon the statutory definition of "legal custody," which the court paraphrased as "a legal status created by court order that vests in a person or agency the right to determine where and with whom a child will live." The court concluded that:

Although the Code authorizes the children's court to order that legal custody remain with the Department, it does not grant the court the power to dictate to the Department where the child should be placed. . . . Thus, we conclude that, once legal custody was in the Department, the children's court had no authority to prohibit the Department from placing physical custody of the child with any particular person.121

These decisions, and others like them,122 reflect the notion that placement decisions fall squarely within the province of the administrative agency, and that the judiciary should not impose its will on the agency in the area of placement of agency wards. One measure of the awkwardness of this rigid division of responsibilities is the frequency with which arguments grounded in separation of powers concerns have been made from conflicting perspectives. Though such arguments are made most often by agencies challenging the authority of the court,123 they also have been made by individuals challenging agency decisions regarding services as a usurpation of judicial authority. For example, in In re G.B.,124 the agency objected to an order of the court directing it to place a child in a specific treatment center and pay for the costs of care. The agency relied upon a statute granting it the authority to "determine the care, placement, . . . and expenditures" of children committed to its care.125 In response, the minor, supporting the court's order, argued that the statute "contradicts the very nature of the reasoning behind the separation of pow-

121. Id. (citations omitted).
122. See, e.g., In re C.D.P., 315 N.W.2d 731, 733 (Iowa 1982) (holding that the juvenile court did not have the authority to direct a specific placement); In re G.B., 418 N.W.2d 258, 260 (Neb. 1988) (holding that once a court commits a child to an administrative agency, the agency has the "sole authority" to select the care and placement for the child); In re Eaton, 757 P.2d 961, 965 (Wash 1988) (en banc) ("We hold that the juvenile court does not have the authority to select the placement facility . . . .")
123. In addition to the cases discussed supra Part III.A, see, for example, City & County of Denver v. Juvenile Court, 511 P.2d 898, 901 (Colo. 1973) (discussing a petition filed by the city and county of Denver and its Department of Welfare against the juvenile court).
124. 418 N.W.2d 258 (Neb. 1988).
ers,“" and urged that “it would be ludicrous to think that the Juvenile Court would have to abide by a decision of the Nebraska Department of Social Services regarding the care of a child, even if the Court knew that such care was not in the best interest of that child.” 126 In In re Danielle W., 127 a mother who objected to a decision by the agency restricting her visitation with her daughters raised a similar challenge. 128 Seeking to block the agency's decision regarding visitation, the mother argued that the court's willingness to allow the agency to define the parameters of visitation constituted an improper delegation of judicial authority in violation of separation of powers doctrine. 129

The facility with which litigants have raised separation of powers arguments from both sides of the fence suggests the difficulty inherent in defining particular decision-making functions in child welfare as either inherently judicial or inherently administrative. More fundamentally, these arguments reflect a narrow view of separation of powers doctrine that is inconsonant with the complex relationship between a juvenile court and a state agency responsible for supervising a dependent or neglected child. This relationship is marked by an interdependence that derives chiefly from the juvenile court's oversight responsibility and is uncharacteristic of traditional relations between administrative agencies and reviewing courts, where the judicial function is normally limited to reviewing agency action. While the relationship may fairly be analyzed in terms of separation of powers doctrine, the analysis nevertheless must recognize the need to balance the agency's presumed superior expertise against the court's oversight responsibility. This balancing will call for varying degrees of deference, depending on the circumstances of the individual case. It follows that the best interests of the child will, at times, require the court to exercise certain functions normally lodged with the agency.

The flexibility called for by this balancing has been recognized as a legitimate factor in defining the constitutionally imposed boundaries of judicial and executive/administrative authority. In one of the more thoughtful discussions of the application of separation of powers doctrine to the field of child welfare, the California Court of Appeal described the juvenile court's necessary dependence on the

126. In re G.B., 418 N.W.2d at 260 (quoting Brief of Appellee at 9). The court on review rejected this argument and sustained the agency's argument that the trial court order exceeded its authority. Id. at 261.


128. Id. at 348.

129. Id. The court rejected this argument. Id. at 350; cf. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (rejecting separation of powers challenge to delegation of authority to the CFTC to hear common-law counterclaims).
information provided to it by agency personnel in dependency proceedings, but at the same time recognized the court's ultimate responsibility to its wards. First, the court acknowledged the need for judicial restraint, grounded in the wisdom of deference to agency expertise:

The Supreme Court has recognized that the probation officers who prepare social studies for use at disposition in dependency proceedings are "disinterested parties" who prepare such reports "in the regular course of their professional duties." These reports accordingly have the characteristics of objectivity and expertise, which lend them a degree of reliability and trustworthiness. . . . [A] probation officer becomes a "special arm of the court" to investigate the status of the children and report. Obviously, the juvenile court is entitled to rely on the expertise and the recommendations of the probation officer in making its dispositional determinations. It should also be wary of substituting its own professional judgment for that of workers experienced in the field.

Yet the court also recognized the complexity of the relationship between court and agency and the need for this complexity to translate into a flexible interpretation of the boundaries of each institution's authority:

The relationship of the juvenile court and its assisting "arm," the Department, is correctly analyzed in terms of the constitutional separation of powers. "Judicial power is in the courts and their function is to declare the law and determine the rights of parties to a controversy before the court. Executive or administrative officers cannot exercise or interfere with judicial powers." However, such separation of powers need not and cannot be absolute. "The correct principle deducible from the better-reasoned cases dealing with the separation of powers seem[s] to be that even the primary function of any of the three departments may be exercised by any other governmental department or agency so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate

131. Id. at 445 (citations omitted).
control over its exercise, as by court review in the case of the exercise of a power judicial in nature."^{132}

As the court in *In re Robert A.* noted, the separation of powers doctrine is not absolute. Rather, it describes a principle of shared powers, in which the court, though dependent on the agency in many respects, must exercise ultimate authority to protect its wards.^{133} While the level of interdependency of juvenile courts and administrative child welfare agencies distinguishes this relationship from many traditional court/agency relationships such as are found in the regulatory context, this interdependence is by no means limited to the field of child welfare. In fact, the Supreme Court, in reflecting on the evolution of public law, observed that it had "recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy was to emerge."^{134}

---

132. *Id.* (citations omitted).

133. See also *In re Jeffrey S.*, 663 P.2d 1211, 1218-21 (Okla. 1983) (Simms, V.C.J., concurring in part and dissenting in part) (arguing that a court's ultimate responsibility to its wards must, consistent with separation of powers doctrine, include the power to direct a state agency that has legal custody over a child); *In re J.A.*, 406 N.W.2d 372, 376 (Wis. 1987) (affirming the authority of the juvenile court to order the agency to produce reports to the court about wards in its care by holding that "[t]he statute envisions a cooperative effort between the court and county social service departments to effectuate its purposes. . . . Thus, judicial and executive branches share certain power as is contemplated by the separation of powers doctrine."); *In re Lawrence M.*, No. 1-93-3113 et al., 1995 Ill. App. LEXIS 33, at *10 (Jan. 20, 1995) (holding that court order directing agency to enroll mother in specific inpatient drug treatment program simply mandated compliance with agency's statutory responsibilities and did not violate separation of powers doctrine). These decisions reflect the same functional approach to the separation of powers doctrine, stressing the interdependence of the three branches and the practical necessities of governance, that has dominated the Supreme Court's treatment of federal separation of powers issues tracing back to the birth of the modern administrative state. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding validity of United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding provisions of the Ethics in Government Act authorizing the appointment of an independent counsel); *Commodity Futures Trading Comm'n*, 478 U.S. at 833 (upholding statute granting CFTC jurisdiction over common-law counterclaims); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (upholding broad delegation of authority to OSHA); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding assignment of statutory authority to administrative agency to impose criminal penalties for violations of the Emergency Price Control Act). For a general discussion of the dominance of functionalist over formalist analysis in the Supreme Court's separation of powers jurisprudence, see Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. Chi. L. Rev. 357 (1990); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 Sup. Ct. Rev. 225, 226.

