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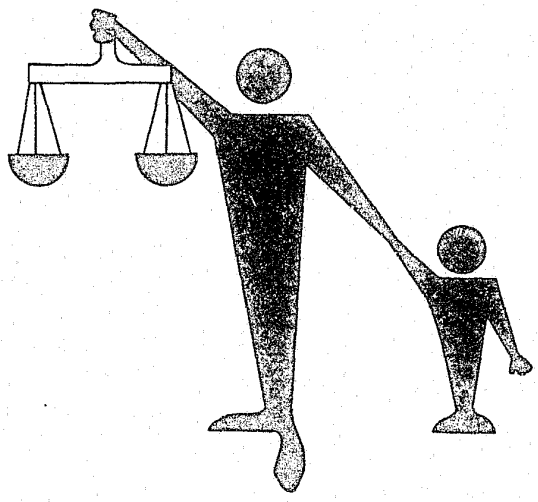
CHILD ABUSE AND NEGLECT LITIGATION

A Manual for Judges



CHILD ABUSE AND NEGLECT LITIGATION

A Manual for Judges

Developed By The

NATIONAL LEGAL RESOURCE CENTER
FOR CHILD ADVOCACY AND PROTECTION,
AMERICAN BAR ASSOCIATION

With The Assistance Of The

NATIONAL CENTER FOR STATE COURTS

National Center on Child Abuse and Neglect
Children's Bureau
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CHILD ABUSE AND NEGLECT LITIGATION

A Manual for Judges

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Inquiries concerning this manual should be directed to the National Legal Resource Center for Child Advocacy and Protection, American Bar Association, 1800 M Street, N.W., Washington, D.C. 20036 (202) 331-2250.

March, 1981

Preface

Each year our courts hear over 200,000 child abuse and neglect cases. These proceedings take place in family courts, juvenile courts, probate courts and often courts of general jurisdiction. Hundreds of judges preside over these matters. For some it is an everyday event; for others, it is a very small part of their docket.

Regardless of the court or frequency, every judge in a child protection case faces difficult decisions:

1. Did abuse or neglect occur?
2. Where will the child live?
3. What services will the family receive?
4. When can state intervention into the family unit cease?
5. Should parental rights be terminated?

In this field, *stare decisis* provides little help. The facts and family dynamics for each case are unique, and outcome predictions are almost impossible to make.

The judge, therefore, must rely upon a fundamental understanding of child abuse and neglect and the appropriate responses of both treatment agencies and the judicial system. This knowledge should include an appreciation of causative factors, familiarity with the roles and responsibilities of involved professionals and the state, and awareness of the positive contributions the court may make to the prevention and treatment of child abuse and neglect.

This manual principally addresses issues commonly involved in child protective litigation. It focuses on the practical aspects of a judge's work in abuse and neglect cases, particularly the problem areas over which a judge has some influence and control. Attention is also given to the judge's role as court administrator, and his or her role in affecting changes in agencies and groups, including the bar, that deal with child maltreatment cases.

It is impossible for one set of materials to do justice to the growing volume of literature on abuse and neglect. Our intention has been to supplement existing resources on this subject, including the excellent curriculum, training materials and other publications of the National College of Juvenile Justice in Reno, Nevada.*

Each section of this manual is accompanied by a set of Support Readings which are taken from proposed professional standards, law review articles, books, court rules, attorney and social worker guides and other written aids developed for use in individual jurisdictions. The editors would like to thank the publishers and authors for their kind permission to reprint these readings. In particular, we appreciate the many contributions of Mr. Douglas J. Besharov and The Hon. Homer B. Thompson, as well as consent from Ballinger Publishing Co. for the use of many extracts from the Institute of Judicial Administration/American Bar Association *Juvenile Justice Standards.*

An earlier draft of this manual was originally designed for seminar use or classroom instruction. The extensive Support Readings have since been added, enriching the manual's use for private studies. Recognizing, however, that the learning experience can be enhanced through group studies in workshops and seminars, we encourage judicial agencies to utilize this manual as a text for their own training programs.

This publication was prepared by the National Legal Resource Center for Child Advocacy and Protection (Resource Center), with the assistance of the National Center for State Courts. The Resource Center, a project of the American Bar Association's Young Lawyers Division, is supported by a grant from the National Center on Child Abuse and Neglect of the U.S. Department of Health and Human Services. Among its many goals, the Resource Center seeks to improve the quality of legal representation for abused and neglected children and to promote dialogue and cooperation among the distinct professions involved in these cases.

Both objectives depend upon an informed and active judiciary. Judges are therefore numbered among the Resource Center's constituents, and this manual has been published

*National College of Juvenile Justice, University of Nevada, Reno, P.O. Box 8978, Reno, Nevada 89507.

as the Center's initial contribution to this critical professional group. A number of publications have been prepared by the Resource Center for bar association, individual attorney, and social worker use. These include:

- *Advocating for Children in the Courts* (a 543 page manual for practitioners),
- *The Child Abuse Legal Representation Project - Suggestions for Effective Implementation,*
- *Access to Child Protective Records - A Basic Guide to Law and Policy,*
- *Special Education Advocacy for the Maltreated Child,*
- *Child Abuse-Bar Activation Guide,*
- *Child Sexual Abuse - Legal Issues and Approaches,*
- *Representing Children and Parents in Abuse and Neglect Cases,*
- *Periodic Judicial Review of Children in Foster Care - Issues Related to Effective Implementation,*
- *Directory of Programs Providing Court Representation to Abused and Neglected Children, and*
- *Child and Family Development - A Manual for Legal Professionals Representing Children and Parents in Custody Cases.*
- *National Guardian Ad Litem Policy Conference Manual*

These and other publications, including a newsletter, are available by contacting the Resource Center at 1800 M Street, NW, Suite S-200, Washington, D.C. 20036 (202) 331-2250.

BRUCE A. KAUFMAN, *CHAIRMAN*
Advisory Board of the National Legal Resource Center for Child Advocacy and Protection;
ABA Young Lawyers Division Committee on Child Advocacy and Protection.

March, 1981

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Section I.

Introduction—Abuse and Neglect, the Child Protective System, and the Role of the Courts

The first section provides a concise background description of the child abuse and neglect phenomena and the child protective system, including reporting mechanisms and central registries. This description serves as a framework for a general discussion of the court's role vis-a-vis the surrounding government agencies and private groups, emphasizing methods for fostering coordination. Specific features of the court's role, however, will be the topics of later sections.

A. Overview of the Problem of Abuse and Neglect

1. Abuse and neglect occur in a wide variety of forms, including physical assaults, sexual assaults, the child abuse syndrome, failure to provide nutritional and health needs, and emotional or psychological abuse and neglect.

Non-assaultive abuse or neglect, especially the emotional types, is often difficult to define. Most statutory definitions are inexact.

The national frequency of child abuse and neglect is uncertain, and estimates vary greatly, mainly because how much goes unreported is not known.

2. The causes of child abuse and neglect are complex. It is often said that parents who were abused as children tend to be child abusers.

3. Due to their exposure to public agencies, institutions, and officials, poorer families tend to predominate in abuse and neglect reports; however, much middle-class abuse may go unreported. Some ethnic groups whose child-rearing practices may be misunderstood by the general community are also prone to abuse and neglect allegations.

4. The expressed goal of child protective services is to keep the abused or neglected child at home when possible. Social workers may have many services available when a child is placed under home supervision. (See Section XII. C.)

5. Judges and court personnel should receive education about the abuse and neglect phenomena.

Several organizations provide technical assistance, courses, and training materials. Judges can contact the National Council of Juvenile and Family Court Judges or the National Legal Resource Center for Child Advocacy and Protection, American Bar Association, 1800 M Street, NW, Washington, D.C. 20036 (202-331-2250) for further information.

B. Reporting, Central Registries, and Child Protective Services.

1. All states have laws requiring specified people (designated as "mandated reporters") to report abuse and neglect cases.

Typically police, social workers, doctors, and school teachers must report. Others can also report voluntarily, and as a practical matter the bulk of reports are made by neighbors and relatives.

Reports are generally required immediately after abuse or neglect is suspected; proof is not required. To encourage reports, all states provide immunity from liability for reports made in good faith.

Doctors are often reluctant to report, feeling that a report might interfere with treatment (this is also a frequent concern of social workers).

The majority of states provide a criminal penalty for mandated reporters who fail to make a report. Courts may also recognize a civil liability for failure to report. (*See Landeros* v. *Flood,* 131 Cal. Rptr. 69, 551 P. 2d 389 (1976).)

2. In most states the agency responsible for receiving reports is the local child protective agency. In some states, however, the police or juvenile courts receive reports.

Courts typically refer reports to the child protective agency for investigation.

3. Most states have a central registry for child abuse and neglect reports, maintained by the state child protective agency.

Registries are designed to give social workers, doctors, and others information about past practices of parents that may help diagnose or treat new cases of suspected abuse or neglect. Also, registries can provide statistical data for researchers and state agencies, e.g., when studying the effectiveness of child protective services.

Registries have run into many problems, including that of defining who has access to information in the reports (See Section VI. B), problems of providing efficient access (e.g., at night), and record-management problems. (*See Sims* v. *Moore,* 438 F. Supp. 1179 (S.D. Tex.1977), *rev'd on other grounds,* 99 S. Ct. 2371 (1979).)

4. Most states have a state-wide protective agency and numerous local agencies.

The central agency, usually a branch of the department of social welfare or similar government entity, coordinates the child protective system.

Local agencies may be branches of the state-wide agency, separate county or city agencies, or private organizations.

5. In recent years there has been a trend towards establishing multi-disciplinary teams to investigate and treat child abuse and neglect cases.

The most common are hospital teams that deal with children brought into the hospital with symptoms of abuse or neglect. In some states there are also multi-disciplinary teams attached to police departments or to child protective agencies.

Teams may include medical personnel, social workers, lawyers, and mental health professionals.

6. Reports of abuse and neglect are typically investigated and screened by a local child protective agency.

Timely investigation is important; therefore 24-hour child protective services are common.

Investigation and screening can include reference to the central registry files, interviews with parents, observation of the child, and use of other evidence readily available.

A major problem in many child protective systems is inadequate social worker staff to perform the initial screening and investigation.

7. A frequent response by a social worker, doctor, or policeman is to take temporary emergency custody of the child, on the grounds that he may be in danger if left in the care of his parents. (See Section II. A.)

8. In the great majority of cases the parents and social workers reach an agreement about the future course of the case, and recourse to the courts is not necessary.

Parents may relinquish voluntarily custody of the child or may agree to home supervision. Typically, the agreement involves a treatment plan in which the social worker outlines the services to be given the family and the changes expected of the parents. Parents, as part of the plan, often agree to undergo treatment for alcoholism or mental health problems or to assure regular medical examinations of the child.

The child protective agency is expected to monitor the child's placement, home supervision, and the treatment plan. However, agencies often lack adequate personnel for effective monitoring.

C. General Role of the Courts in the Child Protective System

1. The courts' role in the initiation or investigation of cases generally has been limited.

Courts typically receive very few abuse and neglect reports, and refer those received to the child protective agency.

Most courts do not themselves investigate cases after petitions are filed and do not provide probation services in such cases. Thus, court staff usually has a less active role than in delinquency or status offender cases. (See Section II. C.)

2. The court's major role is the determination of whether a child should be placed or should remain in a particular custodial situation.

A court order may or may not be required before a child can be placed in custody with the state. (See Section II. A.)

Further custody with the state—that is, temporary custody pending the court hearing or long-term custody following the hearing—must be by court order if parents do not consent.

Courts are becoming increasingly active in reviewing the status of children in placement, even in some states where placement is voluntary.

Involuntary termination of parental rights requires a court order.

Courts also, to varying degrees, play a role in encouraging and monitoring child protective agencies in their obligation to help strengthen natural families, and they can assure that agencies are held accountable to their statutory mandates to provide appropriate care and treatment of children. Judges may order involuntary home supervision, or they may work with the agency and the parties to develop a treatment plan acceptable to all.

D. Court Role in Coordination Between Professionals and Organizations Involved in Child Abuse and Neglect

1. A major problem in the child protective system is coordination of the many agencies, organizations, and professions which are independent but have interacting roles. Several suggestions have been made to affect better coordination, and several states have initiated programs for this purpose.

At the state level, the courts may participate on child protection coordination committees.

Courts are more likely to have a major role at the local level. For example, judges or court staff may participate on community child protection coordinating councils. In this role the court staff may review actions taken on abuse and neglect reports by child protection agencies.

2. Judges may also attempt informal persuasion to coordinate and improve services, especially those services closely related to the courts.

An example might be working with the district attorney and child protective agency to improve legal representation for the agency.

Support Readings

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A. Overview of the Problem of Abuse and Neglect

Douglas J. Besharov, "Child Abuse and Neglect: An American Concern," *The Abused and Neglected Child, Multi-disciplinary Court Practice* **(N.Y.C.: Practising Law Institute, 1978), 30-50.**

Definition of Child Abuse and Neglect

While the needs of children can be largely agreed on, a specific definition of child abuse or neglect is harder to derive. Part of this difficulty comes from the fact that child abuse and/or neglect must be defined within the culture and value system of the community in which it takes place, and ideas about what is proper child-rearing practice vary widely. Many communities and social groups hold the value that a good parent is strict and makes liberal use of physical discipline, that this will not harm children, and that it is, in fact, good for them. A person from such a community might consider vigorous beating of a child completely appropriate, and might even consider other parents who refrain from such behavior to be guilty of neglecting their children's moral development.

Even within one community, there may be problems in definition. Everyone might agree that physical discipline that results in broken bones is abuse, and failure to feed an infant is neglect, while discipline by withholding privileges and use of scheduled meal times are characteristic of good parenting. Between these extremes, however, there exists a wide "gray" area in which it is less easy to classify parental behavior. It is within this gray area that definition is at once most necessary and most difficult.

In light of these considerations, one might propose a conceptual definition of child abuse and/or neglect as a form of parenting which lies towards the end of a continuum stretching from positive and socially acceptable parenting at one end, to negative and unacceptable parenting at the other. Everyone's value system contains such a continuum, and it is a function of one's cultural background, professional role, and personal values where a particular action or pattern of interaction is placed. Thus a social worker who believes that all children should be given the opportunity to become self-actualizing might draw the line between acceptable and unacceptable parenting quite deeply into the gray area, while a judge who believes in minimal interference of the state into family life might require proof of considerable measurable harm to a child before he or she would be willing to say that the child was abused or neglected.

One final variable that enters into the definition is time. The definition may change depending on whether the deviant parenting is seen as acute or chronic. In either case, it is important to remember that any assessment captures the caretaker at one point in time, and does not reflect the myriad of changes that may take place in the family in the space of a year, a month, or even a few days.

In terms of the actual behaviors defined under the heading of child abuse and/or neglect, one might say that abuse, be it physical, sexual, or emotional, is an active form of conduct in which the child is injured by the actions—intended or not—of the caretaker, while neglect, which might be physical, emotional, or the result of lack of supervision or abandonment, is a form of passive conduct in which the child suffers due to the omissions of the caretaker. Much of the discussion which follows makes the assumption that the basic dynamics of child abuse and child neglect are the same; it is the manifestations which differ.

Emotional abuse and neglect present a particularly difficult definitional problem. Some parenting practices performed in ignorance but good faith may have emotionally abusive effects. Should the definition therefore be based on parental intent to injure the child, or on the observation of actual injury? It seems necessary to provide a two-level definition, the lower allowing identification and intervention with the offer of services, and the higher serving, if necessary, to force parents to accept help or face the termination of parental rights in cases of severe present or inevitable emotional damage to the child.

In spite of these problems, all states have enacted legislation defining child abuse and/or neglect and providing for intervention when it is discovered. While the definitions used in these state laws vary, often falling short of useful operational definitions, their significance is great. While various observed or inferred behaviors may be used as the basis for initiating contact with the alleged abusive or neglectful family, the legal definitions provide the mandate for enforcing society's standards of child care on parents and caretakers.

A good example of the legal definitions now in force is found in HEW's draft Model Child Protection Act:

> (a) "Child" means a person under the age of 18.
>
> (b) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.
>
> (c) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:
>
> (i) Inflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment; or
>
> (ii) Commits, or allows to be committed, against the child, a sexual offense, as defined by state law; or

(iii) Fails to supply the child with adequate food, clothing, shelter, education (as defined by state law), or health care, though financially able to do so or offered financial or other reasonable means to do so; for the purposes of this Act, "adequate health care" includes any medical or non-medical remedial health care permitted or authorized under state law; or

(iv) Abandons the child, as defined by state law; or

(v) Fails to provide the child with adequate care, supervision, or guardianship by specific acts or omissions of a similarly serious nature requiring the intervention of the child protective service or a court.

(d) "Threatened harm" means a substantial risk of harm.

(e) "A person responsible for a child's welfare" includes the child's parent; guardian; foster parent; and an employee of a public or private residential home, institution or agency; or other person legally responsible for the child's welfare in a residential setting.

(f) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ.

(g) "Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior, with due regard to his culture.

Incidence

Given the above-mentioned problems associated with defining child abuse and/or neglect, it is obvious that reports of its incidence from various states will be inconsistent. When it is considered that states also differ in their reporting practices (e.g., lumping abuse and neglect together versus counting each separately) and that many cases of child abuse and/or neglect are never reported, either because they never come to anyone's attention or because the professional who does become involved neglects to report the case to the mandated agency, it becomes clear that attempts to compile these reports on a national basis will necessarily yield estimates rather than hard data.

One of the most detailed of recent studies was conducted by the Children's Division of the American Humane Association, which analyzed a sample of 100,000 reports of abuse and neglect. Their findings showed, among other things, that boys are abused about as often as girls, that women were responsible for the maltreatment in 60 percent of the cases, and that although child abuse and neglect is known to exist in all racial and ethnic groups and all levels of society, lower income families, which are more visible to reporting agencies, are over-represented in the reports. The AHA also found that while child abuse and/or neglect affects children of all ages, fully half of the reports concern children under age 6. This is particularly significant since the physical consequences of abuse and neglect are more crucial the younger the child: nearly 60 percent of fatalities reported in the study were of children under age 2.

Estimates of the total number of abused and neglected children in the United States per year vary widely. Published estimates have ranged from a low of 41,000 cases of abuse (plus six times that number of cases of neglect) to a high of 4.07 million! It should be noted that the low estimates tend to be based on reports, or substantiated reports; when one considers how many cases may go unreported for each one that comes to the attention of the authorities, it becomes clear that the minimum estimates are far below reality.

After careful study of a number of surveys, the National Center on Child Abuse and Neglect has come to the conclusion that the figures of 200,000 cases of physical abuse and 800,000 cases of neglect represent a conservative middle ground estimate. To this must be added an estimated 60,000 cases of sexual abuse and molestation, and an unestimated number of cases of emotional abuse and neglect. Also unestimated but of great concern is the number of children—boys and girls—whose youth, attractiveness, and innocence are exploited in the child pornography market, and the probably very large number who are economically exploited for commercial interests, in violation of child labor statutes and the best interests of children's physical and mental health. This totals more than a million maltreated children, of whom perhaps 2,000 or more will die as a result of their caretakers' abuse or neglect.

It should be noted that most of the surveys from which these figures were derived were concerned with child abuse and neglect occurring in the home setting, and thus do not begin to consider the incidence of institutional abuse and neglect which is perpetrated against children who are cared for in residential settings, such as group homes and residential treatment centers.