B. Overlap Between Judicial and Administrative Functions

If the application of bright-line rules cannot be justified as a reasonable derivative of separation of powers doctrine, neither can it be said that such rules offer a workable practical solution to the problem of turf wars between courts and child welfare agencies. The Supreme Court's observation in *Port of Boston*, noted above, reflects what Professor Christopher Edley labels as the "boundary problem," which he describes as a major conceptual failing of the decision-making paradigms on which the public law doctrines dividing judicial and executive responsibilities are based.135 "Although [these] paradigms are arguably distinct in the abstract, in practice they are commingled and inseparable except when subjected to artificial and distorted conceptual violence . . . . Where one paradigm ends and another begins is a matter of arbitrary perception or skillful advocacy."136

Professor Edley's comment seems especially germane in the context of shared decision-making in the field of child welfare, where rigid definitions of certain types of decisions as peculiarly "administrative" or "judicial" seem particularly awkward, and where the practical difficulties posed by the task of distinguishing judicial and administrative functions are especially troublesome.137 Under a typical legislative scheme governing abuse, neglect, and dependency cases, judges are charged with a variety of responsibilities that include determining whether to remove a child from a parent, whether a temporary or permanent legal guardian for a child should be appointed and if so, whom to appoint, whether a particular long-term goal is in the child's

135. Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 *Duke L.J.* 561. Professor Edley describes a trichotomy of decision-making paradigms derived from the separation of powers ethos of public law which, he argues, "provide the framework for much judicial analysis of where the mood for review of an administrative action should be located along a spectrum that ranges from extreme deference to aggressive interventionism." *Id.* at 568. The paradigms consist of (1) adjudicatory fairness, with emphasis on established rules and consistency of process and application such as occurs in an appellate court; (2) science, with emphasis on a rational, objective and impersonal process of fact-finding; and (3) politics, with emphasis on personal values and partisan politics. *Id.* at 568-69.

136. *Id.* at 570-71.

137. *See* Arkansas Dep't of Human Servs. v. Clark, 802 S.W.2d 461, 463-64 (Ark. 1991) (describing aspects of responsibility to provide family services borne by both court and agency). The role of the administrative agency itself encompasses functional aspects of all three branches of government. Thus, even apart from the difficulties of defining child welfare decisions in strict separation of powers terms, the place of the administrative agency within a separation of powers scheme is ambiguous. For a general discussion of the application of separation of powers doctrine to the administrative agency, see Laurence J. O'Toole, Jr., *Doctrines and Developments: Separation of Powers, the Politics-Administration Dichotomy, and the Rise of the Administrative State*, 47 *Pub. Admin. Rev.* 17 (1987).
best interests, and whether the efforts of the child welfare agency to address the family's needs are "reasonable." 138

Though resolution of each of these decisions represents a potential judicial function, each calls upon the decision-maker to exercise knowledge falling more typically within the realm of expertise of the social worker, mental health professional, or child development expert. For example, judgments about whether or not to remove a child from a caregiver call upon the decision-maker to weigh the risks to a child arising from a particular set of circumstances against the potential emotional or psychological harm to the child arising from the removal. Such a decision calls for an assessment of risks that requires knowledge about the predictive value of specific circumstances of the case. Moreover, the decision-maker must understand the fundamentals of child development, attachment, separation, and loss. Indeed, the very nature of the indeterminate legal standard governing child welfare cases—the "best interests of the child"—not only permits, but even compels judges to rely upon knowledge of human circumstance and experience falling more commonly within the ambit of other professional disciplines.

In the modern urban juvenile court, the notion that the generalized nature of a judge's experience compels deference to the more specialized experience of an agency caseworker may fairly be called into question. Even in relatively small urban jurisdictions, the management of a juvenile caseload may command the full-time resources of one or more judges. 139 With such focused experience, a judge is likely to become well versed in the types of problems faced by families, the available community resources, and the indicators that define the likely success or failure of a particular course of action. While such experience is no substitute for professional training in a non-legal discipline, it nevertheless militates against constraining judicial authority on the grounds that social workers are invariably better qualified to make certain types of dispositional decisions. If a judge is intimately familiar with the placement alternatives and resources available to state wards in a particular locale, or if a case presents circumstances


139. In Cook County, Illinois, for example, as of February 1995, 16 judges and 23 hearings officers devote full time to hearing neglect, abuse and dependency cases. In Hamilton County, Ohio, which encompasses the Cincinnati metropolitan area and has a population of less than one-fifth that of Cook County, the equivalent of 3.5 full-time referee positions are devoted exclusively to hearing these cases. See Mark Hardin, AM. BAR Ass'n, JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORM: ONE COURT THAT WORKS 14, 21 (1992).
that are sufficiently unique to render the agency's prior experience largely inapplicable, or if the outcome of a decision will turn solely on expert testimony that a judge is well qualified to assess, there might be comparatively less cause to defer a dispute over the child's placement to the agency's remedial processes. Goldstein notes that a functioning child welfare system will regularly require the crossing of somewhat artificial professional borders:

The effectiveness of participation by persons of different disciplines in the child placement process depends on their learning from one another. A workable child placement process will provide for a conscious, restrained, open and reviewable use by professional participants of knowledge acquired from a discipline not their own. The art of collaboration grows out of a recognition that borders do exist, even if they cannot always be sharply defined, and that under certain circumstances they may be crossed. 140

This discussion suggests that the rigid compartmentalization of judicial and administrative functions in the child welfare context not only is not compelled by constitutional doctrine, but may also engender significant problems as applied to a field that is replete with overlapping responsibilities. While few states have addressed in detail issues relating to this division of responsibility, a review of three separate opinions of the Florida appellate courts offers an excellent case study of the practical difficulties faced by courts attempting to strike a workable balance between judicial responsibility and agency discretion.

140. Goldstein et al., supra note 110, at 54; see also Edwards, supra note 2, at 16 ("The social service agency and the juvenile court...cannot do without one another."). In support of his contention, Goldstein describes a case in which a judge heard and upheld a challenge by a foster parent to an agency decision to remove several foster children from her home. Id. at 56-57 (describing Rivera v. Marcus, 533 F. Supp. 203 (D. Conn.), aff'd, 696 F.2d 1016 (2d Cir. 1982)). In Rivera, the court, though concluding that the process by which removal had been effected was constitutionally deficient, nonetheless refrained from simply ordering the children returned to the claimant's home. Rivera, 533 F. Supp. at 208-09. Instead, because of the passage of time, the court ordered a hearing to determine whether returning the children to the aggrieved foster parent would be in their best interests. Id.

Goldstein writes that "[b]y agreeing to hold a hearing, the District Court judge demonstrated that he knew enough about a child's need for continuity of care not to move these children until he had heard expert testimony on the potential effect of such a move." Goldstein et al., supra note 110, at 56; cf. In re Ashley K., 571 N.E.2d 905, 930 (Ill. 1991) (concluding that child should remain with foster parents pending determination on remand as to her best interests, thus reversing the juvenile court's order, made 20 months prior to appellate ruling, that child should be returned to her biological parents from foster care).
In the 1975 case of *Division of Family Services v. Florida*, the District Court of Appeal of Florida adopted a rule allowing juvenile courts to exercise substantial control over the state's child welfare agency, acting in its capacity as legal guardian for dependent children. In that case, the juvenile court granted legal custody of five siblings to the agency's Division of Family Services, but conditioned that custody on the division’s placement of all five children in the same foster home. The court later held the agency in contempt when it separated the children into three different homes without first seeking court approval.

Relying upon a statutory provision granting it “the right to determine where and with whom the child shall live,” the agency challenged the trial court’s authority to limit its placement discretion. The appellate court rejected the agency’s challenge. Reading the statutory provision in the context of broad statutory grants of authority to the juvenile court, the appellate court concluded that the description of the powers of an agency acting as legal custodian permitted the exercise of agency discretion only in the absence of a limiting court order:

It clearly was not intended that the agency have unfettered discretion nor was it intended that the agency be permitted to flaunt or ignore specific provisions contained in the custodial order. Such interpretation and construction is fortified by the frequent reference in Chapter 39 to the court, the provision for the exclusive original jurisdiction in the court . . . and the declared purposes of the chapter . . . .

Despite the clarity of the court’s rule in *Division of Family Services v. Florida*, the Florida District Court of Appeal took a much more pro-

142. Id. at 74.
143. Id.
144. Id. at 75 (quoting Fla. Stat. ch. 39.01(9) (West 1988)). Oddly, notwithstanding the more expansive view of agency authority taken by several recent Florida decisions, see infra notes 149-153 and accompanying text, the current provision of Florida law defining the powers of a legal custodian no longer references the “right to decide where and with whom the child shall live,” and thus offers an even less persuasive case for protecting the “unfettered discretion” of the agency. See Fla. Stat. Ann. § 39.01(29) (West 1988) (defining “legal custody” as “a legal status created by court order . . . which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care”).
145. Division of Family Servs., 319 So. 2d at 75.
146. Id. at 77.
147. Id. at 75-76.
tective view of the agency's discretion in In re K.A.B., a case construing the identical statutory language at issue in Division of Family Services. The court in K.A.B. held that the juvenile court has no power to direct specific placements of children under the legal care of the responsible agency. In upholding the agency's objection to a court-ordered placement in a specific home, the court concluded, without reference to Division of Family Services, that "the agency is, of course, better equipped to make day-to-day health and welfare decisions which concern the child."

A vigorous dissent in K.A.B. echoed the themes sounded in Division of Family Services. In arguing that courts should have the power to direct placement, the dissenting opinion relied on the juvenile court's broad responsibilities and continuing jurisdiction, as well as on the limitations on the state's right to appeal:

The juvenile court has broad statutory and common law authority and responsibility as to the care and custody of any child it has adjudicated to be dependent. The juvenile court has the authority to impose reasonable conditions as to the placement of any such dependent child. The court imposed condition that the child in this case remains in "Country Acres" is not challenged as being unreasonable as to this particular child. . . . When the juvenile court judge determines that the dependent child, in its best interests, should reside in a particular suitable place, must the judge place the child in the temporary legal custody of someone other than [the Department of Health and Rehabilitative Services (HRS)] in order to effectuate its decision without a contest from HRS asserting its independence as a separate branch of government?

The divergent approaches taken by the court in these two opinions run squarely into conflict in the 1991 case, State v. Brooke, a decision illustrating the difficulty of reconciling the roles of a juvenile court and a child welfare agency responsible for a ward of the court. Brooke involved consolidated appeals from several identical orders directing the responsible agency to place children under its legal custody and in need of mental health services in "available" therapeutic placements, as recommended by a court-appointed advisory review.

149. Id. at 899.
150. Id.
151. Id. at 899-900.
committee. Affirming the orders on appeal, the court recognized and reiterated the separation of powers concerns that had moved it to defend the agency's basic right to choose an appropriate placement in K.A.B. Consistent with the decision in K.A.B., it noted that the challenged orders did not mandate placement in any specific location. The court also noted, however, that the agency's discretion is not "'unfettered,'" and that the court's obligation to act as the ultimate guarantor of the child's well being imposes limitations on the exercise of agency discretion. Therefore, only by construing the orders narrowly did the court in Brooke affirm them as consistent with the agency's constitutionally-protected discretionary authority. Focusing on the use of the word "available" in the challenged orders, the appellate court found that the agency was left with sufficient latitude not to place the child either if funds were unavailable, or if the agency could not find a suitable placement meeting the court's description.

Consonant with the reasoning of the court in K.A.B., the decision in Brooke imposes limits only around the outer margins of the agency's discretion, allowing the agency, for a variety of reasons, to reject the exhortation of the judge. However, the opinion also opens the door to judicial imposition of limitations on agency discretion. For example, consistent with Brooke, an agency required to place a child in a therapeutic residential program, once funds and placement are available, might also be required to utilize a placement proximate to the child's parents, or consonant with a particular religious agenda. Yet clearly, as conditions move from the generic to the specific, the efficacy of a rigid rule of law premised on the protection of some vaguely defined inner core of discretion becomes increasingly suspect. For example, a judge who believes that a child should be placed in a particular institution might describe the desired "type" of placement with such specificity—without actually naming the institution—as to make his intent unmistakable.

Such an action may be cast on review as an artifice, insufficient to pass constitutional muster under cases such as K.A.B. and Brooke. A case in point is the Oregon appellate court decision of In re Smith. In that case, the trial judge, having grown increasingly frustrated with

153. Id. at 369.
154. Id. (quoting Division of Family Servs. v. Florida, 319 So. 2d 72, 79 (Fla. Dist. Ct. App. 1975)).
155. Brooke, 573 So. 2d at 369.
156. Id.
the agency's reluctance to place a child with his mother,\textsuperscript{158} suggested a willingness to reject successive substitute care placements chosen by the agency.\textsuperscript{159} The legal context established by previous decisions of the Oregon Court of Appeals limited judicial authority to direct an agency to utilize a specific placement, but nevertheless allowed for an order directing the removal of a child from an unacceptable home.\textsuperscript{160}

Recognizing this limitation on his authority, the trial judge made it clear that he would reject all other placements for the child until the agency met his expectations.\textsuperscript{161} The appellate court viewed this strategy as an unacceptable end-run around limitations on the trial court's placement authority:

Frustrated by [Children's Services Division's (CSD)] handling of the case, the court appears to have tried to accomplish indirectly, by use of strong declarations from the bench, what it could not accomplish directly. After determining that child was in need of protective supervision, the court said that it would nonetheless terminate both the court's wardship and CSD's legal custody and return child to mother, unsupervised, if CSD did not place child with mother. . . .