The Psychosocial Ecology of Child Abuse and Neglect

Understanding is the first step towards helping, and so it is important for professionals and laypersons alike to have some idea of the reasons for the occurrence of child abuse and neglect in families. There are, however, several points of view on why child abuse and/or neglect happens. These include: psychopathology of the parent, family system dysfunction, the idea that violence—in or out of the family—is "as American as apple pie," and the effects of social problems such as poverty, poor housing, and racism. As might be expected, the first reason is generally espoused by psychiatrists, the second by family therapists, and the last two by people active in social policy analysis. One's point of view, past experience, and professional training tend to influence the type of data one collects, and thus the "cause" which one's research discovers.

Perhaps what is most useful from this multiplicity of views is the insight that child abuse and/or neglect is a multidimensional, multi-problem in which several factors impinge upon the basic parent-child situation to lead to child maltreatment. If a wide range of points of view exist, this can help us to choose from a variety of intervention approaches, to refine help efforts to meet the unique needs of the individual family.

Recognizing the existence of multiple, interacting "causes", we will avoid the idea of causation altogether, since it is clear that many families have what might be "causes" of child abuse and/or neglect but are still strong and loving. Rather, it seems more appropriate to discuss the total psychosocial ecology of the family, i.e., the personal, immediate environmental, social, and cultural backgrounds which influence the interaction of family members with one another.

This approach rejects a narrow examination of one person's behavior—the caretaker's—in favor of a consideration of the interactions within the family system.

Although abuse and neglect is sometimes perpetrated on infants even before interactions per se have begun, researchers in child development and family dynamics are recognizing more and more the reciprocal nature of the parent-child relationship; often children are not passive receivers, but also, by their behavior and attributes, influence the behavior of their caretakers.

The variety of factors which influence total family interaction might be divided into those internal to the family and its members, and those acting on the family from outside. One of the most often (though not necessarily best) researched of the internal factors is the psychological profile of the abusive parent. While there is little evidence to suggest that abusive parents are psychotic (current estimates are that perhaps 10% may be) or are accurately described by traditional categories of behaviors, certain characteristics seem to be common: emotional immaturity, low frustration tolerance leading to aggression, and rigid thought and behavior patterns.

Other characteristics of parents that might predispose them to abuse and/or neglect are poor physical health, low intelligence, and negative past family life histories. This last item seems particularly important, since the majority of identified abusing and/or neglecting parents relate a history of emotional deprivation as children. This finding may be looked at in several ways. Psychodynamically, it is possible that their treatment as children left them with deep psychic scars and unconscious conflicts, which are acted out against their children, who take on unconscious symbolic significance. Behaviorally, it is clear that these parents have had no experience with positive parenting that would permit them to learn how to perform it. They may believe, in fact, that what others consider physical or emotional abuse or neglect is a good system of parenting. From the standpoint of need fulfillment, these parents may never have experienced a time when they were loved and nurtured; in effect, they may have been robbed of their childhoods, and may as adults be demanding the unconditional love and acceptance from their children that they never received from their own parents. These perspectives should be seen as complementary, not conflicting.

Children themselves are also recognized as active agents in the family. In spite of our cultural myths, no child is sweet, innocent, and pleasant to be around all of the time, and some rarely are satisfying companions. Children with congenital or acquired physical or behavioral traits which make them different or especially difficult to care for put them at risk. A child who rejects attempts to provide nurturance, because of a physical problem like colic, thereby assaulting a parent's perhaps already shaky self-concept, is also likely to be abused and/or neglected.

It is also possible for the family to be perfectly healthy as individuals but interacting in a dysfunctional way. The dysfunction may be between parent and child, or between the adult partners, in which case the child may be injured accidentally or purposefully because of resemblance to or association with one of the partners. Increasing attention is being paid to this concept of the family as an interacting system in which all members have effects on each other.

In addition to the physical and mental attributes of the family members, each person's set of values, beliefs, and assumptions also influences his or her interactions with others. Beliefs about the value of children, the age at which certain behaviors can realistically be expected, and ideas about dealing with frustration can determine whether a given interaction ends in rational problem-solving or physical assault.

Environmental factors act on the family at two levels: first and most immediate, the family's specific life situation in terms of its financial status, housing, employment picture, social integration, family relationships, and general stress level; and second, the general community welfare, including both cultural values and assumptions and social institutions.

It seems that financial pressure on the family can be a stress leading to child abuse and/or neglect, but since child abuse and/or neglect appears at all income levels and is not ubiquitous among the poor, it would be inaccurate to state that poverty "causes" child abuse and/or neglect. Money problems, however, can place any parent under enormous stress, even if the family income is well above poverty the line.

Unemployment has also been found to correlate highly with child abuse and/or neglect. This may be a specific stress in itself, but there is also some indication that unemployment affects child abuse by eroding the self-concept, especially for men, whose social role is viewed by many as material provider for the family by working.

Abusive and neglecting families have also been found to be isolated from other families and from their own extended families. This isolation may be a function of lack of resources such as a car, a telephone, or information about places to go to meet people, or of geographic isolation—simply living "way out in the country". However, the parents may find themselves isolated in the middle of a crowded urban neighborhood because of their own or their neighbor's personalities. Sadly, they might even be shunned because of the way they treat their children.

A final aspect of the environment is the occurrence of significant changes in the family's life situation, such as deaths, getting or losing a job, or moving. These changes might even be positive, but their cumulative effect can be to erode the strength of the family by robbing family members of needed consistency and stability and thus lead to conflict and abuse and/or neglect.

In addition to the internal and immediate environmental influences on the family, the community's values and beliefs about children and parents have an effect on how parents see themselves and their children. In most cases these beliefs are so ingrained that they are never examined or questioned, merely accepted. Some of these assumptions that create hazardous conditions for children are those which state that parents own children as chattel and therefore may do anything they want with them, that adults should rule and children must instantly do what is expected of them (even if it is not stated overtly), and that children need physical punishment to develop "discipline" and respect for authority. Common

expressions that exemplify these beliefs are: "You can't tell me how to raise my child"; "When I say 'jump', my kids say 'How high?' on the way up"; and "Spare the rod and spoil the child".

The community, and especially the media, creates expectations of what children "should" be like. If children conform to these expectations, there may be no problem, but if not, they are at a risk as "bad kids". Some of these expectations and images are physical, such as the familiar baby in the babyfood advertisements who is always smiling and gurgling pleasantly, never squalling or spitting up, never dirty or disagreeable. Others are more behaviorial, such as the belief that children exist to gratify their parents, implying that they should react appropriately to nurturance, and develop in ways parents approve.

Children who fail to live up to these expectations—unrealistic as they may be—may be seen by their parents as "strange", "difficult", "problems", or simply as "rotten kids". This sort of judgment has the effect of not only straining relations between child and parent but of also providing a justification for abuse or neglect. For example, the parents might see the child as impossible to care for, and use this view to justify severe neglect. Or, a particularly rigid parent might see evidences of "evil" in the child that seem to call for extreme levels of punishment, justified by the idea that it is for the child's own good.

Community values and expectations also fall on the parents. As mentioned above, the male who cannot provide for his family is often under stress from role failure, but a woman may also experience dissonance from her role as mother. Although "motherhood" is supposed to rank with home and apple pie as a cornerstone of America, the uses of such phrases as "doesn't work", "only a housewife", and "tied to the kids all day" may give a more realistic and personal picture of the community's view of a woman who spends all or most of her time caring for her own children. Her realization that what she does—perhaps all she knows how to do—commands so little respect from the community can certainly affect her valuation of her children.

The mass media is particularly able to establish community norms and expectations. As mentioned above, media images of children are overwhelmingly positive and pleasant, which may be stark contrast to the realities which face parents. The parents' unease may be increased by media representations of parents themselves—pleasant, all-knowing people who rarely, if ever, need to resort to even raising their voices at their children, let alone striking them. When at-risk parents—or even normal parents—compare their own behavior to that of these one-dimensional stereotypes, they are almost sure to seem inferior and "bad parents", thus adding one more stress to those they already bear.

A final significant cultural value, and one which the media play a great part in perpetuating, is our society's acceptance of violence. Violence is seen as a viable means for removing an obstacle or competitor and for ensuring that one gets one's way. Americans begin their immersion in violence at an early age, with exposure to television, films, and contact sports (including some, like basketball, which are not supposed to be such). The nightly news delivers a heavy dose of crimes against persons, of wars, and of atrocious killings in the name of various causes.

Violence towards children, however, is not a recent development blamable on television violence. Historical records make it clear that as long as adults have cared for children there have been some who mistreated their offspring. Corporal punishment is a tradition, sanctioned by history, personal experience, and even the Christian Church: "Foolishness is bound up in the heart of a child; but the rod of correction shall drive it far from him" (Proverbs 22:15); "Withhold not correction from the child; for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and it shall deliver his soul from hell" (Proverbs 23:13-14).

The final influences on the family unit to be discussed here are social factors—resulting from major social movements or trends—and social institutions—formal, established systems that exist within the society.

Three social trends in particular have changed the nature of American family life over the past few generations. These are a shift from rural to urban or suburban place of residence, a shift in family patterns from the extended multi-generation family to the two-generation nuclear family, and a shift in employment patterns from the husband being the sole material provider for the family to a situation with two working spouses, and the children cared for mainly by non-family members.

These changes, in combination with others, have had the effect of isolating the family and depriving it from its past sources of support, as well as placing a whole new set of stresses on the parents. Opportunities to learn about parenting are severely restricted for many young Americans now, so that they may enter into their role as parents completely unprepared.

The social institutions of the community exert an enormous force on families. A few of these systems are: the business/commercial system, the religious system, the media, the medical care system (including both public and private caregivers and facilities), the education system, the social welfare system, the social control system (police and courts), and the local/state/federal governmental triad. Although their effects vary depending on the individual, these systems impact on all segments of society.

In addition to the general social institutions which exist in the community and which impact on all members of the community, there exists in most areas a set of problem-oriented institutions. These differ from the former in that they generally make contact only with people who are experiencing specific kinds of problems and cease to have direct effects on their lives once the problem has been resolved. Examples of these types of systems include mental health services, child protective services, employment assistance, drug and alcohol rehabilitation, special education, and various types of crisis intervention care.

The purpose of social institutions is, obviously, to ensure the smooth functioning of the community. Unfortunately, they may have negative as well as positive

effects on the functioning of families. Religious institutions, for example, can and usually do serve to strengthen families by teaching values of love and tolerance and by providing support in times of personal and family crisis. An excessively rigid and literal religiosity which encourages the ideas expressed in Proverbs 22-23 (above), however, poses a threat to the safety of children in the family.

The medical care delivery system also has the potential to have positive or negative effects. Its ability to provide crisis support to families goes far beyond its modern techniques of medical intervention, to the provision of concerned, caring and skillful emotional support. The medical community's fascination with intervention, however, can lead to extreme levels of technical interference in otherwise normal childbirth, to the extent that the bonding process between parents and child—so important for the development of love and nurturant behavior—is sometimes severly disrupted (the popularization of family-centered maternity care is, fortunately, making some changes in this situation).

Problem-oriented institutions have a particularly high potential for both positive and negative effects on a family. One important reason for this is that they often come into contact with the family when it is in crisis and highly vulnerable to outside effects. Three issues are relevant to this discussion.

First is the question of labelling, and its effect on both clients and the professionals working with them. The application of a label diagnosis of "abusive parent" or "psychopathic personality" carries with it not only useful information but also a great deal of emotional weight. To the parent, it may be the final, crushing blow to a self-concept which was never very strong and has had to deal with stresses of unemployment, marital strife, and the challenges of child-rearing. To the professional, it may set up a view of the client which is based on the professional's ideas, fears, and biases, not the reality of the person before him or her.

A second issue is the question of clients' self-worth and human dignity and whether or not these are respected by agency procedures and requirements. Can clients ask for help in a dignified, adult way, or are they made to feel inferior by endless retellings of their stories and uninviting or inaccessible physical layouts?

Finally, there is the issue of plain quality of services. A person who is physically hungry can be helped by almost anything with calories and protein, but the at-risk parent's hunger for love and nurturance must be dealt with by trained personnel in the proper way, or there is a risk of doing more harm than good.

There are also a few aspects of problem-oriented institutions which do cause problems of their own. Abuse and neglect of children by individual caretakers do exist in schools, foster homes, residential care facilities, and day care centers. The dynamics are probably the same as in the basic parent-child-situation configuration which exists in the family. This is perhaps exacerbated by the lack of affectional ties between the caretaker and the child. An agency itself, in its policies on the nurturance, stimulation, and discipline of the children in its care, may also be implicated as abusive or neglectful.

Prevention

Having recognized the problem of child abuse and/or neglect and some of its related factors, what is an appropriate community response? The obvious general goal is to prevent the maltreatment of children. Prevention, however, may be approached at various levels, each with a specific target and specific methods.

At the lowest level, referred to as tertiary prevention, (or "treatment") the goal is to disrupt an ongoing pattern of abusive or neglectful behavior and to provide assistance or treatment so that it does not recur. The next level, secondary prevention, seeks to avert abuse and/or neglect within a family that has been defined as high-risk by behavioral or demographic indicators but in which there has not as yet been any overt maltreatment. Primary prevention, the highest level, is geared toward making our society a more supportive place to raise children, and applies not merely to high-risk families but to all adults who care for children.

In terms of actual intervention, the approaches for secondary and tertiary prevention are often the same. As mentioned earlier, the specific approaches vary with the orientations of helping professionals and their views of the dynamics of the problem.

One widely-used modality is individual psychotherapy for one or both parents. Less often, the child also receives therapy. The working assumption is that the maltreatment is at least in part due to intrapsychic conflicts within the parent which are acted out against the child, or which predispose the parent to resolve parent-child conflicts through violence.

Another approach assumes that the problem lies in a deficit in parenting skills and responses, and seeks to remedy this deficit through the use of behavior modification methods and educational techniques. Support for this method comes from observations that abusive and neglectful parents were often mistreated themselves as children and therefore have learned inappropriate parenting skills and never been exposed to models of appropriate nurturance. In addition to changing the dysfunctional behavior of the parent, behavioral intervention can also help the parent to learn alternative techniques for influencing the behavior of the child without resorting to violence.

A third treatment modality, family therapy, makes the assumption that the problems lie not within the parent or the child, but in their interaction within the family system. Working wih the family as a group, the family therapist recognizes that the behavior of individual members of the family affects the functioning of the family as a whole. This is not a modality generally used with a family with small children.

Two other modes of intervention proceed from different bases. In the first, the role of the helping professional is to facilitate the family's establishing linkages in the community. These might be with problem-oriented institutions in the community—such as homemaker services, employment assistance, rehabilitation, welfare agencies, etc.—for concrete resources of their own. An excellent example of this, now no longer informal, is Parents Ano-

nymous, whose members provide support for each other in times of stress. Or, the linkage might be to comprehensive services from the community, which might include medical care through university hospitals or public health clinics, day care, crisis intervention services, and various kinds of supportive services within and outside the home.

A final modality of individual treatment works from the dual observations that abusive and neglecting parents often experienced significant emotional and/or physical maltreatment themselves as children and now tend to be isolated and friendless as adults. The assumption is that deprivation of nurturance caused these parents to "miss" their own childhoods, leading them to expect their children to give them the unconditional affection they never received and rendering them incapable of creating friendships with other adults. The helping persons, often volunteers, play dual roles by serving as friends to the parents and "reparenting" and resocializing them into appropriate roles.

In most communities, the main responsibility for the coordination, if not the provision, of secondary and tertiary prevention services rests with the child protective service (CPS) agency. This is often a part of the state department of public welfare/social services/human resources. CPS has a legal mandate to accept referrals of suspected abuse or neglect, to initiate investigations, and to determine whether reports are founded. If a report is substantiated, depending on the circumstances discovered, CPS is also mandated to provide appropriate services or to initiate the proceedings for removal, according to agency determination of the best interests for the health and safety of the child.

The aspect of CPS that distinguishes it from most other social services is its involuntary nature; that is, parents do not have the right to reject intervention. For many, this results in a perceived conflict between the rights of the parents and rights of the child. Our society has determined, however, that the right of the child to live in health and safety is important enough to justify legal intervention into the home. This does not mean, however, that the majority of parents must be coerced into accepting help; many, if not most, parents are sufficiently uncomfortable with the degree of discord within their families that they welcome the offer of assistance in order to change.

CPS is often in many ways more a coordinator than a provider of services. To begin with, the decision to remove a child against parental wishes can never be made by CPS, but only the Court with legal representation provided to both child and parents. The only exception to this is in emergency cases, and even then the Court must review the case as soon as possible. Also, because of the crisis orientation of much of the work of CPS, the agency is in need of a variety of kinds of supports. CPS workers are generally best qualified to carry out the initial parts of the intervention—investigation, determination, and referral—and to supervise the change process, often as ordered by the Court. If therapy is indicated, it is often provided by other agencies, such as public health services and private medical and psychological practitioners, community mental health centers, and other social service providers. In addition to these supports, CPS staff need a group that will advocate for them with local decision makers and share with them the tough decisions relating to the maintenance or dissolution of families. In many communities these functions are carried out by a child abuse and neglect advisory board or task force and a treatment team, or one group may take on both responsibilities.

Thus secondary and tertiary prevention try to strengthen individuals and families by working with them directly. Primary prevention, on the other hand, has as its chief goal the restructuring of society and its institutions to make it more supportive to families. One aspect of this is the eradication of poverty and racism. It is, of course, naive to expect that poverty and racism will be defeated in the near future. It is equally naive to expect that even if they were removed, child abuse and neglect would vanish, since we know that it exists at all income levels and among all ethnic groups, and that some individuals who are hit hardest by the effects of poverty are still excellent parents. In spite of this, efforts to reduce the effects of poverty and racism on individuals and families—perhaps through public assistance programs and civil rights legislation—have great potential for alleviating some of the major stresses on parents.

There exists a need at this time to explore and define the basic needs of families so that we can encourage the adoption of appropriate social policies in the full range of social institutions. A tentative and by no means exhaustive list of these might include encouraging the business community to provide for full and satisfying employment, the media to present realistic expectations for children and parents and to devote more attention to education for parenthood, the medical establishment to move towards family-oriented and self-sufficient health care, especially during the perinatal and early childhood periods, and the social welfare delivery system to adopt policies which promote family unity and achievement, not dissolution and apathy.

We have a law requiring an environmental impact statement before major building projects can begin. We have yet to realize the need for a family impact statement before we enact policies that have a bearing on the welfare of families. We have an Environmental Protection Agency to protect our trees; where is the Family Protection Agency that could play a similar role for our children and their families?