A court is not authorized to order changes in CSD's placement decisions until CSD gets "the right one."\textsuperscript{162}

The decisions in \textit{Brooke} and \textit{Smith} illustrate the awkwardness of placing limits on the authority of a judge who still retains ultimate authority for making dispositional decisions. In practice, the power of a judge authorized to order a specific placement differs little from that of a judge who may only specify the type of placement, but who may continually remand the case until the agency "gets it right." Indeed, if a court has power only to reject an unsatisfactory placement, with no concurrent authority to nudge the agency in the right direction, it presumably would just take longer for the agency to reach the court's desired result.

\textsuperscript{158} The opinion in \textit{In re Smith} suggests that, for reasons left unarticulated, the trial court acknowledged the more conventional route of simply returning legal custody to the mother, but preferred instead to return physical custody and leave the agency as the legally responsible guardian. \textit{Smith}, 811 P.2d at 146.

\textsuperscript{159} \textit{Id.} at 147.

\textsuperscript{160} \textit{See In re J.D.}, 640 P.2d 660, 662 (Or. Ct. App. 1982) ("[W]hen the court has granted custody and guardianship to [the agency] . . . [i]t has the power to recommend [a] placement . . . [or to] order [the agency] to remove a child from a poor placement. . . . That does not give it the power to order [a] specific alternative placement.") (citing \textit{In re Shrewsbury}, 627 P.2d 910 (Or. Ct. App. 1981)).

\textsuperscript{161} \textit{Smith}, 811 P.2d at 146-47.

\textsuperscript{162} \textit{Id.}
Another case in point is the Vermont Supreme Court’s decision in *In re J.S.* In that case, the state child welfare agency gained custody of a minor child and initially placed him, without objection from the minor child, in a recommended foster home. When the agency later made clear its intent to move the boy into a residential home that had been plagued by incidents of sexual abuse of younger residents, however, the child took his objections to court. The juvenile court initially denied the child’s request for review of the agency’s placement decision, limiting him to administrative remedies which had yet to be exhausted. When a space opened in the home and the placement change became imminent, the child returned to court seeking an injunction to bar the move. Receptive to the boy’s concerns, the judge of the juvenile court, while denying the injunction, construed the boy’s request as seeking enforcement of the original dispositional order and barred his removal from the foster home. The court reasoned that, unless it could exercise continuing review powers, the agency would be free to propose a case plan at an initial dispositional hearing, have it rejected, obtain approval of a second case plan, and then return to the original plan with impunity.

The Vermont Supreme Court reversed. Relying on its earlier opinion in *In re G.F.*, in which it had held that the juvenile court’s oversight power is limited to accepting or rejecting an initial treatment plan for a child under the agency’s custody, the Supreme Court barred the juvenile court from exercising review over decisions by the agency to modify an aspect of the original plan. Unpersuaded by the trial court’s logic, the reviewing court found sufficient protection in the juvenile court’s power to set aside an approved dispositional plan when the original order was obtained by “fraud or mistake.” This decision thus effectively limited juvenile court oversight of placement changes to circumstances suggesting a mistake or a manifest intent to defraud the court at the time of the original order, precluding

164. Id. at 659.
165. Id. at 661.
166. Id. at 660.
167. Id.
168. Id.
169. Id.
170. Id. at 663.
171. 455 A.2d 805 (Vt. 1982).
172. J.S., 571 A.2d at 663.
173. Id.
review of placement changes based on subsequent developments, even if those changes are contrary to the best interests of the child.

The statutory delegation to the courts of ultimate responsibility for state wards is consonant neither with the limitation on its powers of review nor with protecting agency decision-making authority from judicial review. It is this broad grant of judicial authority, with its attendant responsibility, which distinguishes the court's responsibilities over dispositional issues from other relationships between courts and administrative agencies, and which makes inappropriate both the deference accorded to the agency in G.F. and the application of principles of exhaustion discussed in J.S.

These decisions in G.F. and J.S. suggest that in an attempt to reconcile limitations on the juvenile court's review powers with its undisputed obligation to exercise some degree of judicial oversight of agency decisions, appellate courts may be driven to such extremes of logic as the application of static principles of contract law to the dynamic process of child development. Permanency goals may change, relationships between children and their caregivers may evolve, and external circumstances may render previously workable plans unworkable. If a court is to exercise effective oversight of its

174. While the decision in J.S. imposes a substantial limitation on judicial oversight of agency discretion, it does not leave the trial court entirely without means to enforce its will. The Vermont Supreme Court affirmed the juvenile court's denial of the minor's injunction request, brought under a statute allowing orders to guard against "conduct that 'may be detrimental or harmful to the child, and will tend to defeat the execution of the order of disposition.'" Id. at 661 (quoting VT. STAT. ANN. tit. 33, § 661(2)). Yet in applying an abuse of discretion standard of review to this aspect of the lower court's holding, the reviewing court implicitly recognizes that the lower court should receive deference in exercising its authority to grant injunctive relief to protect minors—an authority no less expansive than the authority to reject a recommended placement as against the child's best interests. Id. at 663.

175. Indeed, in the face of such a narrow view of the juvenile court's oversight authority, it is difficult to understand what purpose is served by requiring the agency to seek initial approval of a dispositional plan.

176. See, e.g., J.S., 571 A.2d at 662-63 (discussing the limited authority of the juvenile court with respect to placement decisions of agencies); In re G.F., 455 A.2d 805, 810 (Vt. 1982) (holding that courts only have authority to accept or reject an agency proposal, not to rewrite it).

177. Cf. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO APPEALS AND COLLATERAL REVIEW § 6.1 (1980) ("The circumstances of a child's life change more rapidly and are subject to a wider range of external factors than is true for most adults. Children move from childhood to adolescence to adulthood in a relatively short period of time. In addition, total family situations are often fluid, with the child being able to exercise little control over his or her environment."); In re Welfare of C. Children, 348 N.W.2d 94, 99 (Minn. Ct. App. 1984) (granting the juvenile court power to modify dispositions "because such decisions frequently must be made quickly to protect the child").
wards, it must have the power to exercise its authority beyond the point at which a legal custodian is appointed.

To be sure, the protection of an inner core of agency discretion is a desirable objective.\textsuperscript{178} With good cause, courts repeatedly have recognized the wisdom and importance of deferring certain judgments to administrative agencies chartered to manage the day-to-day responsibilities of caring for displaced children. Yet the forces that move bureaucracies are complex, and cannot always be relied on to move agencies in the direction of meeting the “best interests” of individual wards of the court. A compelling case for judicial circumvention of administrative remedies can be made based on at least three general types of circumstances, all of which relate to failings or inadequacies of the administrative decision-making and review processes.

First, resource constraints may lead to decisions that are not in the best interests of a particular child. For example, an agency with a limited number of special residential placements available for children with severe behavioral disorders may reasonably choose to hold those placements open for children who fit all admission criteria, even if the placement is the best available option for a child who does not meet those criteria but is in need of an immediate placement.\textsuperscript{179} In the same vein, an agency having difficulty finding foster homes where large sibling groups can be placed may choose to hold open spaces in such homes, even when this results in keeping other children needing immediate placements in temporary shelter facilities for a longer period of time. This problem prompted the Division of Family Services court to observe that “instances may occur wherein the best interests of the child and of the agency may be divergent.”\textsuperscript{180} Agency decisions allocating scarce resources may thus have a negative impact on certain wards in a manner that arguably is inconsistent with a judge’s respon-

\textsuperscript{178} See J.S., 571 A.2d at 663 (“In any particular situation, the best interests of the child ‘can not be insured by case plans made in such detail that [the Department of Social and Rehabilitative Services (SRS)] is locked in to a particular course of action. SRS, as legal custodian, must have the freedom to determine the appropriate placement of the juvenile, and to make adaptations in the case plan as changing circumstances require.’”) (quoting In re L.T., 545 A.2d 522, 524 (Vt. 1988)).