National Organizations Concerned with Child Abuse and Neglect

National Center on Child Abuse and Neglect
Administration for Children, Youth and Families
Office of Human Development Services
U.S. Department of Health and Human Services
P.O. Box 1182
Washington, D.C. 20013

National Legal Resource Center for Child Advocacy and Protection
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-2250
Howard A. Davidson, Director

National Association of Counsel for Children
1205 Oneida
Denver, CO 80220
(303) 321-3963
Donald Bross, Executive Director

National Center for Youth Law
3701 Lindel Boulevard
St. Louis, MO 63108
(314) 533-8868
David Howard, Managing Attorney

National Center for Youth Law
1663 Mission Street, Fifth Floor
San Francisco, CA 94103
(415) 543-3307
Peter Bull, Director

American Civil Liberties Union
Children's Rights Project
22 East 40th Street
New York, NY 10016
(212) 944-9800
Marcia R. Lowry, Director

Children's Defense Fund
1520 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 483-1470
Marian Wright Edelman, Director

The American Humane Association, Childrens Division
5351 South Roslyn Steet
Englewood, Colorado 80110
(Newsletter and Other Publications)

Child Welfare League of America, Inc.
67 Irving Place
New York, New York 10003
(Newsletter and Publications)

National Center for the Prevention and Treatment of Child Abuse and Neglect
1205 Oneida Steeet
Denver, Colorado 80220
(Publications)

National Committee for Prevention of Child Abuse
Suite 1250
332 South Michigan
Chicago, Illinois 60604
(Newsletter: Caring; Publications)

Parents Anonymous, Inc.
2810 Artesia Boulevard
Redondo Beach, California 90278
(Publications and Help in Starting a Local Chapter)

National Alliance for the Prevention and Treatment of Child Abuse and Maltreatment
41 - 27 169th Street
Flushing, New York 11258

Child Abuse and Neglect Regional Resource Centers

Ten regional resource centers on child abuse and neglect exist in each of the ten HHS Federal Regions. The primary purpose of the resource centers listed below is to support state and local efforts to prevent and treat child abuse and neglect.

Reg. I CA/N Resource Cntr.
Judge Baker Guidance Cntr.
295 Longwood Avenue
Boston, Mass. 02115
Steven Lorch, Director
(CT, ME, MA, RI, VT, NH)

Reg. II CA/N Resource Cntr.
College of Human Ecology
Cornell University
MVR Hall
Ithaca, NY 14853
John Doris, Director
(NJ, NY, PR, VI)

Reg. III CA/N Resource Cntr.
Howard Univ. Inst. for Urban Affairs and Research
PO Box 191
Washington, DC 20059
Ms. Vanette Graham, Director
(DC, DE, MD, PA, VA, WV)

Reg. IV CA/N Resource Cntr.
Regional Inst. for Social Welfare Research
PO Box 152
Athens, GA 30601
Dr. Clara Johnson, Director
(AL, FL, GA, KY, MS, NC, SC, TN)

Reg. V CA/N Resource Cntr.
Grad. School of Social Work
Univ. of Wisc.-Milwaukee
Milwaukee, WI 53201
Ms. Adrienne Haeuser, Director
(IL, IN, MI, MN, OH, WI)

Reg. VI CA/N Resource Cntr.
Grad. School of Social Work
Univ. of Texas at Austin
Austin, Texas 78712
Ms. Rosalie Anderson, Director
(AR, LA, NM, OK, TX)

Reg. VII CA/N Resource Cntr.
Institute of Child Behavior and Development
Univ. of Iowa-Oakdale
Oakdale, Iowa 52319
Dr. Gerald Solomons, Director
(IA, KS, MO, NE)

Reg. VIII CA/N Resource Cntr.
Nat. Cntr. for the Prevention and Treatment of CA/N
1205 Oneida Street
Denver, CO 80220
Donald Bross, Esq., Director
(CO, MT, ND, SD, UT, WY)

Reg. IX CA/N Resource Cntr.
Dept. of Special Education
California State University
5151 State University Drive
Los Angeles, CA 90032
Dr. Herschel Swinger, Director
(AZ, CA, HI, NV, Guam, Trust Ter)

Region X CA/N Resource Center
Panel For Family Living
157 Yesler Way
208, Seattle, Washington 98104
Robert Hunner, Director
(AK, ID, OR,WA)

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Child Abuse and Neglect Law Review Articles

Legal Response will periodically publish bibliographies related to child abuse and neglect. This bibliography consists of law review articles which have been published since 1970. It does not exhaust the stock of child abuse and neglect articles which has proliferated in the past decade, but should provide an ample amount of references in the covered areas. Although subdivided into seven sections, some of the articles are too broad for a restricted classification. Therefore, they have been placed

in the "General" category. For an overview of child abuse and neglect and its legal implications, a number of publications are provided in this section. The "State" category contains articles of wide scope, but focuses on one particular state, as indicated by the title.

Future bibliographies will consist of abuse and neglect anthologies, training manuals, videotapes and films. To include articles in future issues of the *Legal Response,* please send copies of articles, publications, or information on author, title, year, acquisition source, price and topics covered to American Bar Association, NLRC-CAP, 1800 M Street, N.W., Washington, D.C. 20036.

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Battered Child Syndrome

Term introduced in 1962 by C. Henry Kempe, M.D., in the *Journal of the American Medical Association* in an article describing a combination of physical and other signs indicating that a child's internal and/or external injuries result from acts committed by a parent or caretaker. In some states, the battered child syndrome has been judicially recognized as an accepted medical diagnosis. Frequently this term is misused or misunderstood as the only type of child abuse and neglect. (See also CHILD ABUSE AND NEGLECT)

Child Abuse Prevention and Treatment Act (Public Law 93-247)

Act introduced and promoted in Congress by then U.S. Senator Walter Mondale and signed into law on January 31, 1974. The act established the National Center on Child Abuse and Neglect in the HEW Children's Bureau and authorized annual appropriations of between $15 million and $25 million through Fiscal Year 1977, but it is anticipated that Congress will extend the act for several years. Actual appropriations have been less than authorized. The purpose of the National Center is to conduct and compile research, provide an information clearinghouse, compile and publish training materials, provide technical assistance, investigate national incidence, and fund demonstration projects related to prevention, identification, and treatment of child abuse and neglect. In the 1974 act, not more than 20% of the appropriated funds may be used for direct assistance to states, which must be in compliance with specific legislative requirements including, among others, reporting and investigation of suspected neglect as well as abuse, provision of multidisciplinary programs, and appointment of a *guardian ad litem* to represent the child in all judicial proceedings. The act emphasizes multidisciplinary approaches. It also provides for funding for parent self-help projects.

Many persons do not understand that this act is primarily to support research and demonstration projects. Much larger amounts of funding for the ongoing provision of child abuse and neglect services are provided to states through Title IV-B and Title XX of the Social Security Act.

Failure to Thrive Syndrome (FTT)

A serious medical condition most often seen in children under one year of age. An FTT child's height, weight, and motor development fall significantly short of the average growth rates of normal children. In about 10% of FTT cases, there is an organic cause such as serious heart, kidney, or intestinal disease, a genetic error of metabolism, or brain damage. All other cases are a result of a disturbed parent-child relationship manifested in severe physical and emotional neglect of the child. In diagnosing FTT as child neglect, certain criteria should be considered:

1) The child's weight is below the third percentile, but substantial weight gain occurs when the child is properly nurtured, such as when hospitalized.

2) The child exhibits developmental retardation which decreases when there is adequate feeding and appropriate stimulation.

3) Medical investigation provides no evidence that disease or medical abnormality is causing the symptoms.

4) The child exhibits clinical signs of deprivation which decrease in a more nurturing environment.

5) There appears to be a significant environmental psychosocial disruption in the child's family.

Osteogenesis Imperfecta

An inherited condition in which the bones are abnormally brittle and subject to fractures, and which may be mistakenly diagnosed as the result of child abuse.

Psychological Parent

Adult who, on a continuing day-to-day basis, fulfills a child's emotional needs for nurturance through interaction, companionship, and mutuality. May be the natural parent or another person who fulfills these functions.

Skeletal Survey

A series of X-rays that studies all bones of the body. Such a survey should be done in all cases of suspected abuse to locate any old, as well as new, fractures which may exist.

Subdural Hemotoma

A common symptom of abused children, consisting of a collection of blood beneath the outermost membrane covering the brain and spinal cord. The hemotoma may be caused by a blow to the head or from shaking a baby or small child. (See also WHIPLASH-SHAKEN INFANT SYNDROME)

Whiplash-Shaken Infant Syndrome

Injury to an infant or child that results from that child having been shaken, usually as a misguided means of discipline. The most common symptoms, which can be inflicted by seemingly harmless shakings, are bleeding and/or detached retinas and other bleeding inside the head. Repeated instances of shaking and resultant injuries may eventually cause mental and developmental disabilities. (See also SUBDURAL HEMOTOMA)

B. Reporting, Central Registries, and Child Protective Services

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977) 3.1-3.5. Reprinted with Permission.

Part III: Reporting of Abused Children

3.1 Required reports.

A. Any physician, nurse, dentist, optometrist, medical examiner, or coroner, or any other medical or mental health professional, Christian Science practitioner, religious healer, schoolteacher and other pupil personnel, social or public assistance worker, child care worker in any day care center or child caring institution, police or law enforcement officer who has reasonable cause to suspect that a child, coming before him/her in his/her official or professional capacity, is an abused child as defined by Standard 3.1 B. should be required to make a report to any report recipient agency listed for that geographic locality pursuant to Standard 3.2.

COMMENTARY

Since 1966, every state has enacted mandatory child abuse reporting laws requiring professionals to report to some state authority any child who appears to be intentionally physically abused by his/her parent. Physicians are the principle target group for current reporting legislation and are designated in all but six states as a class of professionals with reporting responsibility. Reporting is mandatory for members of each of the other professional groups mentioned in this subsection in at least one or more states. In five states, however, a legal obligation to report is imposed upon *any person* who has "knowledge" (Tennessee), "reason to believe" (Indiana), "cause to believe" (Texas and Utah), or "cause to suspect" (New Hampshire) that injury has been inflicted on a child, rather than upon any particular target group. Another seventeen states supplement requirements placed upon certain classes of professionals with a statutory duty to report placed on "any other person" who becomes aware

of a child injured by nonaccidental means. See V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's* 10 (1974). The laws of six states further provide that reporting is permissible rather than mandatory with respect to persons other than the cited professionals. See chart in DeFrancis and Lucht, *supra,* at 22-23. This latter approach is implicitly adopted here. This subsection is essentially the same as the comparable provision proposed in A. Sussman, *Reporting Child Abuse and Neglect*: Guidelines for Legislation 18-23 (1975).

B. An "abused child," for purposes of Standard 3.1 A., is a child who has suffered physical harm, inflicted nonaccidently upon him/her by his/her parent(s) or person(s) exercising essentially equivalent custody and control over the child, which injury causes or creates a substantial risk of causing death, disfigurement, impairment of bodily functioning, or other physical injury.

COMMENTARY

The definition of "abused child" in subsection B. is typical of current state laws. In recent years, a considerable number of state legislatures (some forty-three, according to the most recent research available, see Katz et al., "Child Neglect Laws in America," 9 *Fam. L. Q.* 40-41, 1975) have expanded mandatory reporting laws to cover some form of child neglect as well as physical abuse. This standard rejects that expansion, and mandates reporting only of "abused" rather than all "endangered" children for the following reasons:

1. Experience under existing mandatory abuse reporting laws indicates that the great bulk of reports point to poor and poor/black families. See D. Gil, *Violence Against Children* (1973). It seems likely (though it cannot be conclusively demonstrated) that child abuse is not in fact limited to poor and poor/black families, but rather that the predominance of such reported cases is an artifact of the reporting system. The fact that the reporting system may be systematically biased is not necessarily a reason for abandoning abuse reports since seriously abused children need protection whatever their socioeconomic or racial status. But the likehood of systematic bias in the reporting system is a strong argument against applying that system beyond physical injuries to matters such as "neglect," "emotional neglect" or even "sexual abuse" which are much more open-ended and subject to vast social and cultural biases in their definitions. (By middle class norms, for example, it would be "sexually abusive" for children regularly to witness sexual intercourse by their parents, but these norms are regularly disregarded in other groups in this society and there is no substantial reason to believe that these children are thereby harmed.) Laws prescribing mandatory reports beyond physical abuse have led to greatly increased reporting and, accordingly, to increased interventions into families. Though there is no systematic study yet available of the operation of these new reporting laws, it is likely that their impact is the same as the prior abuse reporting laws, and that an added wave of reports and interventions into poor and poor/black families has taken place. There is thus substantial reason to believe that these new interventions express only cultural bias and severely harm the children who purportedly are "rescued."

2. Current responses to child abuse and neglect reports give little confidence that the current trend toward expanding the numbers and kinds of cases brought to official attention beyond physical abuse will in fact assist the additionally identified children. It appears that substantial numbers of allegedly and actually abused or neglected children are removed from their parents and remain in foster or institutional placement for substantial periods of time. See Mnookin, "Foster Care—In Whose Best Interest?" 43 *Harv. Educ. Rev.* 599 (1973). Many children are ultimately returned to their parents without any adequate services having been provided to the parents to ensure against repetition of the previous abusive conduct. Other children remain for indefinite periods in "limbo statuses" of foster or institutional care without any assured lasting familial ties, since termination of parental rights is relatively infrequent even when children are not returned to their parents during long terms. Some few centers in the country claim greater therapeutic finesse and success in pursuing the true psychological interests of abused children. Even if these claims can be substantially documented, it is clear that society has not yet been able to replicate the services provided in these few programs for the great bulk of children now reported as abused.

The haphazard interventions we now provide for physically abused children are probably justified on the ground that, though our intervention techniques cannot assure against grave psychological injury to the children separated from their parents, the risks to their physical wellbeing urgently require intervention. But to require reports, and likely interventions, beyond those for physical injuries—to harms whose injury is more rooted in adverse psychological consequences from parental practices—is absurd unless we can have some reasonable assurance that our intervention techniques in fact safeguard the child's psychological wellbeing.

3. Mandating reports even of child abuse can, in some cases, interfere with efforts to provide effective therapy to the abusing family. Particularly if criminal prosecution follows from such reports, effective therapy in the interests of child and parent both is typically stymied. Though criminal prosecution is relatively infrequent, it apparently occurs in haphazard fashion in response to the fortuities of newspaper coverage. See Part IX and commentary. But even if criminal prosecution does not result, psychotherapy with many families is compromised because the therapist is forced to divulge confidential communications. Forcing such breach of confidence can be justified when the child's physical life is at stake. But it is much harder to justify such interferences with the prospect of successful psychotherapy for suspected "neglecting" or "sexually abusing" families. For many such families, mandatory reporting will not only fail to bring benefits to the child; such reporting will actively hurt the child by interfering with the prospects of successful psychotherapy for the child and his/her family. Discretion to report, when the therapist has reason to believe the child cannot adequately be protected in the processes of ther-

apy, provides a more helpful legal response to this problem; see Standard 5.1 A.2, *infra*.

4. Enactment of expanded mandatory reporting will encourage legislators who pass such a statute to believe that they are "doing something"—something that is truly constructive and helpful—for children mistreated by their parents, without spending any state funds. Child abuse reporting laws have enormous political seductiveness since they create the appearance of action without any extraordinary financial burden involved in legislative mandates for truly effective action. Existing child abuse reporting laws are essentially fictitious because there is no state commitment for effective service response behind those laws. It would endorse that harmful fiction by now pressing for expansion of such laws, thus implicitly labelling them as successful enterprises in the interests of children.

C. Any person making a report or participating in any subsequent proceedings regarding such report pursuant to this Part should be immune from any civil or criminal liability as a result of such actions, provided that such person was acting in good faith in such actions. In any proceeding regarding such liability, good faith should be presumed.

COMMENTARY

The purpose of this subsection is to protect child abuse reporters from inappropriate retaliation in response to their reports, particularly from angered parents who were the subject of reports. Absolute immunity is not, however, provided; the majority of current state statutes agree with this position, providing immunity only for good faith reports. See V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's* 12 (1974). In some states, good faith is statutorily presumed. See A. Sussman, *Reporting Child Abuse and Neglect: Guidelines for Legislation* 33 (1975). This presumption is explicitly provided here.

D. The privileged character of communication between husband and wife and between any professional person and his/her patient or client, except privilege between attorney and client, should be abrogated regarding matters subject to this Part, and should not justify failure to report or the exclusion of evidence in any proceeding resulting from a report pursuant to this Part.

COMMENTARY

A clause waiving certain privileges is a standard part of current reporting legislation. The privileged nature of communications between doctor and patient is abrogated in thirty-nine states as well as in Washington, D.C., Guam, and the Virgin Islands. Waiver of the husband-wife privilege occurs in the laws of the thirty-three jurisdictions, and is inferred in the statutory language of another ten (*i.e.*, with a waiver of doctor-patient and "similar" privileges). The attorney-client privilege is generally preserved, except in the reporting statutes of Alabama, Massachusetts, and Nevada. V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's* 12, chart at 21-22 (1974). See commentary on a similar proposed provision in A. Sussman, *Reporting Child Abuse and Neglect: Guidelines for Legislation* 35-36 (1975).

E. Any person who knowingly fails to make a report required pursuant to this Part should be guilty of a misdemeanor (and/or should be liable, regarding any injuries proximately caused by such failure, for compensatory and/or punitive damages in civil litigation maintained on behalf of the child or his/her estate).

COMMENTARY

The reporting statutes of twenty-nine states and the Virgin Islands provide misdemeanor penalties for failure to report. See also the proposed provision in A. Sussman, *Reporting Child Abuse and Neglect: Guidelines for Legislation* 33-34 (1975). This criminal penalty has, however, rarely been enforced in any state. It may be that the threat of civil liability, to reimburse the child or his/her estate, for harm coming from failure to report would be a more effective spur toward reporting. Initiative for such litigation would, however, rest with private parties and thus there is no great likelihood of its frequent or aggressive invocation. The question of choice between civil or criminal liability, or conjoining both, thus appears quite close, and the proposed standard reflects that conclusion.

3.2 Recipients and format of report.

A. The state department of social services (or equivalent state agency) should be required to issue a list of qualified report recipient agencies (which may be public or private agencies), and to designate geographic localities within the state within which each such recipient agency would be authorized to receive reports made pursuant to Standard 3.1 A. The state department should ensure that there be a least one qualified report recipient agency for every designated geographic locality within the state.

B. An agency should be eligible for listing as a qualified report recipient agency if it demonstrates, to the satisfaction of the state department, that it has adequate capacity to provide, or obtain provision of, protection to children who may be the subject of reports pursuant to this Part. The state department should be required to promulgate regulations indicating standards for such adequate capacity, which specify requisite staff personnel (which may include, without limitation, pediatric physicians and other medical care personnel, mental health professionals and paraprofessionals, and attorneys and legal paraprofessionals), requisite agency organizational structure, and any other matters relevant to adequate child-protective capacities.

C. The state department should review, at least every two years, whether an agency listed as a qualified report recipient agency continues to meet the requirements for listing pursuant to Standard 3.2 B. For purposes of such review, the state department should examine the agency's disposition of and efficacy in cases reported to it pursuant to this Part. Each agency should maintain records, in a format prescribed by regulations of the state department,

to facilitate such review. Such regulations should provide safeguards against any use of such records that would disclose the identity, except where specifically authorized by this Part, or otherwise work to the detriment of persons who have been named in reports made pursuant to this Part.

D. The format of the reports to the report recipient agencies, in satisfaction of the requirements of Standard 3.1 A., should be specified by regulation of the state department. Such regulations should provide that initial reports pursuant to Standard 3.1 A. be made by telephone to a report recipient agency, and that telephonic and any written reports contain such information as the state department may specify.

COMMENTARY

This standard is designed to serve two goals: first, to sponsor continuing investigation of the efficacy of interventions brought by reporting and, second, to permit some discretion in reporting where preserving confidential relations between the parent and professional person would aid a therapeutic relationship in the child's interests. Both of these goals are ignored under existing laws. Currently, the law's goal is the report itself; there is no mechanism structured into the reporting laws that provides some check on the efficacy of reporting. Further, under current laws only a narrow range of state agencies qualify as report recipients. At present, twenty-three jurisdictions designate a single agency to receive reports. In seventeen, the receiver agency is a state or county department of welfare. In only five states is a law enforcement agency designated as the sole recipient; and in one state the juvenile court receives all reports. In other states, reports must be made to one of two or more specified agencies or to two or more of the designated receivers. In forty-three states, a report to the department of social services at the state or local level is required—either exclusively or among other reports. See V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's* 11, 177-178, chart at 23-25 (1974).

These two goals—testing efficacy and fostering discretion in reporting—can be better served without altering the first step in the basic format of existing abuse reporting laws. That is, the law can continue to mandate reports from a wide range of professional persons likely to have contact with young children—school personnel, physicians, and other medical personnel and the like. But, unlike the current law, this obligation should be satisfied by reports to a potentially extensive list of public and private community agencies that specialize in responding to the problems of abusing families. The professional would be required to report to *some* qualified agency, but would have discretion to choose *which* agency.

A statewide agency—the State Department of Social Services or its equivalent—should be charged with compiling a list of acceptable report recipients in each community. The standard provides that this list should be revised every two years. It is here, in the compilation and continued revision of this list, that "quality control" and "efficacy investigation" should take place. The statewide listing agency, that is, should permit a public or private community agency to remain listed as an acceptable abuse report recipient only if that agency can demonstrate from records of the cases it has handled that it has capacity to respond helpfully in the best interests of suspected abused children.

The process of statewide agency listing review would be the mechanism for intensive inquiry into the efficacy of the entire range of interventions into alleged and actual abusing families which, as discussed above, is critically lacking and essential for justification of any state sponsored external interventions into family life in the interests of children. The state listing agency would apply general criteria of competence to the various agencies, elaborated by specific staffing and programmatic standards. In some small or rural communities, it may be that the only authorized report recipient agency qualifying as competent for responding to abusing families would be the court-related county or state child protective services agency. In larger communities, it may be that both private and public agencies would qualify as report recipients thus giving an option to report originators to choose among various recipient agencies.

Many professionals now involved in operating special programs for abusing families are advocating a "multidisciplinary team" for each community composed of psychiatrists, pediatric physicians, social workers, attorneys and others. The state listing agency could mandate such a team concept for all, or for selected, communities within the state. Similarly, the state listing agency could require that abuse reports be purposely diverted, in the first instance, away from court and court-related agencies. But in view of the many untested empirical propositions about efficacy of differing intervention techniques, it is inadvisable to provide for a single pattern of service program organization for every state. Rather, as noted earlier, the goal for nationally applicable model legislation should be to design institutional structures which are likely to work toward answering the critical open and untested questions in this field.

The constitutional doctrine, which still has vitality in state courts, regarding delegation of legislative authority to private parties is not in conflict with the recommendation here that private as well as public agencies should be licensed as report recipient agencies. Professor Davis, in his exhaustive treatise on administrative law, has stated that state courts have invalidated legislative delegations which fail to provide "either adequate standards or adequate safeguards" to guide the exercise of delegated powers. *Administrative Law Treatise,* § 2.17 at 77 (1970 Supp.). The extensive supervision by the state licensing agency over the actions of both private and public report recipient agencies envisioned by these standard would clearly obviate any constitutional doubts. Further, in matters of child welfare there is a strong state tradition of legislative reliance on private agencies. Particularly regarding adoptive placements, private agencies have traditionally exercised extensive roles both in placement itself and in investigating prospective adoptive families in connection with judicial adoption proceedings. See Clark, *The Law of Domestic Relations* 638-44 (1968). There is

growing recognition that the authority exercised by such private agencies is "state action" and must be consistent with constitutional norms regarding, for example, religious or racial critieria for adoptive placement and adequately fair procedures. See *id.* at 644-51. But the legitimacy of such delegated authority as such in this critically important child welfare matter is widely accepted.

Subsection D. provides that the state agency should prescribe the formats for reports. Urgency in reporting is emphasized in most of the existing statutes and the requirement of an oral report by telephone or otherwise is fairly standard. The present trend in state laws seems to be in the direction of lessening demands upon report sources. Four states now require written reports only when specifically requested by the recipient agency. Another four states have dispensed entirely with the requirement of a written report. Thirty-one states as well as the District of Columbia, Guam, and the Virgin Islands require that oral reports be followed by written ones within a specified period of time. New Jersey demands a written report only from physicians. Requirements making reporting an onerous task, such as Michigan regulations which require that reports be filled out in quadruplicate and submitted to each of four different agencies, are rare. V. DeFrancis and C. Lucht, *supra*, at 11, 181.

3.3 Action by report recipient agency.

A. A report recipient agency receiving a report submitted pursuant to Standard 3.1 A. should be required to immediately undertake investigation of the report and to determine *inter alia* whether there is reason to believe the child subject of the report is an abused child, as defined in Standard 3.1 B., and whether protection of the child requires filing of a petition pursuant to Part V, and/or taking emergency temporary custody of the child pursuant to Part IV.

B. If the agency determines, upon initial receipt of the report or at any subsequent time after its initial contact with the child that filing of a petition pursuant to Part V or emergency temporary custody pursuant to Part IV is necessary for the protection of the child, it should promptly take such action, except that the agency has no authority to examine or take custody of the child or to interview the parents or custodians or visit the child's home, against the wishes of the child's parents or custodians named in the report, except as specifically authorized by a court-approved plan of investigation pursuant to Part V, or as specifically authorized by Part IV regarding emergency temporary custody of the child.

C. If a report recipient agency receives a report pursuant to Standard 3.1 A., or otherwise has contact with a child whom the agency considers an "abused child" as defined in Standard 3.1 B., and the parents or custodians agree to relinquish custody of the child, the agency should report this matter to the court, which should convene a hearing and periodic subsequent review hearings as specified in Part V.

D. Identifying characteristics in all unsubstantiated reports (including names, addresses, and any other such identifying characteristics of persons named in a report) should be expunged from the files of the report recipient agency immediately following completion of the agency's listing review pursuant to Standard 3.2 C., within two years of the report's receipt. In any event, identifying characteristics in all reports should be expunged from the files of the report recipient agency within seven years of the report's receipt.

COMMENTARY

Under this standard, the authorized report recipient agency is required to investigate every abuse report. The agency is, however, given no authority to override parental wishes in conducting its investigation. Interviews with the child or parent or home visits contrary to parental wishes can only take place with explicit court approval, as indicated in Standard 3.3 B. Accordingly, the agency's investigation before any court recourse would be limited to such matters as contacting the person reporting the suspected abuse and the parents, and soliciting parental consent for interviews with them and the child, in order to verify the reported abuse. If, for example, the agency found, after these investigative contacts, that the report came from a physician who had directly observed serious bruises on the child and the parents refused to permit agency employees to see the child either at their home or on agency premises, then as provided in Standard 3.3 A. there would be clear "reason to believe [that] the child subject of the report is an abused child . . . [and that] protection of the child requires filing of a petition" in court, and perhaps even taking of temporary emergency custody. In many reported cases, however, invocation of the court or emergency custody would not be required to protect the child even if there was some evidence that the parents had been physically abusive toward the child. If, for example, the child's injuries were slight, the parents welcomed the agency contact with some obvious relief and the problems which had led to the child abuse were both readily apparent to the agency and easily correctable, then court referral would be both unnecessary and possibly counterproductive for the ultimate protection and welfare of the child.

The critical innovation of these standards is that, following its investigation, the report recipient agency would have discretion as to whether it would in turn report the child to a court for invocation of forced intervention into the family. Through existence of this discretion, the agency could make an individualized judgment about the family's need for and capacity to respond to an intervention without direct invocation of legal coercion. This therapeutic relationship would not, of course, fit precisely into the traditional mental health model in which the patient wholly controls what information the therapist is authorized to release to third parties. Here, instead, the therapist would control whether third parties would be involved—whether, that is, state power would be invoked in order to protect the child. This hybrid version of existing reporting laws and the traditional mental health relationship paradigm appears particularly suited to the special problems of abusing families as described in current professional literature: that while

they need sympathetic assistance in resolving the underlying psychological dynamic conflicts that find expresssion in child abuse, they and their abused child also need firm and visible control to protect them and their child from their "worst selves." If an agency with demonstrated capacity to provide effective, sympathetic assistance is given discretion to invoke external controls, but not obliged to do so invariably and always at the abusing family's first appearance in the agency, greater therapeutic flexibility and finesse in the long-range best interest of abused children should result.

Not every agency has such capacity. Nor indeed does every agency that thinks it has such capacity in fact have the capacity. But one of the tasks of the statewide listing agency, in its periodic reviews of the quality and efficacy of agencies' work with abused families, would be to scrutinize the records of each agency to determine what kinds of cases were not reported for state intervention and the subsequent history of those cases. It it appeared that an agency was misusing this discretion, or failing to maintain adequate follow-up with the families who were not reported because of perceived therapeutic progress, this could be adequate ground for invocation of the basic sanction against the agency—that is, delisting. The sanction of removing a professional agency from the list of specialized abusing family service agencies is both more likely to be invoked, and has greater likely deterrent impact than criminal sanctions for nonreporting as under existing laws. Delisting of an agency is not only a highly visible, deeply felt slur on professional competence; it also removes an agency from important sources of funding, a sanction which will grow in significance as the current trend for federal funding support of services to abusing families gains greater momentum.

3.4 Central Register of Child Abuse.

A. The state department of social services (or equivalent state agency) should be required to maintain a central register of child abuse. Upon receipt of a report made pursuant to Standard 3.1 A., the report recipient agency should immediately notify the central register by telephone and transmit a copy of any written report to the central register for recordation.

B. Within sixty days of its initial notification of a report for recordation, the report recipient agency should be required to indicate its action pursuant to Standard 3.3 and to indicate any subsequent action regarding such report at intervals no later than sixty days thereafter until the agency has terminated contact with the persons named in the report. If at any time the report recipient agency indicates that the report (including names, addresses, and any other such identifying characteristics of persons named in the report) should be expunged, the central register should immediately effect such expungement. In any event, all reports (including names, addresses, and any other such identifying characteristics of persons named in the report) should be expunged from the central register seven years from the date the report was initially received by the report recipient agency.

C. The central register, and any employee or agent thereof, should not make available recordation and any information regarding reports to any person or agency except to the following, upon their request:

1. a report recipient agency within this state, listed pursuant to Standard 3.2, or a child protective agency in another state deemed equivalent, under regulations promulgated by the state department of social services (or equivalent state agency), to such report recipient agency within this state;
2. Any person (including both child and parent(s) and alleged abuser [if other than parent]) who is named in a report (or another, such as an attorney, acting in that person's behalf), except that such person should not be informed of the name, address, occupation, or other identifying characteristics of the person who submitted the report to the report recipient agency;
3. a court authorized to conduct proceedings pursuant to Part V;
4. a person engaged in bona fide research, with written permission of the director of the state department that no information regarding the names, addresses, or any other such identifying characteristics of persons named in the report should be made available to this person. Any person who violates the provisions of this standard by disseminating or knowingly permitting the dissemination of recordation and any information regarding reports in the central register to any other person or agency should be guilty of a misdemeanor (and/ or should be liable for compensatory and/ or punitive damages in civil litigation by or on behalf of person(s) named in a report).

3.5 Action By Central Register.

The central register should be required to notify by registered mail, immediately upon recordation of a report, any person (including child and parent(s) and alleged abuser [if other than parent] who is named in a report recorded in the central register, and to subsequently notify such person of any further recordation or information (including any expungement of the report) regarding such report submitted to the register pursuant to Standard 3.4, except as provided in Standard 3.4 C. 2. Any such person should have the right, and be so informed, to inspect the report and to challenge whether its entire contents, or any part thereof, should be altered or wholly expunged. Proceedings, including hearings and other procedural matters, regarding any such challenge should be governed by the administrative procedures act of this state.

COMMENTARY

Central registries of some form are maintained in forty seven jurisdictions. Thirty-three of these registries are mandated by law, while the remaining fourteen are maintained as a matter of administrative policy. The trend seems clearly to be in the direction of increasing recognition of the value of such registries. Between 1970 and 1974, fourteen states added provisions for central registries to their child abuse laws. At least in the majority of states, these central registries are maintained by the state department of social services. V. DeFrancis and C.

Lucht, *Child Abuse Legislation in the 1970's* 13, 178 (1974).

Two main functions are intended to be served by the operations of the central registries: A. providing information facilitating the identification of repeated child abusers and the assessment of the probable seriousness of recurring cases; B. gathering data and statistics on the nature and incidence of child abuse. Although both purposes are of undoubted validity and use in dealing with the problem of child abuse in society, nevertheless certain dangers inherent in the central registry system must be considered.

More specifically, the principle dangers of prejudice and stigma must be guarded against to as great an extent as possible in the law. The recording of cases with a central registry must not be allowed to be a factor in jumping to a conclusion of guilt in a subsequent situation of suspected child abuse on the basis of an earlier recorded report. Neither should parents or children be unfairly or unduly stigmatized as a result of an incident of child abuse. It is to be noted that not only may an adult suffer from a continuing label as a child abuser, but, especially in the light of evidence that abused children are more likely to abuse their own children, the child may well be damaged by a continuing label as an "abused child." The provisions in Standard 3.4 and 3.5 controlling access to register reports and mandating expungement (*i.e.,* physical removal) of unsubstantiated and "stale" reports are directed to these purposes. See generally A. Sussman, *Reporting Child Abuse and Neglect: Guidelines for Legislation* 43-53 (1975).

The provision in Standard 3.4 C. 4., suggesting that access to identifying information in the reports be withheld from researchers, would not apply to research conducted by the state department or related governmental agencies. In order to monitor or assess the efficacy of interventions, follow-up studies of individual cases can be critically important and for this purpose access to identifying information would be needed. There is also reason for concern about unregulated handling of reports even by agency personnel. Control of such intra-agency recordkeeping practices, particularly when much information will be computerized, raises difficult regulatory problems. See generally *Records, Computers and the Rights of Citizens (Report of DHEW Secretary's Advisory Committee on Automated Personal Data Systems, July 1973), and the Juvenile Records and Information Systems* volume.

Kay Drews, "Child Protective Services," *The Abused and Neglected Child, Multidisciplinary Court Practice* (New York: Practising Law Institute, 1978), 89-121.

Child Protective Services

In most states the Department of Social Services is the agency designated to receive reports of suspected child abuse and neglect, investigate those reports, provide protective services to the child and provide or arrange for services to the family. In most departments a specific unit, Child Protective Services, has been established to receive and investigate the reports and arrange for the services to the child and family. To understand better the roles and responsibilities of child protective services it will be discussed in terms of:

(1) The Reporting laws
(2) Hotlines and central registries of reports
(3) Investigation and verification of reports
(4) Case assessments and case plans including determinations of the need for court action
(5) Treatment and referral

Reporting laws

Although departments of social services have been providing services to abused and neglected children for many years, state child abuse and neglect reporting laws have had an impact on the numbers of cases and expansion of responsibilities of the departments.

Prior to the 1960's, departments of social services attended to the needs of these children through their Child Welfare services. Abused and neglected children were brought to the department's attention through police, court or other "referrals." During the 1960's, however, state legislatures passed child abuse and neglect reporting laws which mandated certain professionals to report suspected child abuse or neglect. Passages of these laws followed the description of the "Battered Child Syndrome" by C. Henry Kempe in the early 1960's.[1]

The new reporting laws, followed by public education campaigns, resulted in large volume reporting by mandated professionals and by non-mandated lay persons who were now protected from liability through the "immunity from liability" clause which protects those reporters who report in good faith.

The reports, prior to the reporting laws, often went to the police who would investigate, decide whether to file criminal charges, and occasionally refer the case to social services. Many new reporting laws require that the reports be made directly to the local or state social services department. More than 25 statutes currently name the department of social services as the sole receiver of reports. A few continue to require reports to be made to law enforcement agencies, or allow reporters to choose between two or more agencies.[2] The American Humane Association incidence study found that of the 31 states participating in the "National Analysis of Child Abuse and Neglect Reporting," the department of social services at state, county, and local levels received the initial report of abuse and neglect in 97.5% of all cases.

The difficulties that social service agencies are currently facing are numerous; defining abuse/neglect; responding to large numbers of reports; and, providing services to the families who have been identified as abusing or neglecting their children.

Definitions of child abuse and neglect vary from state to state. Although many state statutes include definitions of "child," "physical abuse," "sexual abuse," "emotional maltreatment" etc., there is often little guidance as to what degree and under what circumstances do such conditions warrant legal intervention. Attempting to qualify with terms such as "serious" can be dangerous

since less serious injuries might reflect very severe parent-child inter-actions which could result in future greater harm to the child. Since qualifiers are not the solution, the need to intervene should be based on harm or threatened harm to the child instead of solely on the basis of the parental act.

Prioritizing reports based on the reporter's assessment of degree of seriousness is also dangerous. The majority of state laws require that the agency initiate an investigation "immediately," "promptly," or "within 48 hours." Most states with such clauses do not allow for telephone screening of reports and for good reason.

The danger to the child can be much greater than that described by the reporter. The reporter may have witnessed only one of a series of incidents. Or, the reporter may be unaware of other neglect-abuse related problems within the family. Although Child Protective Service workers may realize the importance of responding to *all* reports, they are finding difficulty in interpreting terms such as "immediate" or "promptly." It is often left to the discretion of the worker or the local agency to define a time frame for responding to reports. Time frames which are spelled out in the law do not leave room for arbitrary delays in responding. However because most states were caught off guard with the massive increase in reporting, the local agencies still do not have enough staff to keep up with the reports.

The fear and concern of workers who are attempting to meet the requirements of the reporting law is that they are able to do little more than conduct the investigation. They feel that those families who may not have been in crisis prior to the investigation, do fall into crisis because of the lack of time and resources available for follow up after the investigation and the situation is worse for those families who may have already been in crisis.

Although the reporting laws have resulted in additional responsibilities for the local protective service agencies, it does reflect a shifting of investigative responsibilities from a haphazard, uncoordinated system of several agencies to one single specialized child protective agency. Several state protective service agencies have successfully stated their case to the legislature and received authorization to hire enough staff to meet the requirements of the reporting laws. Hopefully, other states will follow so that each state's reporting law is implemented in such a way it provides a basis for "those procedures and services necessary to safeguard the well being and development of endangered children and to preserve and stabilize family life, whenever appropriate."[4]

Further discussion of the impact of the reporting laws will be discussed in the sections that follow: Hotlines and central registries of reports; Investigation and verification of reports; Case assessment and case plans; Treatment and referral.

Hotlines and Central Registries

Forty-seven states and the District of Columbia have established some kind of a central registry of child protection cases in order to improve case diagnosis and monitoring, or statistical systems, or both. Forty of those states have created their central registry as a result of legislative mandate; the others have developed them through administrative decisions.[5]

Hotlines are often an integral part of the central registry. Hotlines are used for: the receipt of reports on a 24 hour a day, 7 day a week basis; checking for previous reports of child abuse and neglect on a family; and, for the receipt of self-referrals. In some states or communities, there is more than one hotline. The duplication is often confusing to the general public. However, some hotlines are in reality "help lines" which provide the caller with a sympathetic, nonjudgmental listener and/or information and referral. Help lines are a valuable resource in a community. They can provide isolated parents with a sympathetic and concerned individual who will listen as a caller airs frustration or anger which might have been directed at a child. Or it can serve as a preventive resource for those families who have not reached a crisis but fear losing control and need information and referral to resources available to them.