\textsuperscript{179} See, e.g., In re Doe, 390 A.2d 390, 396 (R.I. 1978) (“The setting of priorities among those who are deemed to be suitable candidates for treatment is most suitably performed by the administrative agency rather than by a court.”); In re Eaton, 757 P.2d 961, 965 (Wash. 1988) (en banc) (“We hold that the juvenile court does not have the authority to select the placement facility because this authority has not been enumerated [by statute]. This holding enables [the agency] to fulfill its responsibility to all children in assuring that those most needy receive the limited available openings.”).

sibility to safeguard the best interests of the individual child before
the court.\footnote{181}{See id. ("We recognize the validity of the agency's concern for the loss of a facility but that fear, though a legitimate interest of the agency, may not be permitted to interfere with the best interests of the subject children.").}

A second and perhaps more compelling basis for judicial activism
is the all-too-common problem of misfeasance by agency workers. A
case in point is the decision of the New York Family Court in \textit{In re Daniel T.C.}\footnote{182}{532 N.Y.S.2d 474 (N.Y. Fam. Ct. 1988).} The dispute in that case arose over a provision of the
juvenile court judge's order directing the agency to place two minors
with their maternal grandmother. The agency maintained that this
order exceeded the court's authority.\footnote{183}{Id. at 475-76.} Though the principal issue
was one of statutory interpretation, the court indicated that it could
not rely on the agency to select a placement that would meet the chil-
dren's interests. The basis for the court's concern was the agency's
failure, over a period of more than two years, either to monitor the
children or to take steps to move their cases toward permanency.\footnote{184}{Id.}

These concerns prompted the court to note that "[t]he history of this
case illustrates a problem too prevalent in neglect proceedings before
this Court: the failure of [the agency] to monitor diligently and to
aggressively seek to serve the interests of children in its care."\footnote{185}{Id. at 479.} In
the face of such circumstances, a court declining to interfere with the
agency's mismanagement of a child's case might fairly be charged
with failing to carry out its own responsibility to move the case toward
permanency. Speaking generally of administrative discretion, one
commentator has noted that

> the quality of policy judgments made by agencies is highly
variable, so that great deference to agency expertise, and to
procedural insulation of the agency's decisionmaking against
public participation, will in practice mean broad acceptance
by the judiciary of preventable misfeasance. It is difficult to count this as a valuable goal of administrative law.\textsuperscript{186}

Finally, administrative procedures may, in some circumstances, prove ill-equipped to respond to an urgent request for review. In many states, agencies continue to devote only limited resources to fair hearing processes and may not even have formal emergency review processes in place.\textsuperscript{187} Courts, on the other hand, are accustomed to conducting emergency review hearings and therefore may be better equipped to respond quickly when the need arises. Where children may suffer irreparable harm from placement in an inappropriate setting for even a short period of time,\textsuperscript{188} the ability of a review system to respond quickly to urgent requests is of critical importance. The hypothetical case described at the outset of this Article\textsuperscript{189} offers but one example in which rapid review of a potentially harmful decision—a decision which the agency has refused to stay or reconsider—may be imperative to safeguard the child's well-being.

At least one court has suggested that removing the agency as legal guardian is a sufficient remedy in a case in which the agency fails in its duty.\textsuperscript{190} Yet for several reasons, this solution may be unsatisfying. In many states, child welfare services are provided by a single administrative agency funded largely through the federal Adoption Assistance and Child Welfare Act. Under this Act, the functions of case planning and case monitoring that are meant to drive movement toward an appropriate stable plan for a child or family are required only for children under the legal responsibility of the single federally-funded state

\textsuperscript{186} Edley, \textit{supra} note 135, at 600. Edley's comment rings particularly true as applied to child welfare agencies which are perennially plagued by underfunding and a host of related problems, giving rise to numerous lawsuits across the country. \textit{See supra} note 3 and accompanying text.

\textsuperscript{187} \textit{See} Shotton & Henry, \textit{supra} note 14, at 3-4.

\textsuperscript{188} \textit{See generally} Goldstein et al., \textit{supra} note 110, at 40-43 (stressing the importance of permanency for the psychological well-being of children); Christopher M. Heinecke & Ilse J. Westheimer, \textit{Brief Separations} (1965) ("Each time [a] child is removed, . . . there is damage done to her capacity to establish meaningful relationships, to feel secure about herself."); \textit{Interview with Joseph Goldstein}, 12 N.Y.U. Rev. L. & Soc. Change 575, 575 (1983-84); Peg Hess, \textit{Parent-Child Attachment Concept: Crucial for Permanency Planning}, 63 Soc. Casework 46, 47-48 (1982) ("When the child experiences inconsistent care, . . . [the child] may develop a less than optimum attachment with the parent, and will experience and demonstrate permanent impairment in the capacity to form human attachments . . . ").

\textsuperscript{189} \textit{See supra} Part I.A.

\textsuperscript{190} \textit{In re G.B.}, 418 N.W.2d 258, 260 (Neb. 1988) ("Under the statute, if the juvenile court finds that the placement selected by the department is not in a child's best interests and that some other placement would better serve those interests, the court is free to remove the child from the custody of the department and place the child wherever the court concludes best meets the child's needs. ").
agency. Access to critical services in many circumstances may thus be dependent on the involvement of the agency, and relieving the agency of its responsibility when it fails in its function—rather than providing it with the direction of a court order—may work to the detriment of the child.

At some point, then, and in some manner, when the interests of state wards are not adequately protected by the responsible agency, juvenile courts must be equipped to take affirmative measures, short of relieving the agency entirely of its responsibility, to safeguard the interests of their wards. This duty derives from the fundamental authority of such courts—an authority recognized almost universally in state statutes—to protect children once cause for state intervention has been established.

V. Determining When Judicial Review Should Be Allowed

A. Application of the Doctrine of Primary Jurisdiction

This critique suggests the importance of flexibility in applicable principles of judicial review that balance the court's ultimate responsibility against the wisdom of deference to sound agency decisions. At bottom, the problem may be better cast as one of timing rather than of determining an appropriate standard of review. If resort to the juvenile court follows the full treatment of the issue in an administrative proceeding, where all parties have had notice and an opportunity to be heard in a setting affording due process protections, then the court has the benefit of a fully developed record to explain and support the agency's conclusions. Under such circumstances, there is little reason not to apply standards traditionally applicable to judicial review of administrative action, under which the conclusions of the agency are left

191. See supra note 24.

192. For example, in the Chicago, Illinois area, parents whose service plans include a requirement that they attend drug rehabilitation programs and whose children are in foster care receive priority in the allocation of limited openings for such programs. Because waiting lists may be months long, a parent's ability to secure needed services quickly enough to avoid permanent separation from her children may thus be dependent on a referral from the state child welfare agency. Rob Karwath et al., Fixing Families from Scratch, CH. TRIB., Mar. 8, 1994, at 1.

193. For example, in Daniel T.C., the children's law guardian argued that the agency should not be relieved of legal responsibility, despite the agency's failure to provide services or monitor the cases of two siblings in foster care with their grandmother. In re Daniel T.C., 532 N.Y.S.2d 474, 476-77 (N.Y. Fam. Ct. 1988). The law guardian took this position because she believed that the children and the family would not be supervised and assisted adequately, and because at the end of the initial 18-month placement, the caregiver would be unable, without the assistance of the agency, to seek an extension of the placement, thus leaving the children in legal "limbo." Id. at 477.
intact unless they are clearly against the weight of the evidence or deemed an abuse of discretion. Conversely, if an agency's decision has not been tested by an administrative review process, and therefore is unaccompanied by the reliability that accompanies such scrutiny, there is little reason to apply a heightened degree of deference to the decision. Thus, once a juvenile court has undertaken to treat an issue within its jurisdiction, it should apply the same standards applicable to any de novo judicial hearing. It is presumed here that if a court chooses to exercise jurisdiction over an issue which has yet to be subjected to administrative review, it should afford whatever deference the recommendations of the agency warrant, based upon the qualifications, experience, and persuasiveness of the persons supporting the agency's position.

A more difficult question arises in determining whether judicial review of a question should go forward when the issue presented to the court falls within the purview of the agency's review processes, but agency review either has not been initiated or has not been completed. On what basis should courts address dispositional issues before administrative review of these issues has been completed?

In other contexts, relationships between administrative agencies and courts have been defined by a variety of administrative gatekeeping doctrines, including the doctrines of exhaustion, finality, ripeness, and primary jurisdiction. In some respect, each of these gatekeeping devices defines the point in time when a court may address issues subject to review by an administrative agency. While application of these various devices has been marked by significant overlap and confusion, several fairly consistent and distinguishing themes emerge from a review of case law and literature defining these doctrines. These themes suggest that the doctrine of primary jurisdiction is well

194. Reviewing courts commonly have applied an abuse of discretion or clearly erroneous standard in reviewing actions of a child welfare agency. See, e.g., In re B.L.J., 717 P.2d 376, 380 (Alaska 1986) ("[T]he abuse of discretion standard of review is appropriate when the court is presented with agency actions on matters committed to the agency's discretion."); In re Doe, 784 P.2d 873, 880 (Haw. Ct. App. 1989) ("The conclusion is reviewed under the abuse of discretion standard."); O'Bryan v. Eighth Judicial Dist. Court, 594 P.2d 739, 741 (Nev. 1979) (stating that agency decisions will be set aside only if they are arbitrary or illegal); cf. Administrative Procedure Act, 5 U.S.C. § 706 (1988) (describing scope of judicial review of federal administrative action).


196. Id. at 83-91; see also Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 732, 745, 750 (D.C. Cir. 1987) (holding that federal court review of constitutional challenge to FTC's prosecutorial authority was precluded, with each of three judges arguing, respectively, that decision should rest on grounds of exhaustion, finality, and ripeness).
suited to analyzing the proper contours of the boundaries between juvenile courts and child welfare agencies.

Both the prudential doctrines of exhaustion and primary jurisdiction recognize that judicial review of a subject may be permitted, even when circumstances compel judicial deference to administrative processes. Though both doctrines contemplate a balancing of factors to determine whether judicial review is appropriate, the doctrine of primary jurisdiction more clearly contemplates areas of shared and overlapping authority. The Supreme Court addressed the difference between exhaustion and primary jurisdiction in the leading case of United States v. Western Pacific Railway Co., in which the Court deferred to the Interstate Commerce Commission the determination of whether napalm bomb cases shipped without fuses were subject to a higher tariff applicable to incendiary devices. The Court defined the two doctrines as follows:

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

197. In his opinion in Ticor Title, Judge Williams distinguished between "prudential" judge-made administrative doctrines such as exhaustion and ripeness, which typically permit a more flexible balancing of factors to determine whether judicial review is appropriate, and "jurisdictional" gatekeeping doctrines such as the doctrine of finality. Ticor Title, 814 F.2d at 746; see also McKart v. United States, 395 U.S. 185, 193-95 (1969) (describing competing factors in determining whether judicial review is barred by the failure to exhaust administrative remedies under the Selective Service Act). As a prudential doctrine, primary jurisdiction provides courts with significant discretion in its application. See United States v. Henri, 828 F.2d 526, 528 (9th Cir. 1987) ("The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts.") (quoting United States v. Bessemer & Lake Erie R.R., 717 F.2d 593, 599 (D.C. Cir. 1983)).

198. Thus, while exhaustion contemplates a situation where initial authority to consider an issue lies exclusively with the agency, primary jurisdiction contemplates a situation where both the agency and the court have the legal capacity to deal with a matter, but where judicial review may be withheld out of deference to the agency's experience or expertise. Mountain States Nat'l Gas Corp. v. Petroleum Corp., 693 F.2d 1015, 1019 (10th Cir. 1982).

199. 352 U.S. 59 (1956).

200. Id. at 63-64.
A court customarily invokes primary jurisdiction when a litigant initially seeks judicial redress but the court determines that an initial administrative resolution of some aspect of the dispute would facilitate a resolution. The application of the doctrine by the Supreme Court strongly suggests that each case should be considered sui generis, with consideration of individual circumstances dictating whether the court should preempt agency treatment of an issue: "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

Among the significant issues that must be weighed in this balance is the cost to the litigants of delaying judicial review in favor of an administrative process. For example, in Ricci v. Chicago Mercantile Exchange, a plaintiff aggrieved by the defendant's decision to revoke and transfer his seat filed an antitrust action in federal court. The majority concluded that the plaintiff's claim would more fairly be resolved by first permitting the Commodity Exchange Commission to consider whether the plaintiff's conduct violated its rules. In challenging the majority's view that the plaintiff suffered no overriding prejudice from requiring administrative review, Justice Marshall made explicit the calculus implicit in the majority opinion:

To be sure, judicial deference to agency jurisdiction remains important, particularly in those areas where the responsibilities of judges and administrators meet and overlap. But the primary jurisdiction doctrine, like the related exhaustion requirement, must not be "applied blindly in every case" without "an understanding of its purposes and of the particular administrative scheme involved." Wise use of the doctrine

201. See, e.g., Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 291 (1973) (determining that district court was required to reserve its ruling pending evaluation of the plaintiff's conduct by the Commodity Exchange Commission in antitrust challenge to defendant's transfer of his seat on the exchange); Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68-69 (1970) (deferring to the responsible agency on the question of the validity of certain charges in suit to recover harbor charges from shippers); see generally 4 Davis, supra note 52, § 22:1, at 82 (discussing the nature, function, and significance of primary jurisdiction issues as they relate to the relationship between courts and agencies).

202. Western Pac., 352 U.S. at 64.

203. As previously discussed, the issue of delay is particularly relevant in the child welfare context. See supra notes 187-189 and accompanying text.