To avoid confusion, "hotline" in this presentation will refer to that which is linked to the central registry.

Central registries and hotlines are usually maintained by the state department of social services. They are the subject of much controversy due in part to the manner in which they are being used and the issues of confidentiality and expungement which have not been adequately addressed in some states.

Central Registries in most states were designed to:

(1) assist in diagnosis and evaluation by providing information on suspicious and prior treatment efforts;

(2) improve the handling of child abuse and neglect cases by providing convenient consultation on case handling to workers and potential reporters;

(3) refine diagnosis and encourage further reporting by providing feedback to those who have made the reports;

(4) measure the performance of child protective services by monitoring follow-up reports;

(5) coordinate community wide treatment by monitoring follow-up reports;

(6) facilitate planning and program development by providing statistical data on the nature and handling of reports; and

(7) encourage the reporting of suspected child abuse and neglect by providing a focus for public and professional education campaigns.[6]

In reality many central registries are failing to meet any of the objectives. Many systems were and still are poorly managed and inadequately staffed. Many have a backlog of reports on a desk waiting to be filed or entered into the system. Calls to the central registry are to no avail because the information is not readily accessible. There are many who contend that central registries which include identifying data for the purpose of assisting in diagnosis and for tracking transient families are more dangerous than beneficial. Whiting states:

> As a tracking method, the registry is not useful. Abusive families may or may not be more mobile than others, but if they move, it is as likely as not to be across state lines, making a statewide registry ineffective. In any case, the registry cannot "track" families; it can only receive reports of suspected abuse after the abuse happens. At that time, a protective service worker has received the report, and offered help to the family and protection to the child. Information that the

child had been previously abused in some other part of the state comes as no surprise and offers little in the way of further protection of the child.

It used to be thought that families reported to authorities as abusive would flee their community. More than 10 years of tighter reporting laws indicate that this rarely happens Families generally do not want to be abusive, and repetitive offenses after reporting are less frequent than had been supposed. Abusive families that move from a county are referred to the new location's department of social services for ongoing service.

As to diagnosis, again time has wrought changes in knowledge and thinking. In Maryland, as in many other states, any suspicion of abuse must be reported. Neither the physician nor the teacher, nor any other reporter, must "confirm" abuse before making a report. That is up to those mandated to investigate the reports of suspicion. Reports to a registry of previous suspicians thus are of dubious value in confirming or ruling out findings in a current report. Therefore, a central registry, computerized or not, does not and should not function as a diagnostic tool.

The Dangers of Confidentiality

Once identifying information is put on a computer, painstaking steps must be taken to arrange for erasure or expungement. Families involved must be notified, and an appeal system set up. Although such data are usually released only to persons cleared by a complex identification system, the information is accessible to other computers, either deliberately or by machine mistake. It has been reported to this writer that in a demonstration of such a system the machine printed out confidential information from some other system—information that had not been requested. This can be dangerous to civil liberties. When the argument about breach of confidentiality is raised, the rebuttal often is that protection of children overrides any intrusion of privacy. In fact, children are best protected by the prompt and vigorous response of those whose jobs it is to protect them. A requirement that all abuse reports be investigated within say, 3 hours or less, would protect a child more effectively than anything a computer could do.[7]

In addition, Besharov describes further weaknesses in current systems in terms of their research and statistical functions:

Most central registers are also unable to fulfill their research and statistical purposes because they provide one-dimensional, statistical summaries that offer only the roughest profile of limited segments of the protective process in their community or state. The forms used by most protective agencies to send information to the register are brief, containing little more than the rudimentary data mandated by the child abuse reporting law. Hence, the only statistics usually available describe the total number of cases reported, the ages of the children involved, the type of alleged abuse and neglect, the source of the report, and, sometimes, the alleged perpetrator. But this information offers little understanding about the children and families involved; missing are the vital and sensitive data that would explore and document patterns of abuse and neglect and variations in family status, treatment programs, and dispositional alternatives. Because of complicated and fragmented reporting procedures, many reports received by child protective agencies or the police are never forwarded to the central register. In some states, failure to provide printed forms for making uniform reports to the register is an additional obstacle to collecting complete data.[8]

Front line protective service workers feel little commitment to attempting to improve the system. They feel that the volume of "paper work" required from them for various reporting requirements (title XX, courts, administrative etc.) already infringes on their availability to provide services to children and families.

They feel they provide volumes of input and receive no useful feedback. They feel threatened by a system that monitors their performance and feel protective toward their clients. When asked, many protective service workers will admit that they do not send in reports on unfounded cases because of poor expungement procedures or total lack of expungement procedures. Workers feel that if they have conducted an investigation and determine a report to be unfounded, then those reports should stop there and not be entered into a system which maintains names on file. There is less resistance to submitting statistical data on unfounded reports. Many state offices have concluded, however, that the workers may be conducting cursory investigations or making arbitrary case decisions; therefore, the state office wants to make the ultimate decision as to whether a case remains on file as founded or unfounded.

The problems and controversies surrounding central registries will probably continue. The constitutionality of methods with which states are implementing their central registries will probably be tested with court actions such as *Sims vs Texas,* 438 Federal Supplement 1179 (Southern District Texas 1977). Douglas Besharov described this decision in a memorandum to NCCAN staff dated 28 July, 1978. In this decision "the court held that the method that Texas used to implement its statutory provisions for a central register was an unconstitutional infringement on the rights of parents. The Court's decision seems rooted in the Courts concern that:

(1) persons listed in the register were not given notice of their being in the data system; were not given access to the data; and had no opportunity to have the material in the register amended, expunged or updated, and

(2) cases were labelled as proven based merely on social work investigations without judicial review."

Besharov further states that this case is "a clear sign that the courts can now be expected to accept challenges to the operations of state register systems and, when necessary, order changes in their operations when they do not comport with the fundamental due process requirements."

Until the problems are solved, front line protective service workers will continue to "fill out the forms" and do what is required without committing themselves to the success or failure of the system.

Fortunately "hotlines" seem to be working effectively for reporting in spite of the failures of the central registries. Although the central registry staff may not be able to immediately search the system for previous reports, the hotline does provide the effective means for anyone to report a suspected case of abuse or neglect at any time any day. The usual procedure is for the call to be received at the state office through a toll-free number, be logged in and immediately referred to the local agency in the city or county where the family resides. There are variations in how the local agency handles after-hours calls from the hotline. Some agencies have workers "on call" with that list of "on-call" available to the hotline staff; others have police pick up on the after hours reports, and a few have hired workers to work the night and weekend shift. There are also variations in requirements for responding to a

report after hours. Some jurisdictions allow no screening with workers being required to immediately respond to every report. The fallacy in this requirement is obvious. For example, a school teacher may finally get up the nerve at 10 o'clock at night to report a case of chronic neglect to one of the children in the classroom. Although screening is generally not advised, it would be ridiculous to attempt to see the family that late at night regarding that report. Most jurisdictions use the approach of weighing the seriousness and urgency of the described situation. If there is *any* chance that a child is in imminent danger, the worker immediately investigates. Many jurisdictions have agreements with the police to accompany the worker on night investigations.

Investigation and verification of reports

Whether a report of suspected child abuse or neglect is made to a toll free hotline or directly the local protective service agency, the agency *must* conduct on investigation to determine if neglect or abuse exists within the family. If the report is validated, the appropriate intervention must be identified. Even in those states in which other agencies are designated to receive reports, protective services is often called in on the investigation with the assumption that they will ultimately be working with the family if abuse or neglect is established.

However, because the goal of intervention is treatment and the initial step is the investigation, workers often question whether or not the investigative process is at cross purposes with the remaining (treatment) process. The *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects* suggest that the local social service agency "assign specific staff for the purpose of *intake* (receipt and evaluation of child abuse and neglect reports) when the Local Unit has two or more child protective service workers" and "assign specific staff for the purpose of *treatment* (provision and/or obtainment of services and resources to meet the needs of the child, individual members and the family as a unit) when the Local Unit consists of two or more protective service workers."[9]

Those agencies which have separated out the functions of intake and treatment have found that it reduces the amount of worker burnout attributable to constant role conflict of investigation/helper, and ensures that the Unit has staff with expertise in each phase of the child protective process. Those agencies which do not have separate intake and treatment units often justify the single unit on the basis of continuity and stability for the families involved. If, however, the agency provides guidelines for the smooth transfer of cases, the result should be effective handling of reports, and investigations, and appropriate and effective services for those cases requiring follow-up. It should also reduce the worker complaint of having time for little more than investigation and crisis intervention. The effectiveness of the division of function is, of course, dependent upon manageable caseloads. The *Federal Standards* suggest a ratio of one intake worker to every twelve to eighteen reports received each month and a ratio of one treatment worker to every 20-25 cases.[10] The unfortunate current reality is that many protective service workers are carrying combined intake/treatment caseloads of approximately 70 cases.

Whether intake and treatment are separate or single units, the investigation and validation processes should be the same. There are three basic steps in the investigative process:

(1) Receipt of the report
(2) Investigative interview and observations
(3) Information gathering and case decision

Receipt of the report: The report of suspected abuse or neglect may come from a number of sources. The *American Humane Analysis of Child Abuse and Neglect Reporting* indicates that almost 45% of the reports come from friends/neighbors, relatives or other (non-professional relationship with family). Law Enforcement, Educational and Medical professionals each account for approximately 11% of the reporting. The American Humane also indicates that "Aside from medical examiners who referred only 29 cases, the source of the reports with the highest validity rate was school nurses (67.1%) of all cases). Validity rates for private physicians and hospital/clinic physicians were also relatively high; 60.1% and 64.4% of all cases. Anonymous reports accounted for the lowest validity (27.2%) rate followed by friends, neighbors and relatives (37.8%)."[11]

These figures do not mean that the reporters were malicious in their reporting, nor does it necessarily mean that they were inaccurate in their suspicions. In many situations the reporting may reflect poor parent-child interactions which do not justify legal intervention.

Whether the report is validated or not, the protective service agency must be supportive of the reporter's decision to report. Most reporters feel better about having reported a suspicion if they are given feedback as to the results of the investigation. However, there are often strong regulations against providing such feedback to all who report. Some states have included or interpreted their reporting statute to allow providing feedback to a professional who is mandated to report. The *Model Child Protection Act With Commentary* states "A person who makes a report of suspected abuse or neglect should be informed of the disposition of his report, and, particularly, whether the investigation verified his suspicion. If he is not told what will happen, he may feel isolated from the efforts to protect the child; he will not learn the validity of his diagnosis; and he will not know the consequences of his report. Feedback reinforces the positive purpose of reporting in the mind of the reporter and will determine to a great extent, his willingness to report in the future." The Act further states, "The amount of information provided should be limited by the child and family's right of privacy and should also depend upon the source of the report. Thus only the person in charge or a physician is to be given a summary of the investigation's results."[12]

Provisions such as this do much to promote interagency cooperation and reduce "turf guarding." However, it does little to support the non-mandated reporters who often have had to muster up much internal support to even make the report. Because of the parent and child's rights to confidentiality there is little that can change the

situation. Most non-mandated reporters are comforted by a letter from protective services which thanks them for their concern and states that the agency is checking into the situation. This, at least, assures the reporter that the report has not been ignored.

Some reporters wish to remain anonymous. This creates difficulty for the person who must conduct the investigation, but, the reporter's reasons must be understood. Some fear retaliation, some fear having to testify in court. The difficulty for the investigator arises if further information is needed. It is important for the intake unit to be certain to get all the information (from both anonymous and non-anonymous callers) that is needed to locate the family; provide emergency assistance; and, identify additional sources of information about the family.

Upon receipt of the report some agencies initiate a routine records check. Those which have central registries check that source, others check internal agency files. Local policy and procedure determine whether other agency records can be checked prior to contacting the family. Even if obtaining information prior to making contact with the family is legal within the particular community, it could still affect the investigator's credibility with the family if they later become aware that the information was collected without their knowledge.

Investigative interviewing and observation: After receipt of the report and initial record checking it is necessary to gather information which will determine:

(1) Whether neglect or abuse is occurring;

(2) The safety of the child;

(3) What type of intervention is most appropriate to help the family and assure the child's continuing safety in the home.

Interviewing is probably the most important but most difficult part of the information gathering process. Too often, a protective service worker, uncomfortable with the role of investigator, makes a home visit in the guise of a visit from the friendly social worker just checking to see how things are with the family. With proper training and community support, the protective service worker can become comfortable with the knowledge that in order to fulfill the responsibility of child protection, an investigation must be conducted as the beginning of the helping process. Certain guidelines can make the process easier. Investigative interviews are most productive and the information gathered more useful either for future treatment or possibly court proceedings if the worker:

(1) commits to memory the charges in the report

(2) formulates the goals that the interview is to achieve i.e., ascertain validity of the report and determine if child is in immediate danger

(3) determines the content of the interview e.g., history of the injury, type of medical attention sought, family dynamics, social history and context in which the family lives.

Protective service workers are rarely welcomed warmly into the house. They regularly must face strong hostility and occasionally violence from the parents. In some of the "rougher" communities protective service workers feel that they are put in a position of no defense because they, unlike the police, cannot go into a situation of domestic violence with the protection of a gun. Instead, the worker must attempt, often in a very short period of time, to develop rapport and a trusting relationship. This is accomplished through the worker being honest with the family about the fact that the interview is part of the investigative process and through a discussion of the issues of confidentiality.

Protective service workers on the whole do not issue Miranda warnings. Yet there are situations in which the cases they investigate do face possible criminal prosecution. Many workers do not feel that their procedure is secure and that eventually they will either have to issue Miranda warnings or that investigations will be turned back to law enforcement. Currently in those situations in which there is a suspicion of criminal activity, protective services usually immediately refers it to the county or district attorney for criminal investigation.

Information gathering and case decision: After conducting the interviews and record checks, the protective service worker assesses the information and makes a decision concerning the needs of the child and family. Ideally, the protective service worker will have the opportunity to share the findings with a team of professionals who will assist in the evaluation and decision-making process. Some cases are so complex that it requires the professional expertise of several disciplines to make a determination on the needs of the child and family. In addition, the greater the chance that the investigator's decision will be contested by the parents, thus requiring resolution by the courts, the greater the need to "build a case" that will stand up under the admissible rules of evidence.

Not all cases will end up in court, nor does lack of admissible evidence mean that a case will be closed. However, there is a process of evaluating the information which is not only useful if the case does eventually require court intervention, but also helps the investigator marshall the information he or she has gathered in such a way as to support whatever case decision he or she makes. The process of evaluation does not end at the case decision, but continues until services to the family are terminated. This process for making the case decisions is:

(1) *Focus on the allegations in the complaint:* Since these are the reasons for the investigation, the information gathering presumably focused on discovering whether they are true or false and the case decision must reflect this focus. This does not mean that the investigator cannot list additional allegations of abuse or neglect as a result of the investigation, but it does mean the report must address itself at a minimum to the allegations in the initial complaint.

(2) *Determine the facts obtained in the investigation that support or refute the allegations in the complaint and/or additional allegations of abuse or neglect determined by the investigator.* A fact, within the context of the investigative report, is any statement that can be supported by information gathered during the investigation. It is helpful to investigators if they can conceptualize in their own minds, what the facts of the case are. Often, at this stage, they are not very conclusive. For example, if

a child sustains an injury that does not seem to fit the parents' explanation, the facts that can be established are:

(A) child sustains an injury of a certain type

(B) the parents explained the injury in a certain way

(C) the cause of the injury is in question

Facts are not opinions or judgments. If, for example, a mother says she locks her 2-year old in the closet when he misbehaves, the statement of fact would be "mother reports locking her 2-year old child in the closet when he misbehaves." Saying that "mother's discipline is inappropriate" is an opinion based on measuring the mother's behavior against the investigator's standards of appropriate parenting.

(3) *List the evidence that substantiates the facts:* Evidence can be in the form of statements of parents or other people interviewed during the investigation, observations of the investigator, and records, photographs, and x-rays. The more "contestable" or "subjective" a fact is, the more evidence that will be required to prove it. For example, the investigator may first state as a fact, that the parents' explanation for an injury is incorrect. The evidence to substantiate that fact should include medical evidence which proves that the injury could not have occurred as stated and that physical circumstances of the home make the explanation an impossibility.

(4) *Conceptualize all professional judgments relating to the possible existence of abuse of neglect:* In many cases, the social worker conducting the investigation will reach conclusions concerning the existence of abuse or neglect that represent his or her professional judgment. The fact that some of these judgments may not be supported by "hard evidence" should not preclude the worker from making them or even including them in the record themselves. However, it is most important that such judgments or conclusions be clearly labeled as such. Such professional judgment could include a statement about the degree of emotional bonding between a parent and child.

(5) *Determine the child's immediate safety in the home:* In addition to substantiating or refuting the allegations in the complaint, the investigator is also responsible for determining the child's immediate safety in the home, and for taking the necessary steps to protect the child from harm during the investigation itself and during the treatment.

There are five basic decisions that are made as a result of the investigation:

(1) Abuse and/or neglect *does not* exist - no services needed - case closed.

(2) Abuse and/or neglect *does not* exist but family should be offered other services.

(3) Abuse and/or neglect *does* exist and family will cooperate with voluntary services.

(4) Abuse and/or neglect *does* exist and family will require a court order for treatment or protective services supervision.

(5) Abuse and/or neglect *does* exist and the danger to the child is so immenent that he or she should be removed from the home—either with the parent's consent or with a court order.

Protective Custody: There are variations in state laws as to who has authority to take emergency protective custody of a child. However, the legal standards for protective custody are usually set forth in the State Reporting Law, The Juvenile Court Act or the Criminal Code. Generally, a child can be placed in protective custody when there is imminent threat of substantial harm or injury to a child if the child were to remain in the custody of its parents or caretakers. If the child is placed in protective custody all states require that a child abuse or neglect petition be filed in the juvenile court within a short time thereafter and a custody hearing be held shortly after the petition filing.

The decision as to whether a child is in imminent danger may be the most crucial step in the investigation. Although it is difficult to think about removing a child from his or her parents it is more difficult to think about the possibility that the child could die during the investigation process. There are certain considerations which help delineate whether a child could be in need of protective custody:

(1) The maltreatment in the home, present or potential, is such that a child could suffer permanent damage to body or mind if left there.

(2) The child is in need of immediate medical and/or psychiatric care and the parents refuse to obtain it.

(3) The child is already physically and/or emotionally damaged by the home environment and requires an extremely supportive environment in which to recuperate.

(4) The child's age, sex, race, physical or mental condition renders him/her incapable of self-protection . . . or for some reason constitutes a characteristic the parent finds completely intolerable.

(5) The evidence suggests that the parents are torturing the child, or systematically resorting to physical force which bears no relation to reasonable discipline.

(6) The physical environment of the home poses immediate threat to the child.

In addition, if the following findings are accompanied by evidence of physical or mental injury from abuse or neglect, they can be a signal for the need for protective custody:

(1) Parental anger and discomfort with the investigation which will be directed towards the child in the form of severe retaliation against him or her. Such information could be gained through a review of past parental behavior, statements and behaviors of parents during the investigative interview or reports from others who know the family.

(2) Evidence suggests that the parents are so out of touch with reality that they cannot provide for the child's basic needs.

(3) There is a history of the child being hidden by the family from the authorities.

(4) There is a history of prior offenses or allegations of sexual abuse, child abuse, or child neglect.

(5) There is total resistance to the investigation by the parents.[13]

Case assessment and case plans

If a report of suspected abuse or neglect has been validated, it is the responsibility for child protective ser-

vices to provide or arrange for services for that family. Many families cooperate with protective services because of the family's honest desire for help, others cooperate as a means of avoiding going to court for non-cooperation. There are situations, however, in which it is clear from the beginning that the family will only cooperate through court intervention: Those situations usually requiring *court intervention* are:

(1) When social services is unable to properly investigate a report of suspected child abuse and neglect because of the family's unwillingness to cooperate;

(2) When the social service investigation indicates the need for social service but the family refuses to accept such services and the child is in substantial danger;

(3) When the social services investigation indicates the need for removal of the child from the home. (In some states, removal and temporary placement of a child may occur through voluntary agreement betweeen the family and the social worker. In such cases, court involvement may not be necessary. However, because of the serious nature of such an agreement and because the agreement may be obtained as a result of actual or implicit threats of a referral to court, many states now require juvenile court involvement in any decision to remove a child from the home.)

(4) When social services feels certain programs or services are indicated for the family, but eligibility and/or funding for such programs are conditioned on the child being a "dependent" child of the juvenile court.

(5) When the family is already under the authority of the juvenile court and a modification of the original court order is desired, it is necessary for social services to refer the case back to court;

(6) When it is decided that permanent placement and/or adoption of the child is desirable, it is necessary to terminate the parental rights of the natural parents. In every state, court action will be necessary for such termination. In most states, the action will be heard by the juvenile court. In some states, a termination proceeding must be brought in another civil branch of the county court.[14]

Whether the family voluntarily cooperates with protective services or the court intervenes, it is necessary to gather information concerning the child, the family members, and the circumstances of their lives. The purpose of this process is to determine why abuse or neglect is occurring and to identify areas in which treatment can help. To be useful to the court or the treatment provider, the assessment should identify problems, strengths and needs.

The case assessment usually includes: basic factual information on the family; a brief summary of the family's contact with other agencies; the family's perception of the incident of abuse or neglect; the worker's perceptions and any discrepancies between the two; strengths and weaknesses in the family's ability to care for their children; and a description of events in the parents early lives that formed their ideas of child rearing.

It is possible for a social assessment to include much of the information which should be included in a case record as a protective service worker prepares for a court hearing. Most important is the manner in which the assessment and case record is written. Effective records are written with clear and precise language which reflects what is actually happening in the family. Reports which are filled with jargon frequently reflect a worker's uncertainty about what is going on. Terms such as "inability to accept reality" should be replaced with a statement that describes the behavior which would lead to the generalization.

Protective service workers must also be cautious during the assessment process to avoid labeling, e.g., "infantile," "immature." Again, such terms should be replaced with specific behaviors.

Personal judgment and gut reactions are a part of most assessment processes. However, both for record keeping and for possible future court references they must be identified as judgments.

Some of the more successful protective service workers make certain that their opinions and judgments are not the only ones reflected in the record but also those of the parents. In such situations a court is able to more easily see the situation from the point of view of the worker and from the parent's point of view. For those cases not referred to the courts, the parents are able to feel that everything is not going on behind their backs and that they are active participants in the process.

If a protective service worker will be testifying in court, it is vital to talk with the attorney for the petitioner (county attorney, agency attorney, etc.) before the hearing to review the information with him or her. Not only is it necessary to review the assessment with the attorney but, because often other witnesses have been interviewed, it is important to discuss the need for other witnesses and documents. Unfortunately, in many cases, the meeting takes place minutes before the hearing begins. Such arrangements result in less effective testimony from the protective service worker and often incomplete assessments of the family situation and safety of the child.

Case planning is based on the information gathered during the investigation and assessment processes. For those cases which are referred to court, it is advisable to have a tentative treatment plan developed prior to the hearing. For those families not requiring court intervention, the treatment plan should be initiated immediately after the assessment of strengths, problems and needs has been completed.

The case plan is a plan to establish a safe environment for the child and if at all possible, maintain the family as a unit. The process includes:

(1) setting goals for treatment which when achieved, will result in a safer environment for the child;

(2) formulating objectives which are measurable and observable, state a level of acceptable performance and contain a time-frame for completion;

(3) identifying service alternatives, types of resources, programs and activities by which the goals and objectives can be met;

(4) selecting specific services based on the problems and needs of the family, objectives set and availability of services in the community.

The protective service worker often must overcome several hurdles in attempting to develop a treatment plan which provides for a safe environment for the child *and* which will engage the family's commitment and cooperation. The purpose of a treatment plan is to change someone's behavior yet, ultimately people do not change their behavior unless they commit themselves to making those changes. This sometimes means that much of the initial case planning is focused on involving the family rather than working only on the neglect and abuse related problems.

Sometimes families are willing to cooperate in such a way that the worker and the family develop the plan together. Others do not involve themselves with the planning at all. In such situations, the worker usually develops the plan and presents it to the family. Instead of presenting it as a hard and fast document, ideally it is presented as a basis for further development.

The ideal situation for effective case planning is accomplished when an agreement for services is developed. It specifies what the social worker is to do to help the family meet its goals, what the parents (and children, if appropriate) are to do, and the estimated length of time required. The agreement should also specify the consequences of violating the agreement and the procedures for redeveloping the agreement before the date set for review.

Treatment and Referral

Protective service agencies most common type of treatment for abusing and neglecting families has been a casework relationship. Most workers would like to continue in the role of therapist for these families, in fact entered into the field of protective services with that role in mind. However, because of heavy caseload most workers are carrying, *and* because of the amount of intensive support and treatment each family needs, protective service workers are finding it more and more difficult to meet the needs of the families. Many communities are developing multi-discipline teams which provide case consultation and promote interagency cooperation. It is often through the team consultation that a full range of resources are identified which could be used to help a family deal with its problems.

Once alternatives to casework counseling are identified, protective service workers assume the role of case manager to make the referrals, coordinate and monitor the services.

Community resources which have been identified as responsive to the needs commonly evidenced by abusing and neglecting families are:

(1) community mental health
(2) parent aide or lay therapist programs
(3) public health nurses
(4) homemaker services
(5) parents anonymous
(6) priests, rabbis and ministers
(7) therapeutic day care centers
(8) school counseling services
(9) vocational counseling services

Summary

Child abuse and neglect reporting laws which have been enacted in all states since the 1960's have had a direct impact on the roles and responsibilities of Child Protective Service Agencies. These agencies have been inundated with reports of suspected child abuse and neglect. The result is that many agencies do not have enough staff to meet the demand of investigating the reports and providing services to the families. In addition, in those agencies in which the functions of intake and on-going services have not been separated, the child protective workers often find themselves in a role conflict of investigation/helper.

Many workers are now finding themselves in the role of case manager rather than direct service provider. This is a successful approach to working with abusing and neglecting families. If the protective service worker has conducted a thorough assessment of the family's strengths, problems and needs, the treatment needs can be met through an array of community resources. The protective service worker in such situations is responsible for the referral, coordination and monitoring of the services provided to the families.

Many problems continue to exist for child protective service agencies. Progress is being made in many communities but much is dependent upon cooperation of the full range of community resources including the courts, attorneys and representatives to the state legislature.

FOOTNOTES

1. Kempe C. Henry et al "The Battered Child Syndrome" Journal of the American Medical Association 181:1:17-24, July 7, 1962.
2. *Child Abuse and Neglect State Reporting Laws,* National Center on Child Abuse and Neglect, May 1978, p. 15.
3. *National Analysis of Official Child Abuse and Neglect Reporting* American Humane Association, Denver, Colorado 1978, p. 13.
4. *Model Child Protection Act With Commentary* (draft) National Center on Child Abuse and Neglect DHEW August 1977, p. 1.
5. Besharov, Douglas Esq. "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect" *Villanova Law Review* Vol. 23, No. 3, 1977-1978, p. 501.
6. Ibid.
7. Whiting, Leila "The Central Registry for Child Abuse Cases: Rethinking Basic Assumptions." *Child Welfare,* Vol. 201, No. 1, Jan. 1977, p. 763-765.
8. Besharov *Villanova Law Review,* p. 504.
9. *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects* (draft) National Center on Child Abuse and Neglect DHEW March 1978, p. 111-79.
10. Ibid. p. 111-81
11. American Humane, p. 12.
12. *Model Child Protection Act with Commentary,* draft August 1977, p. 96.
13. "We Can Help: Specialized Training for Law Enforcement Professionals," National Center on Child Abuse and Neglect, DHEW, p. 16: 74-75.
14. "We Can Help: Specialized Training for Social Work Professionals." National Center on Child Abuse and Neglect, DHEW, p. 13-86.

C. General Role of the Courts in the Child Protective System

Vincent DeFrancis, *The Court and Protective Services; Their Respective Roles* **(American Humane Association, n.d.), 10-16.**

Origin and Philosophy of the Juvenile Court

Such a court may be a special court created to handle only matters relating to children; or it may be a special part of a county, district or probate court. In some jurisdictions it is a specialized court with broad jurisdiction covering marital or family problems as a Domestic Relations Court or a Family Court.

The first juvenile court in the world was established in 1899 in Cook County, Illinois. An interesting sidelight, in view of the subject matter of this meeting, is the little known fact that Child Protective agencies, which came into being some 25 years earlier, played a major role in promoting legislation for these socialized courts for children.

Most juvenile courts have exclusive jurisdiction over dependent, neglected or delinquent children within age limits prescribed by law in each state. A 1957 National Probation and Parole Association report shows that about 75% of these states fix the maximum juvenile court age at 18, seven states at 21, and five states use 16 as the jurisdictional age limit.[2]

Basic to the court's philosophy is the concept of nonpunitive, individualized justice for children—thus, help and treatment are substituted for punishment, with focus on the child and his needs—not the offense.

The Court's Need for Auxiliary Services

With treatment and rehabilitation generic to the court's approach to children's problems the availability of treatment resources adapted to meet the range of special needs of children becomes an absolute necessity. Commenting on the many lacks in this area Judge Mary Conway Kohler says:

> "...the most cursory examination shows that treatment facilities which are necessary tools for the courts in rehabilitating young people have not kept pace with the increased needs. Facilities and services of sufficient variety to meet the wide range of problems presented by the many children for whom the court must accept responsibility have never been established."[3]

In many parts of the country, the lack of child care and treatment resources, for that matter the very absence of basic Child Welfare services, made it impossible for these courts to plan constructively for children who needed placement away from home. The urgent necessity to implement court planning for these children forced some courts to develop child care and other services within their own administrative structure. Thus, many juvenile courts found themselves saddled with auxiliary facilities and services for children simply because no voluntary or public agency was available to provide such resources as shelter care, detention care and institutional or foster care.

Once embarked on a plan to provide such child welfare services, some courts were able to develop well-structured programs to serve broader community needs. However, heavy community dependence on the court sponsored services blocked assumption of this responsibility by other public and voluntary agencies.

The Court—A Judicial Agency

The propriety of the Juvenile Court's entry into the broad area of child welfare services has been seriously questioned by many of its judges. The consensus supports a position that the judicial function of the court should not be adulterated by bringing into the court structure facilities and services more appropriate to an administrative social agency setting. Some views even go so far as to say that probation services, since they are a helping service, should be separated from and made administratively independent of the court with its law-centered responsibility. The pattern for probation services in Los Angeles is cited as an example of this kind of administrative division of responsibility; and there is a growing movement in New York City to set up a separate probation division to serve all courts in that city. But this is an extreme view, not widely held.

Judge Harry L. Eastman, Presiding Judge of the Juvenile Court in Cleveland, recently expressed a view which represents a logical position on the need for the court to examine its role with respect to responsibliity for broad Child Welfare services.

> "Some juvenile courts have had a tendency to assume more and more the coloration of social agencies, something they were never designed to be. Judges have allowed themselves more and more to be regarded as agency executives... The judge is depicted over and over again as a social caseworker, a psychiatrists, a family counsellor and—perhaps most commonly—as a kindly old coot like Dr. Christian who fixes things up for everybody...
>
> "This results in part from the generally sentimental attitude of the public toward juvenile courts. It also results from the tendency of the courts themselves to take on administrative functions in the child care field that properly belong to social agencies... We have failed to check this tendency for our courts to become administrative agencies in the Child Welfare field... Had the court restrained its activities strictly to the exercise of its judicial function, its position in the welfare field would have remained clear and well defined."[4]

The Court's Role in Child Protective Services

Now, what about Child Protective Services—the particular topic under discussion? Is this service an area of Child Welfare services which courts in some communities found necessary to provide?

The absence of an administrative child protective agency in many states prompted juvenile courts in those areas to receive and investigate complaints of child neglect. In many communities, services to children and parents were offered by the courts on an "informal basis." This seemed a logical development because juvenile court law grants the court jurisdiction over neglected children.

A. Investigation of Complaints Not A Court Function.

Unlike most other types of services to children which the courts adopted by default, investigation of neglect cases involves services which are initiated and extended before the court has legal jurisdiction. Investigation of such complaints precedes the filing of a petition which is needed to bring cases within the court's jurisdiction. With many neglect cases requiring casework services to remedy the situation without recourse to formal court proceedings and adjudication, these courts found themselves providing distinct and identifiable social services. Probation staff time was being diverted from the court's service to adjudicated cases. Acceptance of responsibility for services to neglected children drained funds and staff from more basic probation services so that in many courts the effectiveness of probation and protective services was materially reduced by a dilution of both programs.

These courts deserve real credit and praise for their willingness to fill a gap in community services so that neglected children could be helped. However, aside from the question of whether protective services are a proper function of the court, it seems a high price to pay if this laudable effort results in weakening the court's probation service.[5]

A strong advocate of high standards in probation services, Judge Donald E. Long of Portland, Oregon, summarized this very predicament:

> "A few years ago in my own community our court staff was burdened with disproportionate numbers of so called 'protective cases.' Their primary function of meeting the needs of delinquent youth referred to juvenile court was being preempted by time-consuming neglect cases. In cooperative planning with the court and police officials, public welfare assumed responsibility for these neglected children, thus relieving the court of an administrative function which the other agency might handle more approriately."[6]

No one would question, even for an instant, that the juvenile court plays a role—in fact, a vital role—in the process of protecting children. If any question exists it relates solely to the issue of whether Child Protective Services, as we discussed and defined them earlier, are an appropriate function of the court.

Looking at this issue from another aspect we might ask, "Is it consistent for the juvenile court with its judicial function and responsibility to also provide child protective services, an administrative function and responsibility?"

The answer can only be, "No, it is not consistent with the court's basic purpose and function!"

At the risk of being redundant, let's explore this further.

As we defined and discussed them earlier, Child Protective Services may be given by a public or voluntary administrative social agency. This agency must be divorced from the judicial function so that in such cases as are brought to the court, the evidence presented can be reviewed objectively by the court.

If the court's own staff were to investigate neglect complaints, the judge would have the un-enviable task of adjudicating neglect petitions on the basis of evidence produced by his own subordinates. While we know that the court would not be likely to lose its objectivity, such adjudications could become questionable and suspect in the eyes of the very people the court is trying to help.

This position is supported by many authorities. A clear statement on this issue is found in "Standards for a Specialized Court," where on page 11 is found this statement:

> "It seems clear that investigation . . . and the filing of a petition are not appropriate functions of the court. A court through the use of its own staff should not be placed in the position of investigator and petitioner and also act as the tribunal deciding the validity of the allegations in the petition. Generally, therefore, investigating complaints and filing petitions require services proper to the . . . administrative agency providing protective services for children . . . vested by law with these functions."[7]

Similar support is found in a report of the National Agencies Workshop on Child Protective Services, published by The American Humane Association.

> "Reference was made to the responsibility of the juvenile courts in the area of accepting and investigating complaints of neglect. The Workshop strongly felt that complaints of neglect should be referred to the public or private agency in the community charged with responsibility for the protective function; with the court's function lying in the area of acting on requests for a petition of neglect. The distinction was made that a complaint 'reports a condition of neglect which needs exploration' while a petition of neglect is a 'formal application to invoke the judicial authority of the court' after the agency's investigation has found a condition serious enough to warrant authoritative action from the court."[8]

There is an even stronger reason why the casework aspect of Protective Services is not a court function. Judge Long touched upon it when he spoke of "time-consuming neglect cases." Exploration of a neglect complaint requires more than mere investigation. In addition to finding out the facts of neglect, the child protective agency must provide the skilled social services inherent to its function and necessary to improve the situation. Its focus on helping parents become more responsible results in the adjustment of a majority of neglect situations without the necessity for action in the juvenile court. Thus, the court is called upon to adjudicate only a small percentage of neglect situations—variously estimated as between 7% and 10% of the total annual caseload of a good child protective agency.

This is where the cooperative and complementary roles of the two agencies begin to emerge.

FOOTNOTES

2 "National Probation and Parole Association Directory," National Probation and Parole Association, 1957.
3 "Child in the Courts," *Reference Papers on Children and Youth*, 1960 White House Conference on Children and Youth.
4 *National Probation and Parole Association Journal*, October 1959.
5 "Community Cooperation for Better Child Protection," The American Humane Association, 1959.
6 *Child*, U. S. Children's Bureau, March-April 1960.
7 "Standards for a Specialized Court," U. S. Children's Bureau, 1954.
8 "Report of National Agencies Workshop on Child Protective Services, Part I," The American Humane Association, 1957.

Jay Olson, Memorandum (National Center on Child Abuse and Neglect, 1979)

There are good reasons why the judge should confine his duties to judicial functions. Some of the more pertinent reasons are described below:

(1) It's virtually impossible for the judge to spend most of the day in hearings and also carry out the day to day administrative tasks.

(2) Most judges do not come to the bench with either the education or experience to administer or supervise social service functions.

(3) When the judge is both judge and administrator of services, he creates a possible conflict for himself, since he may be called upon to pass judgment upon what is in effect his own action and program. For example, if the parents of a child receiving services or care wish to raise an issue about the care and/or treatment their child is receiving, their appeal is to the judge that made the disposition. The judge is no longer ruling on the merits of the case. He is deciding to support or reverse his administrative decision.

(4) Judges are most often elected officials and court staff performing social service functions serve at the pleasure of the judge. Court staff, under these circumstances, may be intimidated. More importantly, they should be employed under a merit system.

(5) Judges, other than juvenile courts judges, do not have non-judicial administrative functions. No one has ever suggested that these judges administer a social service program. I'm confident that such judges would never suggest that they be given administrative duties.

(6) The trend towards the establishment and strengthening of administrative offices of courts with non judges administering judicial services further demonstrates the direction the judiciary is taking. The "sitting" judge is becoming less and less active in the day to day administrative tasks.

(7) The question of separation of powers is an issue. Human service programs, including social services are services appropriate to private and public administrative agencies. Public social services are vested in an agency within the executive branch of government. This provides appropriate checks and balances.

While you can tell that I do not favor court administered services, the reality of the situation is that juvenile courts, in some jurisdictions will continue to administer some services. If this is the case there should be some established guidelines:

(1) The judge should have a competent administrator and divest himself of day to day administration.

(2) The judge in cooperation with the administrator would establish policy and procedures for the court.

(3) Court staff should not serve at the pleasure of the judge but should be included in a merit system.

(4) The court, through its own staff should not investigate known or suspected cases of child abuse or neglect. This is more appropriate for a social service or protective service agency. More importantly the judge should not hear cases investigated by his/her own staff.