206. Id. at 306.

207. Id. at 304-05 n.14.
necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay. Where the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of immediate court action. Since the majority's scale is apparently differently calibrated, I must respectfully dissent.208

With respect to dispositional issues, the relationship of overlapping authority contemplated by the Supreme Court in *Western Pacific* offers an apt analogy to the division of responsibility between juvenile courts and child welfare agencies. It is undisputed that agencies carry an initial responsibility for making decisions about the placement of children under their care. Nor is there doubt that juvenile courts carry ultimate responsibility for making decisions about the legal custody of state wards and for granting ultimate approval of dispositional plans, or that juvenile courts are generally free to correct obvious abuses of agency discretion. The challenge thus posed for courts sharing responsibility with child welfare agencies is to find effective ways to resolve disputes that fall within these outer limits. The doctrine of primary jurisdiction offers an effective and flexible device for resolving problems of overlapping jurisdiction.

**B. Some Suggested Criteria for Resolving Jurisdictional Conflicts**

Under the principles of law advocated by this Article, a juvenile court judge presented with a request, similar to that made by Patrick's law guardian,209 would be obliged to consider the full range of circumstances of the particular case in deciding whether or not to preempt administrative review processes. In addition to exploring the individual circumstances of a particular case, a court would also need to consider a variety of institutional characteristics of both the court

---

208. *Id.* at 321 (Marshall, J., dissenting) (citations omitted) (quoting *McKart v. United States*, 395 U.S. 185, 193, 201 (1969)). In a separate dissenting opinion, Justice Douglas echoed this theme, stating that

> [t]he odds of petitioner's getting the Commodity Exchange Commission now to find a violation in contradiction of its past inaction do not, in my view, justify the expense and delay to the petitioner. . . .

> The road this litigant is now required to travel to obtain justice is equally long and expensive and available only to those with long purses, even though he is remitted only to a federal regulatory agency. *Id.* at 309 (Douglas, J., dissenting).

209. See *supra* Part I.A.
and the administrative agency affecting their respective abilities to provide prompt, considered, and procedurally adequate responses to a given problem. The issues that are identified in the following section are offered not as an exhaustive list, but rather as a starting point in discussing the circumstances under which, in the application of flexible principles of case management, judicial intervention should preempt administrative review.

1. Does the Urgency of the Situation Compel Judicial Intervention?—In Patrick's case, the impetus for judicial preemption of administrative processes derives primarily from the sense of urgency behind the request for judicial review of the agency's decision to place. The agency has demonstrated its intent to place the child in a setting that, because of its distance from his current foster home, will effectively sever his relationship with his foster parent. Moreover, the agency has indicated that it plans to implement its placement decision before review through normal administrative fair hearing processes can take place. There can be little doubt that the interests at stake are central to the court's responsibility to protect Patrick's welfare. Patrick's law guardian has argued that the child will suffer permanent harm if the agency moves him to a residential setting, and effectively severs his relationship with his primary caregiver. The law guardian has argued further that effective review of the placement decision must precede its implementation, because the harm of the change, once done, cannot be undone. Moreover, were Patrick to be returned to his former foster parent pursuant to a decision that the original placement change was inappropriate, the additional disruption of another placement change would in all likelihood compound the harm to the child. The court's refusal to conduct an immediate review of the decision thus would constitute de facto approval of the agency action, with any effective subsequent review precluded by limitations on the court's power to grant relief after the fact.

In Patrick's case, it is presumed that effective administrative processes would be available but for the need for a prompt resolution of the challenge raised by the child's law guardian. Where such processes do exist, and where effective review of a dispute could be achieved through either an administrative or a judicial forum, the principal concern will be over the timing of the review process. In other words, the focus of the court's inquiry into the particular circumstances of a case will generally be on whether the urgency of the

210. See supra Part I.A.
request for judicial review compels circumvention of administrative processes.

In practice, an inquiry into the level of urgency may be difficult to distinguish from a more searching inquiry into the ultimate merits of the dispute. A judge seeking to determine whether judicial intervention is warranted in Patrick's case must begin by considering the nature of his attachment to his caregiver and the harm that may follow if this attachment is broken. This same question will be central to the ultimate issue of whether the planned placement change should be barred. Nevertheless, the threshold inquiry into whether judicial review is warranted and the subsequent inquiry into whether relief should be granted, though marked by overlapping issues, are distinct in kind. To justify judicial review, the court need determine only that the planned placement change will interfere with a significant relationship in a manner that may jeopardize the child's best interests, and that any effective review of the change will be precluded by the court's failure to intervene prior to its implementation. Consideration of the merits of the law guardian's request for review, on the other hand, will require a more detailed review of the circumstances of Patrick's case and a more searching balancing of interests.

Patrick's case thus suggests several specific questions germane to a court's determination of whether or not to preempt administrative review: (i) What is the nature of the interest at stake, and does the dispute implicate the court's responsibility to safeguard this interest?; (ii) Might the child be harmed if the planned action goes forward?; and (iii) Will the failure to review the planned decision effectively preclude further review?

2. Are Administrative Review Processes Adequate?—A related, though somewhat more generalized inquiry, addresses the nature and adequacy of administrative review processes. Governing federal law requires states to provide an opportunity for administrative fair hearings to certain persons aggrieved by actions of a state child welfare agency.211 Yet federal oversight of the Adoption Assistance Act has been limited,212 and federal regulations implementing this requirement offer little guidance as to the requisite parameters of a fair hear-

212. See Shotton & Henry, supra note 14, at 1 ("[S]tates have often been resistent [sic] to implementing fair hearing procedures . . . and the Department of Health and Human Services . . . generally has not forced the issue.").
ing system. As a result, fair hearing processes vary widely from state to state, and in many states fair hearings occur only infrequently. Therefore, it cannot be assumed that the fair hearing process invariably affords a complainant with effective administrative review.

Before an applicant for judicial review fairly can be limited to administrative remedies, a juvenile court judge should be confident that the administrative review process is both accessible and adequate. Several specific questions will be relevant to this inquiry:

(i) Would the applicant for judicial review have standing to seek review of the disputed issue through the administrative fair hearing process? Beyond identifying "applicants" for or "recipients" of benefits as persons for whom hearings should be allowed, federal regulations do not define parties entitled to seek a fair hearing, and state regulations vary widely in their definitions. In Illinois, for example, foster parents may only appeal certain types of placement changes through the fair hearing process. In Patrick's case, apart from the interest of his law guardian and her ability to pursue available administrative remedies, a court's refusal to allow judicial review potentially precludes any review of an issue if state regulations would prohibit Ms. Glenn from seeking administrative review of a placement decision.

(ii) Would all other interested parties be entitled to participate in the administrative process? Agency regulations may not, for example, include provisions permitting a parent to participate in a fair hearing over a change in substitute care held at the request of a foster parent. Under such circumstances, a judge could not be assured that the administrative decision would be binding upon persons not party to the process, raising the possibility of duplicative judicial hearings.


216. See Ill. Admin. Code tit. 89, § 337.70 (1993); cf. California Department of Social Services Manual, Chapter 22-001(c) (10/30/90) (excepting foster parent requests for hearings on placement changes from regular fair hearing processes); Pa. Admin. Code, tit. 55, § 3700.73(a) (foster parents may appeal the relocation of a child from the foster family unless the child has been with the foster family less than six months, the removal is initiated by the court, the removal is to return the child to his parents or place the child for adoption, or the removal is to protect the child from injury); Texas Admin. Code tit. 40, § 700.301 (1992) (permitting "child protective services clients" fair hearings to contest the denial, reduction, or termination of services).
(iii) Do fair hearing rules provide adequate due process protections? Federal regulations\textsuperscript{217} require that state fair hearing processes shall meet the due process standards described by the Supreme Court in \textit{Goldberg v. Kelly}.\textsuperscript{218} Because the issues at stake in a dispute over placement may involve fundamental interests, a court should be satisfied that any party held to administrative remedies will receive adequate due process protections.

(iv) Does the administrative process permit timely review? Though federal regulations require "[p]rompt, definitive, and final administrative action" to be completed within ninety days of a request for a hearing,\textsuperscript{219} hearings often take significantly longer.\textsuperscript{220} If an agency's record demonstrates it is unlikely to provide timely review, a juvenile court should be permitted to take account of this record in order to ensure that effective and timely review of a decision occurs in some forum. In addition, a court should consider whether the agency process permits expedited or emergency review. While it is often assumed that courts are better suited to handle emergency requests for injunctive or other relief, deference to an agency may be appropriate if it is able to provide effective review of contested decisions on an emergency basis.

3. \textit{Is Review by a Juvenile Court Consistent with the Interests of Judicial Economy?}—Questions as to where the interests of judicial economy lie encompass at least two distinct issues: (1) concern over the prospect of duplicative reviews, and (2) the relative value of the resources required, respectively, for judicial and administrative review processes. The most pointed concern raised by the shared jurisdiction of separate administrative and judicial review processes stems from the prospect of duplicative proceedings. If significant resources have already been devoted to an administrative review process that is complete or nearly complete when the question is first presented to the court, it will be difficult to justify a de novo judicial hearing. If judicial review under such circumstances is unwarranted, a judge may stay any part of a proceeding pending the outcome of the administrative action, and may treat the final administrative decision under standards prescribed by state administrative procedure acts. Conversely, if the matter is

\begin{itemize}
  \item 218. 397 U.S. 254 (1970).
\end{itemize}
presented to the court when a dispute first arises, prior to any administrative review of the agency's decision, comparatively less cause exists for a court to defer to agency review processes. Moreover, if a judge chooses to proceed with a hearing on an issue also subject to administrative review, an administrative hearing officer who learns of a potentially preemptive judicial process would have cause to refrain from proceeding with an administrative hearing.

To avoid duplicative hearings, it is critical that each potential arbiter of an issue has knowledge of any conflicting or potentially conflicting process. If the judge and the administrative officer are each aware of the status of proceedings in the other forum, steps can be taken in either forum to avoid duplicative hearings. Moreover, the same parties and individuals—including the parent, the child, and the agency—will usually be involved in both fora. Because it normally will be in at least one party's interest to apprise the adjudicator of a potential conflict, the prospect that both processes might proceed simultaneously seems unlikely.

The greater concern—and the more problematic question for a judge—arises when an issue is presented to the juvenile court judge after administrative review has been undertaken but before it has been completed. Under such circumstances, in order to determine whether judicial review should proceed, the court should inquire into whether the applicant for judicial review was aware of the ongoing administrative process but failed to seek a timely stay of administrative review, and whether the applicant appears to be engaging in forum shopping. The court might also consider whether aspects of the administrative process that have already been undertaken—such as administrative discovery—might lessen the burden imposed on the court by judicial review, thereby minimizing concerns about the duplication of functions.

A somewhat different concern regarding the interests of judicial economy relates to the relative value of judicial and administrative hearing resources. Deference to administrative agencies commonly rests in part on the assumption that judicial resources are comparatively more precious than administrative resources, whether by virtue of judicial caseloads, higher costs associated with judicial hearings,221 or other unidentified factors. The disparity in resources varies, however, depending on the nature of the administrative review process and the extent to which attorneys and other necessary parties are

---

221. Attorney's fees and salaries for support staff are two sources of the increased costs of judicial hearings.
equally taxed by an administrative hearing. To the extent that the administrative process is less costly, consideration of judicial economy may reasonably support a presumption that administrative review should be applied.

4. Is the Administrative Agency Better Suited to Resolve an Issue By Virtue of Superior Expertise or Experience?—According to Professor Davis, when a court and an agency have concurrent jurisdiction to decide a question, the most common reason for a court to defer initial treatment of the question is that “the judges, who usually deem themselves to be relatively the generalists, should not act on a question until the administrators, who may be relatively the specialists, have acted on it.”222 While this assumption may provide an appropriate starting point for evaluating the relative levels of expertise of judicial and administrative adjudicators,223 resolution of this issue in a specific case requires a more searching inquiry into the nature of the specific juvenile court. As noted above,224 judges in some jurisdictions focus exclusively on family law issues, and judges in other jurisdictions focus even more narrowly on child dependency cases. Through such focused experience, a judge may have superior knowledge about the types of issues faced by litigants in child welfare cases, or about resources available to assess and meet those needs. Conversely, as is often the case with administrative hearings for state agencies, the responsibility for conducting administrative hearings may fall on attorneys whose involvement with the agency consists of periodic and comparatively limited contract work,225 offering at best a restricted opportunity to develop the type of experience or expertise that would make a hearing officer especially qualified to adjudicate certain types of issues.

In either forum, the presiding officer presumably will be called upon to hear and evaluate information from child welfare and other professionals. While an experienced administrative hearing officer may demonstrate superior strengths in understanding aspects of the child welfare system that might be germane to a particular dispute, a judge’s experience in evaluating expert testimony or weighing com-

222. 4 DAVIS, supra note 52, § 22:1, at 82.
223. Presumably, an adjudicatory officer presiding over a dispute resolution process, whether in a judicial or an administrative forum, will rely in large part on information and opinions of professionals responsible for, or otherwise involved in, the case.
224. See supra note 139 and accompanying text.
225. In Illinois, for example, the only required qualification for administrative law judges in child welfare cases is that they be licensed attorneys with some knowledge relevant to child welfare. See ILL. ADMIN. CODE tit. 89, § 337.180 (1993).
peting recommendations may prove more valuable in a given context. Thus, while focus on the experience of individual judges or hearing officers will generally be both impractical and inappropriate, it nevertheless should be possible to identify institutional aspects or characteristics of the two competing systems that bear on the qualifications of each to resolve certain types of disputes. Accordingly, it cannot and should not be presumed in every case that the experience of the administrative officer is more specialized or superior to that of a juvenile court judge, who in some jurisdictions may well be, relatively speaking, the specialist.

VI. Conclusion

Under a prudential rule governed by the principles underlying the doctrine of primary jurisdiction, the delineation of factors that will determine when a court should preempt administrative review will vary with the circumstances of each case. Critical to this discussion is the distinction between an absolute jurisdictional bar, which prohibits judicial review of particular types of decisions, and a prudential rule that recognizes judicial authority but counsels restraint when the dictates of judicial economy or administrative expertise encourage deference. A more flexible prudential rule still provides the juvenile court with a basis for deferring to the agency under appropriate circumstances, but permits juvenile courts to determine whether or not to exercise judicial authority, taking account of the full range of circumstances particular to each individual case. This balance, it is believed, is the only way to ensure the juvenile court's ultimate ability to safeguard the interests and well-being of children in state care.