(5) The judge in cooperation with protective services agencies and officials of the justice system should develop written procedures for the handling of cases that enter the justice system which define roles, responsibilities, and rights of everyone involved.

D. Court Role in Coordination Between Professionals and Organizations Involved in Child Abuse and Neglect

National Center on Child Abuse and Neglect, *Federal Standards for Child Abuse and Neglect, Prevention and Treatment Programs and Projects,* **(1978) Standards D-1, E-5, E-6, E-7, E-8, I-8 DRAFT.**

Standards for State Authority—Administration and Management

Standard D-1

To coordinate, assist, and strengthen the state's child abuse and neglect prevention, treatment, and resource enhancement efforts, the head of the state department, as designated by state law, should convene a state child protection coordinating committee.

GUIDELINES

Ensure that the State Committee is composed of:

(1) representatives from State departments or State agencies providing or concerned with human services related to the prevention, identification, or treatment of child abuse and neglect, such as: Public Health, Mental Health, Mental Retardation, Education, Police, the Attorney General, Juvenile or Family Court, Youth Services, Public Affairs, and the Independent State Agency;

(2) representatives from minority groups and Indian tribes in the State.

Establish the following basic Committee objectives (in State Law or via the Governor's directive):

(1) assist the State Child Protective Services Division;

(2) convene task forces or sub-committees to focus on areas, such as: legislation; planning; research and evaluation; multi-disciplinary teams; budget; and the functions and policies of the Central Register;

(3) assist in the establishment of an Independent State Agency which is to oversee residential child care institutions and which is to assess reports of institutional child abuse and neglect;

(4) report child protection plans, issues, and concerns to the Governor and to the State Legislature in an "Annual Report on Child Abuse and Neglect Prevention and Treatment".

Develop a written statement which clearly identifies the State Committee's purposes.

Develop a written statement of operating procedures to include:

(1) appointment of the Head of the State Department, or his personal designee, as the chairperson;

(2) responsibilities of the chairperson and members;

(3) terms of service of the chairperson and members;

(4) frequency, dates, and locations of meetings;

(5) procedures for the conduct of meetings.

Encourage Committee members to make available to their departments or organizations copies of State Committee minutes and materials.

Encourage Committee members to send written reports to appropriate personnel in their departments or organizations which detail specific actions taken and directions proposed at meetings and to solicit their comments for presentation at future meetings.

Standards for Local Authority

Standard E-5

To foster cooperative, community-wide child protection efforts, the local agency should initiate the establishment of a community child protection coordinating council (community council).

GUIDELINES

Include representatives of local law enforcement agencies, the juvenile or family court, appropriate public, private, and parental organizations, and individuals of distinction in human services, education, health, law, and community life.

Insure that members are broadly representative of social and economic groups in the community.

Have no less than five and no more than fifteen members.

Assign the following responsibilities to the Community Council:

(1) coordinating and developing community-wide child abuse and neglect prevention, treatment, and resource enhancement activities;

(2) convening task forces or subcommittees to focus on areas such as planning, multi-disciplinary teams, training, community education, and funding;

(3) providing input into the Local Plan of Action (Cross-reference to Standard E-6);

(4) serving as a conciliation team in situations of institutional abuse and neglect (Cross-reference to *Standards for the Prevention and Correction of Institutional Child Abuse and Neglect*, Standard K-I-6, p. 229).

Require the Community Council to develop a written statement clearly identifying its purpose and overall responsibilities.

Advise the Community Council to develop a written statement of operating procedures including:

(1) a method for selecting the chairperson;

(2) responsibilities of the chairperson and committee members;

(3) terms of service of the chairperson and members;

(4) recommended frequency, dates, and locations of meetings;

(5) procedures for the conduct of meetings.

Prevention and Treatment

Standard E-6

The local unit and the community council should develop jointly an annual comprehensive and coordinated plan for the delivery of child abuse and neglect prevention and treatment services.

GUIDELINES

Identify key community agencies and individuals who are concerned with the child abuse and neglect prevention and treatment efforts.

Identify the personal and environmental forces that contribute to the child abuse and neglect problem, in general.

Identify the environmental forces that appear to have the most negative iompact in the community.

Recognize joint roles and responsibilities for prevention and treatment.

Identify information needed to develop the Local Plan of Action including:

(1) local demographic data;

(2) existing public and private prevention and treatment resources;

(3) comprehensiveness of existing public and private services;

(4) costs of existing public and private services.

Develop recommendations for a formal community needs assessment.

Determine whether necessary information for the needs assessment will be collected and analyzed by:

(1) the State Authority alone (See Standard D-6, p. III-55);

(2) the Local Authority in conjunction with the State Authority;

(3) a task force or individual appointed by the Local Authority.

Prepare a Local Plan of Action which:

(1) focuses on realistic, measurable, time-limited goals and objectives;

(2) includes action plans and specific milestones;

(3) describes monitoring and evaluation activities;

(4) coordinates with Title XX, Title IV B, health, and other planning processes.

Submit the Local Plan of Action to State Department, State Child Protection Coordinating Committee, and the County Commissioners or the Mayor.

Accept responsibility for change by:

(1) convening task forces or subcommittees that oversee implementation of the Local Plan of Action;

(2) developing contracts or agreements between the Local Unit and other agencies or organizations represented on the Community Council to delineate roles and responsibilities for providing or developing:

(a) advocacy services;
(b) support services;
(c) services for children and adolescents;
(d) services for adults;
(e) services for families;
(f) client participation services;
(g) emergency services;
(h) services for involuntary clientele;

(3) implementing (by each agency or organization represented on the Community Council) program policies that reinforce:

(a) child abuse and neglect reporting requirements and procedures;

(b) roles and responsibilities for consultation, technical assistance, public and professional education, and training;

(c) participation on the Multi-disciplinary Case Consultation Team;

(d) coordination of financial resources.

Contribute to State and local planning processes, policies and legislation.

Contribute to the State Child Protection Coordinating Committee's Annual Report on Child Abuse and Neglect Prevention and Treatment.

Standard E-7

The local unit and the community council should develop operational definitions of abuse and neglect to serve as the basis for local intervention strategies.

GUIDELINES

Base operational definitions on the State Law and on community standards regarding adequate physical and emotional care.

Define physical abuse, sexual abuse, physical neglect, emotional abuse and neglect and institutional abuse and neglect.

Obtain assistance in the development of the definitions from the State Division, the State Committee, and the Independent State Agency.

Use operational definitions as the basis for determining intervention strategies, such as:

(1) emergency and priority situations which require *immediate* intervention by the Local Unit; for example:

(a) all complaints of physical abuse;

(b) all complaints of sexual abuse;

(c) complaints alleging that children under the age of eight years are unattended;

(d) complaints alleging that children are without food;

(e) complaints involving children who are suffering from acute, untreated medical conditions;

(f) complaints alleging that parents of young children are psychotic, behaving in a bizarre manner, or acting under the influence of drugs or alcohol;

(g) complaints alleging bizarre punishment (e.g. locking a child in a closet, forcing a child to stay under a bed);

(h) complaints alleging that a child or an adolescent is suicidal;

(i) complaints involving abandonment;

(j) complaints from hospital emergency rooms concerning children under their care;

(k) self-referrals from parents who state they are unable to cope, feel like they will hurt or kill their children, or wish their children's removal and placement away from home;

(l) cases in which protective custody is authorized;

(2) situations which necessitate *immediate*, joint intervention of the Local Unit and the police; for example:

(a) situations requiring the exercise of protective custody authority;

(b) complaints alleging that crimes (in addition to abuse and/or neglect have been or are being committed;

(c) complaints suggesting that a child or a caseworker, or both, need protection against bodily harm;

(d) complaints alleging that it is necessary to secure forcible entry;

(e) a court order has been obtained and the parents refuse to allow the child to be removed.

(3) situations which require joint intervention of the Local Unit and public health or visiting nurses; for example:

(a) complaints involving a child's health;

(b) complaints alleging that parents are physically ill;

(c) complaints alleging that children are suffering from acute, untreated medical conditions or from sexual abuse;

(4) situations which require joint intervention of the Local Unit and homemakers; for example:

(a) complaints alleging unsafe housekeeping standards;

(b) complaints alleging that parents are physically or emotionally ill;

(c) complaints alleging that children under the age of eight years old have been left unattended;

(d) complaints alleging neglect;

(5) situations which require joint intervention with other disciplines;

(6) situations not considered to be the responsibility of the Local Unit.

Distribute the operational definitions and intervention guidelines throughout community services agencies.

Standard E-8

The local unit and the community council should establish a multi-disciplinary child abuse and neglect case consultation team.

GUIDELINES

Determine the geographic area in rural communities that can be served realistically by one Team.

Consider the establishment of more than one Team in urban areas when warranted by population density and number of child abuse and neglect reports.

Determine whether Team members can provide direct services to children and families, in addition to case consultation services.

Include as Team members individuals who have experience in case assessment, treatment planning, and case management and who represent, at a minimum, the following professions: physical health, mental health, social work, education, law, and law enforcement.

Include as Team members persons with knowledge or skills needed for specific types of cases (e.g., a representative from the military if there is a nearby military installment).

Require that Team members be directly involved in preventing or treating cases of child abuse or neglect (or supervise those who have such contact), have sufficient authority to accept referrals, and can fully interpret their respective agencies' policies and procedures.

Develop a written statement which clearly identifies the Team's purpose and its operating procedures, including:

(1) a method for selecting the chairperson;

(2) responsibilities of the chairperson and Team members;

(3) recommended frequency, dates, and locations of meetings;

(4) procedures for the conduct of meetings;

(5) procedures for case presentation.

Set guidelines for case presentation to include:

(1) any Team member or his designee can request that a case be reviewed;

(2) The Local Unit should present cases particularly when:

(a) specific treatment needs are unclear;

(b) numerous community resources and treatment services require coordination;

(c) it is questionable whether a child can remain safely in his home;

(d) a permanent plan of foster care or adoption is under consideration;

(e) the child's return to his own home is under consideration.

(1) analyze available information on the child, the family, and individual family members, to determine if additional information is needed for informed decision making;

Recommend that the Team perform the following functions, as appropriate, during case presentations:

(2) assess needs, strengths, and problems of the child, family, and individual family members;

(3) recommend short- and long-range treatment goals based upon needs and problems;

(4) identify potential problems in service delivery;

(5) determine which available resources within the community can be utilized for the child and/or family members;

(6) determine when the case should be presented for another review;

(7) determine when the case can be closed;

(8) promote the development of community resources for children and families that are needed but unavailable.

Require that Team members sign a written statement guarding the confidentiality of all information revealed during Team discussions.

Develop procedures for providing feedback to mandated reporters when this is authorized by State Law.

Develop mechanism(s) for resolving conflicts which might arise among Team members working on the same case.

Request that the Community Council conduct or arrange for an evaluation of the effectiveness with which services are coordinated by the Team.

Integrate results of the evaluation and Team members' recommendations for improved service delivery into a Local Plan of Action (See Standard E-6).

Cooperate with individuals and groups conducting bona fide research on child abuse and neglect, if the following conditions are fulfilled:

(1) the purpose of the research is valid;

(2) no information identifying children and families is made available, unless such information is essential to the research purpose;

(3) suitable provision is made to maintain the confidentiality of the information;

(4) acceptable research standards governing the protection of human subjects are followed by the researcher;

(5) the head of the State Department or Local Agency gives prior written approval.

Standards for Courts and the Judicial System

Standard I-8

Judicial system personnel should participate on the state child protection coordinating committee and on the community child protection coordinating council.

GUIDELINES

Cross reference to STATE AUTHORITY and LOCAL AUTHORITY, pp. III-45 and III-86.

Appoint representatives from the judicial system (including judges, attorneys, intake workers, and probation counselors) who are experienced in child protective court proceedings.

Promote coordinated planning and implementation of State and community child abuse and neglect prevention, identification, and treatment efforts by:

(1) developing case referral criteria;

(2) developing referral mechanisms;

(3) developing a cooperative scheduling system as to the time child protective proceedings will be held (e.g. with physicians and the Local Unit);

(4) planning programs, developing needed resources, and conducting evaluations;

(5) advocating the children and families;

(6) promoting public awareness;

(7) supporting professional training and education.

Participate in training and public awareness programs with other professionals, service systems, and consumers, to provide information on:

(1) the State Law;

(2) legal and operational definitions of child abuse and neglect;

(3) legal rights and responsibilities;

(4) court procedures followed by the judicial system (to aid persons from different disciplines who may become involved in child protective court proceedings);

(5) the use of expert testimony and qualifications for expert witnesses;

(6) the role of the judicial system in the prevention and treatment of child abuse and neglect.

Determine with the Community Child Protection Coordinating Council the role of judicial system personnel on the Multi-disciplinary Case Consultation Team (Cross-reference to LOCAL AUTHORITY, p. III-94).

Contribute to the Annual State Plan on Services for Children and Families; Annual Report on Child Abuse and Neglect Prevention and Treatment; and Local Plan of Action.

Commentary

Participation on the State Committee and the Community Council are means by which the judicial system can augment its role in child abuse and neglect prevention and treatment efforts. The judicial system has daily contact with cases which are prosecuted as well as with charges of abuse and neglect which are brought to court and then referred elsewhere. At the dispositional and post-dispositional stages of the court process, judicial system personnel are closely involved with all aspects of treatment and rehabilitation for the child and his family, i.e., decisions concerning the advisability of placement, social services for the family, and treatment resources. The judicial system's role in preventing a recurrence of child abuse and neglect also makes its active participation on the State Committee and the Community Council vital to coordinated efforts among all professions to prevent, identify and treat child abuse and neglect.

SECTION II.

Intake and Initiation of Court Action

The second section explores in more depth an important aspect of the courts' and child protective agencies' roles in child abuse and neglect cases: the process of commencing court proceedings. The first topic is the use of emergency removal from the home, which is initiated by court order or subject to court review within a short time after the agency's administrative decision. Discussion then turns to the process by which a petition arrives at the court. The major topics here are who, besides the child protective agency, should be permitted to bring a petition and what guidelines should govern the agency's decision to seek a petition. The final two topics concern the screening of petitions by the court staff or by lawyers representing (or perhaps independent of) the child protective agency.

A. Emergency Procedures

1. Emergency removal without court order is permitted in many states.

There are two forms of emergency removal. First, when the child is in the custody of his parents, social workers or police may have legal authority to take temporary custody if the child is endangered, even without a court order. Second, when the child is already in temporary custody, especially in a hospital, some states permit continuation of such custody without parental consent if the child appears endangered or in need of treatment.

After emergency removal, a court order is required within a short time, typically two or three days, if custody is to be continued without consent of the parents.

The case may not reach the court if the child protection agency releases the child or if the parents consent to extension of custody. In some states, however, judges must review these actions.

2. Emergency removal requires permission of the court in some states. A problem here is to arrange mechanisms through which court orders can be obtained rapidly when a child is clearly in danger, especially when the court is not in session.

If a judicial order is required, a judge should be continually available. In some states a verbal order, made over the telephone, can be used.

Written or telephone permission by the court intake staff is possible in some jurisdictions.

3. Soon after emergency removal, the case should be screened for possible early release of the child to his parents.

The child protective agency generally performs this initial screening.

Occasionally, however, court intake staff may investigate and suggest that the child be released or retained in custody. Some courts have prepared screening criteria to aid the intake staff.

4. Judges should carefully consider the consequences of granting requests for emergency custody orders.

Such orders may be appropriate when the child is in imminent danger.

However, if such is not shown, a precipitous removal may make an accurate assessment of parent-child interaction very difficult.

Such removals often engender reactions of rage and anger which may make the parents appear to be emotionally unstable.

B. Bringing Petitions to Juvenile Courts

1. There is considerable difference of opinion about whether, and under what circumstances, a person other than the employee of the child protective agency can file a petition.

Some courts require that complaints be brought first to the child protective agency. The agency then investigates and screens the case, reducing the court's workload. This restricts citizen access to the courts, although a person dissatisfied with the agency's decision can still attempt to file a petition in court.

A common, less restrictive procedure is for courts to request that the citizen voluntarily take the case to a child protective agency.

In some jurisdictions agency petitions are routinely accepted by the court, while petitions brought by others are accepted only at the discretion of the court after investigation.

2. Child protective agencies seek petitions in only a small portion of their cases, and agency standards for when a petition is to be filed have an important impact on the types of cases received by the juvenile court.

Many child protective agency regulations or social worker manuals establish written criteria for when social workers should seek a petition. Judges informally can influence the criteria for filings so that needless petitions are avoided. They can also ensure that social workers are not overly reluctant to seek court intervention.

In addition, judges may encourage agencies to establish guidelines for social worker preparation prior to filing a petition. Guidelines concerning, for

example, how to compile evidence sufficient to substantiate the petition would improve the quality of petitions and evidence received by the court.

C. Role of Juvenile Court Intake

1. The general trend is towards reliance on child protective agencies to investigate and screen complaints of child abuse and neglect.

2. Some courts, however, do screen some or all complaints to determine whether a petition should be allowed. Court intake officers may also investigate the case or may attempt informal settlement.

Some courts have produced guidelines for intake processing of abuse and neglect cases.

3. It has been suggested that courts use special attorneys to screen petitions, including those filed by a child protective agency, to insure legal sufficiency.

D. Screening by Others

1. A common method of screening cases before they reach the court is review by the lawyer representing the child protective agency or other petitioner.

A major question here is whether the agency's attorney (typically the city, county or district attorney) should be authorized to refuse the agency's request to file the petition.

Some courts automatically allow petitions when the petitioner is represented by a lawyer, while other requests are screened by a judge or intake officer.

2. It has been suggested that cases be investigated and screened by an agency separate from the court and from the child protective agency. This would insure a second review by an independent organization, but it is an expensive and time-consuming procedure.

Support Readings

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A. Emergency Procedures

Douglas Besharov, *The Legal Aspects of Reporting Known or Suspected Child Abuse and Neglect, 23* Villanova L. Rev. 458, 484-498 (1978)

IX. Protective Custody Authorizations

In most child abuse and neglect situations, the child need not be removed from his parents' care in order to protect his well-being and future development. Indeed, in many situations, removal may be harmful to the child. Children identify with their parents at a very early age, seeing them as models for and as part of themselves. Separation from parents can be experienced as a profound rejection, or the child can introject into his own self-image the parental inadequacy that led to the removal.[156] As a result, the child may see separation from his parents as a deprivation or as a punishment for his own inadequacy. The psychological wounds that can be caused by removing a child from his parents have been repeatedly described.[157] The conditions of foster care are frequently not conducive to a child's emotional well-being.[158] Furthermore, removal may hinder treatment efforts with the parents; it may destroy a fragile family fabric and make it more difficult for the parents to cope with the child when he is returned to their care.

But sometimes a child has to be removed from his parents' home for his own safety or as part of an appropriate treatment plan for the parents. When this happens, removing a child with the parents' consent is preferred, because resort to unnecessary legal coercion can be detrimental to later treatment efforts. In recognition of the importance of parental consent, a number of states require that the parents' agreement be sought before protective custody is invoked.[159]

Frequently, however, a child must be removed from his home without parental consent, and indeed against parental wishes, to protect him from further harm. In such situations, the preferred method of removing a child is through a court order. As in all situations in which individual discretion is preeminent, there is always the danger of careless or automatic, though well-meaning, exercise of the power to place a child in protective custody. Prior court review lessens such dangers by ensuring that a judge, an outsider, reviews the administrative decision to place a child in custody. Indeed, police and child protective agencies having authority to remove a child against the parents' wishes are often hesitant to do so without court authorization and often seek court approval before placing a child in protective custody.[160]

Nevertheless, sometimes removal must occur before court review is possible because, in the time it would take to obtain a court order, the child might be further harmed or the parents might flee with the child. In all states, the police are authorized to take a child into protective custody, either under specific child protective legislation or through their general law enforcement powers.[161] Moreover, under the common law, anyone has the legal authority to use force in the protection of a third person, although this is usually contingent upon the existence of some sort of emergency or imminent danger.[162]In recognition of the prime decisionmaking responsibility of child protective workers, and presumably in the belief that authority should accompany responsibility, a growing number of states, at least thirteen at this writing, also grant protective custody power to child protective agencies. However, despite the fact that child protective workers make most of the important decisions about the initial handling of child abuse and neglect cases, some observers feel that giving them direct authority to remove children will unduly hamper their efforts to develop trusting treatment relationships with families.[164] In any event, as a practical matter, forcible removal of a child ordinarily is not attempted without police or law enforcement assistance, because of the possible danger to the protective worker.

In the past, most provisions authorizing protective custody were stated broadly, in general phrases such as "necessary to protect the child's life or health."[165] But past practice, in too many situations, was to remove a child from his home first — and to ask questions later. To prevent the indiscriminate use of protective custody, a growing number of states have placed two limitations on when a child may be taken into protective custody without a court order: 1) a child must be in imminent danger, and 2) there must be no time to apply for a court order.[166] Examples of situations which require immediate action because of imminent danger to the child include: when children are being or are about to be attacked by their parents; when they need immediate food, clothing, shelter, or medical care; when children are left alone or unattended; or when it appears that the entire family may disappear before the facts can be sorted out.

In an interesting legal nuance, a number of states make a distinction between the test for reporting — "reasonable suspicions" — and the test for taking a child into protective custody — "reasonable cause to believe" that the child is in imminent danger.[167] Although seemingly minor, this difference is one of important degree because it signals the difference between the subjective condition of the reporter's state of mind and the existence of sufficient objective factors to cause a reasonable person to believe that the child must be placed in protective custody.

More recently, a number of states have granted hospitals and similar institutions a protective custody power

called "twenty-four hour hold."[168] This authority is much broader than standard protective custody authorization because there is usually no need to establish that the child is in "imminent danger."[169] Indeed, the person in charge of such a facility is usually authorized to place a child in protective custody "where he believes the facts so warrant."[170] Such broad language is designed to give hospitals and similar institutions a flexible tool with which to deal with home situations that appear explosive or dangerous.[171] These situations often arise in the middle of the night when outside guidance and assistance are unavailable.[172] But because of its radical nature, the "twenty-four hour hold" is an emergency measure to enable other components of a community's child protection system to have enough time to mobilize.

Whatever the initial basis for placing a child in protective custody, there is a real need for a court to review the initial administrative decision. It may have been wrong; it may have been based on incomplete or misunderstood facts, or the situation may have changed since the decision was first made — for example, counseling, homemaker, daycare, or housing services may have succeeded in making the child's home safe for his return. Therefore, the correctness of such decisions should be reviewed by a court as soon as possible. Although many states put no time limit on protective custody before court review,[173] a number of states do provide a time limit.[174] Twenty-four hours seem to be a reasonable length of time to authorize holding a child without court order. Within that time, there is no reason why a judge cannot be reached. The possibility of disturbing a judge at home is a small price to pay for ensuring that the initial decision is promptly reviewed.[175] The fact that such judicial reviews are frequently perfunctory does not denude them of their value.

In many communities, the dearth of suitable facilities for the temporary care of abused and neglected children has led to their placement in a jail or a facility for the detention of criminal or juvenile offenders. Such practices are wholly inappropriate to the purposes and philosophy of child protective services, and a number of state laws expressly forbid them.[176] Of course, such prohibitions should not apply to situations where an abused or neglected child requires secure detention because of his own misconduct and there is independent legal authority for detaining him.

Protective custody is only the beginning of the child protective process. In utilizing protective custody, officials should bear in mind that subsequent treatment efforts may be impaired if the parents are not accorded full due process, not treated fairly or are not fully informed about what is going on. All of these, of course, are important goals in themselves. Some appropriate person, preferably from the child protective agency, should tell the parents where the child was taken, in order to calm their fears and to enable them to maintain contact with their child. In unusual or severe cases, it may not be prudent to inform the parents of the child's exact whereabouts if it appears that the parents may seek to regain custody of the child forcibly or otherwise interfere with his care. In such cases, contact between the child and parent may have to be limited to highly structured situations. Since the welfare of the child is an added consideration, it is unlikely that failure to notify parents in such cases would be considered grounds to terminate a protective custody placement.

Protective custody must not be considered a final disposition of the case. If not a child protective worker, the person taking a child into protective custody should immediately notify the appropriate local child protective service so that necessary protective, assessment, and treatment efforts can begin. During all stages of the case — whether or not court action is commenced — the need for protective custody should be continually reviewed, and an attempt should be made to return the child to his home, "whenever it seems reasonable and safe to do so."[177] Even after a court proceeding has begun, the child protective agency may still recommend to the court that the child be returned to the parents pending further court action.[178]

It would be misleading to end a discussion of protective custody without acknowledging that the undue delays caused by breakdowns in the planning process, overburdened child protective staffs, backlogged courts, inadequate long term alternatives, weak management procedures, and the absence of a host of other needed services can turn temporary protective custody into long term care. Children can be temporarily "parked" for months and even years in foster homes, shelters, and hospitals where, if they are medically ready for discharge, they are called "boarder babies."[179] Sadly, long term planning for child — whether it means preparing the family for the child's return, establishing a long term foster care arrangement, or permanently terminating parental rights — is too frequently neither approached realistically nor completed expeditiously.

FOOTNOTES

156. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19, 20, 33, 40-42 (1973) [hereinafter cited as BEYOND THE BEST INTERESTS OF THE CHILD].

157. *See generally* N. WEINSTEIN, THE SELF IMAGE OF THE FOSTER CHILD (1962).

158. *See* BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 156, at 23-26.

159. E.g., CONN. GEN. STAT. ANN. §17-38a(e) (West Supp. 1976); N.J. STAT. ANN. §9:6-8.27 (West 1976); N.Y. FAM. CT. ACT §1021 (McKinney 1975).

160. When the court is not in session, *e.g.* at night or on weekends, authorization can usually be obtained by telephoning a judge at home. *See e.g.*, COLO. REV. STAT. §19-10-107 (Supp. 1976).

161. Specific legislative authorization is found in at least 45 states. *E.g.*, DEL. CODE tit. 10, §933 (1974); MINN. STAT. ANN. §260.165 (West 1971); N.D. CENT CODE §27-20-13(1) (Supp. 1973).

162. *SEE* W. PROSSER, *supra* note 138, at §20.

163. *E.g.*, COLO. REV. STAT. §19-10-107 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 119, §51B(3) (West Supp. 1977); TEX. FAM. CODE ANN. tit. 2, §17.01 (Vernon Supp 1976).

164. *See* A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT GUIDELINES FOR LEGISLATION 30 (1975).

167. *E.g.*, ALA. CODE tit. 27, §§21, 22(1) (Supp. 1975); N.Y. FAM. CT. ACT § 1024(a) (McKinney 1975); N.D. CENT. CODE § 27-20-13(1)(c) (1973), § 50-25.1-03 (Supp. 1977).

168. *Compare* MICH. COMP. LAWS ANN. § 722.626 (Supp. 1977) (next court day) *and* MO. AANN. STAT. §210.125(1) (Vernon Supp. 1976) (20 hours) *and* N.Y. SOC. SERV. LAW § 417(2) (McKinney 1976) (next court day) *and* PA. STAT. ANN. tit. 11, § 2208(a)(2) (Purdon Cum. Supp. 1977-1978) (24 hours) *with* ALA. CODE tit. 27, § 22(1) (Supp. 1975) (72

hours) *and* CONN. GEN. STAT. ANN § 17-38a(d) (West Supp. 1976) (96 hours) *and* VA. CODE § 63.1-248.9 (Supp. 1977) (72 hours).

169. *See* note 166 and accompanying text *supra.*

170. N.Y. SOC. SERV. LAW § 417(2) (McKinney 1976).

171. Frequently, for example, hospital staff are concerned about the safety of a child with suspicious injuries, or are unsure of the child's real name or address, or fear that the parent will flee before a protective worker can make a home visit.

172. *See* note 160 *supra.*

173. *E.g.,* ILL. ANN. STAT. ch. 23, § 2055 (Smith-Hurd Supp. 1977); MINN. STAT. ANN. § 260.165 (West 1971); UTAH CODE ANN. § 55-10-90 (1974).

174. *E.g.,* ALA. CODE tit. 27, § 22(1) (Supp. 1975) (72 hours), ARIZ. REV. STAT. § 8-546.01(D) (Supp. 1977) 48 hours); CONN. GEN. STAT. ANN. § 17-38a(e) (West Supp. 1976) (96 hours); MD. CTS. & JUD PROC. CODE ANN. § 3-815(c) (Supp. 1977) (next court day); N.Y. FAM. CT. ACT § 1021 (McKinney 1975) (3 days).

175. Even in the most rural communities a judge or magistrate is available to hear preliminary criminal matters: Colorado law, for example, facilitates around-the-clock utilization of the "twenty-four hour hold" by allowing authorization by "a person appointed by the juvenile judge, who may be the juvenile judge, a referee, or any other officer of the court." C06OLO. REV. STAT. § 19-10-107 (Supp. 1976).

176. *Compare* IND. CODE § 31-5-7-23 (1976) (juveniles must be kept separate from adult criminals) *and* S.C. CODE ch. 21, 14-21-590(c) (1977) (same) *with* IOWA CODE ANN. § 232.21 (West 1969) (children requiring detention shall be separated so far as practicable from children requiring shelter) *and* NEV. REV. STAT. § 62.170(4) (1971) (separation whenever possible).

177. MODEL CHILD PROTECTION ACT § 9(e) (Aug. 1977 draft).

178. *E.g.,* N.Y. FAM. CT. ACT § 1026(a) (McKinney 1975).

179. N.Y. Times, Nov. 26, 1976, at 1, col. 4.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 4.1-4.4. Reprinted with Permission.

Part IV: Emergency Temporary Custody of an Endangered Child

4.1 Authorized emergency custody of endangered child.

A. Any physician, police or law enforcement official, or agent or employee of an agency designated pursuant to Standard 4.1 C. should be authorized to take physical custody of a child, notwithstanding the wishes of the child's parent(s) or other such caretaker(s), if the physician, official, or agent or employee has probable cause to believe such custody is necessary to prevent the child's imminent death or serious bodily injury and that the child's parent(s) or other such caretaker(s) is unable or unwilling to protect the child from such imminent death or injury; provided that where risk to the child appears created solely because the child has been left unattended at home, such physician, official, or agent or employee should be authorized only to provide an emergency caretaker to attend the child at home until the child's parent returns or sufficient time elapses to indicate that the parent does not intend to return home; and provided further that no such physician, official, or agent or employee is authorized to take physical custody of a child without prior approval by a court pursuant to Standard 4.3 unless risk to the child is so imminent that there is no time to secure such court approval. Any physician or police or law enforcement official who takes custody of a child pursuant to this standard should immediately contact an agency designated pursuant to Standard 4.1 C., which should thereupon take custody of the child for such disposition as indicated in Standard 4.2.

COMMENTARY

This provision, directed toward the protection of children whose lives or physical well-being are in serious and immediate danger is atypical of American child abuse and neglect statutes. In six states reporting laws include clauses permitting the emergency removal of children from their homes. See Ky. Rev. Stat. § 119.335(4), (Cum. Supp. 1972); Md. Ann. Code, art. 27 35A(f-1) (Cum. Supp. 1973); N.Y. Fam. Ct. Act § 1024-1025, and N.Y. Soc. Serv. Law §*10* 414(2); S.C. Code Ann. § 20-310.2 (Supp. 1972); Tenn. Code Ann. § 37-1206 (Cum. Supp. 1973); Tex. Fam. Code, ch. 34, 34.05(d). In New York authority is granted to physicians, law enforcement officials, and social service workers to take immediate custody in cases of "imminent danger" to a child when such action is taken, the Family Court must be notified forthwith, and child protective proceedings must be commenced by the appropriate social service agency at the next weekday session of the court. Authority of a similar nature is given to law enforcement officials in Maryland, Kentucky, and Tennessee. In Maryland, such removal is authorized subsequent to the law enforcement official being summoned by social agency personnel. In Kentucky, law enforcement officials may remove a child pursuant to a warrant, and must begin efforts to obtain a court order within twenty-four hours. Tennessee laws authorize "appropriate protective action" on the part of law enforcement officers. Both Texas and South Carolina require the filing of a petition with the court before emergency removal may be authorized. Statutes in eight states allow medical personnel to retain custody of an injured child against parental wishes for a specified period of time or until a court hearing can be held. See Conn. Gen. Stat. Rev. § 17-38a(d) (Supp. 1973); Ky. Rev. Stat. § 199.355(4) (Supp. 1973); Mass. Gen Laws Ann., ch. 199-51c (Cum. Supp. 1974); Mich. Comp. Laws Ann. § 722.571(2) (Supp. 1973); N.J. Rev. Stat. § 9:6-8.16 (Supp. 1974); N.Y. Fam. Ct. Act § 1025(a); N.C. Gen. Stat. § 110-118(d) (Cumm. Supp. 1974); Tenn. Code Ann. § 37-1204 (Cum. Supp. 1974). Two states require consultation with the welfare department before law enforcement officials may remove a child from his/her legal custodians. See Ohio Rev. Code Ann. § 2151.421C (Supp. 1972); Nev. Rev. Stat. § 200.502 (1971, as amended 1973). This consultation may be dispensed with in certain emergency situations.

All of these statutes are, we believe, inadequate to deal with the problem of crisis situations of abuse and neglect. Existing statutes are either too limited—restricting emergency action to only a segment of those most likely to come in contact with endangered children, or making procedural requirements precluding intervention that may be needed in an emergency—or too broad—incompletely defining authority and providing insufficient guidelines for implementation of emergency custody in the manner least detrimental to the child.

The reservations of commentators and legislators, as reflected in the literature and in the rarity of emergency custody provisions in the law, are not difficult to comprehend. DeFrancis and Lucht express the fear that such laws "substitute good motives for effective skilled services" and invite over-zealous officials and less skilled agency personnel to avoid difficult case by case decisions by summary and routine removal of children from their homes. V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's* 15, 185 (rev. ed. 1974); see McCoid, "The Battered Child and Other Assaults Upon the Family," 50 *Minn. Law Rev.* 1, 49-50 (1956); Paulsen, "Child Abuse Reporting Laws: The Shape of the Legislation," 67 *Colum. L. Rev.* 1, 46 (1967). Moreover, the costs and risks of emergency custody, in terms of the child's psychological trauma, disruption of the family, and possible violation of due process with regard to parental rights, are formidable.

These objections, however, are less arguments for the exclusion of emergency custody provisions from the law than they are factors that must be considered in drafting legislation. See, for example, the Model Child Abuse and Neglect Reporting Law, Section 6, and its accompanying commentary in A. Sussman, "Reporting Child Abuse and Neglect: Guidelines for Legislation," 4, 29-33 (1975). The child who is in true immediate danger needs protection. Yet misuse and overuse of emergency measures are dangers to be reckoned with. The provisions of this section are intended to facilitate intervention in cases where the child's situation is so hazardous that immediate protection is mandatory, while concurrently minimizing the dangers of overuse and unnecessary detrimental effects on the child and family.

Standard 4.1 A. sets four important limitations on the taking of emergency temporary custody of an endangered child:

1. Removal or retentive action is authorized only by specific types of personnel.

2. Emergency removal is limited to situations of imminent danger of death or serious injury where there is no time to take steps seeking a court order.

3. An individual taking emergency custody is required to immediately contact and turn custody over to an agency authorized to handle such cases.

4. Where a child's danger is the result solely of his/her being unattended, removal is not to be effected until the alternative course of sending an agency caretaker into the home has been tried, and the parent has not returned and the time lapse indicates that he/she does not intend to return.

This standard gives emergency custodial authority to physicians since they typically encounter severly endangered children in, for example, emergency clinics of hospitals. But the subsection further requires that physicians taking custody must immediately contact a specially designated agency which in turn would evaluate the imminent need for emergency custody and take custody itself where appropriate. Such agency personnel are also authorized to take direct emergency custody of children by this subsection. A specialized child protection agency is thus given a central role in initially evaluating the need for emergency custody and in providing that custody where necessary. The processes and standards by which such agency is designated are indicated in 4.1 C. Standard 4.1 A. envisions further that police or law enforcement officials would also be authorized to take emergency custody of endangered children. It might be preferable, because of the likelihood that police intervention might appear punitive (however unintended) and that police officers will lack requisite training and skills in protecting the emotional wellbeing of children and families, that the specialized agency personnel assume this exclusive role (beyond physicians likely first to identify endangered children).

This stipulation that an agency must send a caretaker into the home of a child endangered because of being unattended before that child may be actually removed reflects one of the basic premises of this statute. That is, removal of a child from the home is a drastic measure and should be avoided whenever there are any other available means for protecting the child.

B. Any physician, police or law enforcement official, or agent or employee of an agency who takes custody or care of a child pursuant to Standard 4.1 A. should be immune from any civil or criminal liability as a consequence of such action, provided that such person was acting in good faith in such action. In any proceeding regarding such liability, good faith should be presumed.

COMMENTARY

The goal of protecting endangered children would be defeated if those contemplating protective measures in an emergency hesitated in fear of future legal sanctions. A requirement of good faith is an adequate restriction here on wrongful use of emergency custody. Only if there is probable cause to believe that a child's death or serious harm is so imminent that there is insufficient time to seek court intervention may be individual in good faith take such action. It is vital to the interests of the child, however, that legal standards are not so restrictive as to discourage emergency action where that action is appropriate. Compare the similar immunity provision in Standard 3.1 C. *supra.*

C. The state department of social services (or equivalent state agency) should be required to designate at least one agency within each geographic locality within the state, of those agencies listed as qualified report recipient agencies pursuant to Standard 3.2, whose agents or employees would be authorized to take custody of children pursuant to Standard 4.1. To qualify for such designation, an agency must demonstrate to the satisfaction of the state department that it has adequate capacity to safeguard the physical and emotional wellbeing of children requiring emergency temporary custody pursuant to this Part. The state department should be required to promulgate regulations specifying standards for personnel qualification, custodial facilities, and other aspects of temporary custodial care which an agency must provide, or have access to, regarding children subject to this Part. Each agency designated should thereafter be required to demonstrate, in conjunction with review proceedings

pursuant to Standard 3.2 C., that it continues to meet the requirements for designation pursuant to this standard, in view of its efficacy in safeguarding the wellbeing of children subject to this Part.

COMMENTARY

Removal of a child from a dangerous home situation is obviously useful only where the child is removed to an environment less detrimental to his/her wellbeing. High standards of custodial care, strictly enforced and periodically reviewed, are necessary to insure that children temporarily removed from their homes are protected as much and damaged as little as possible. To this end, only specially qualified and carefully investigated agencies and facilities should be involved in the very delicate and difficult situation of temporary emergency custodial care. Under current child protective systems, one of the greatest problems is that the inadequacy of resources for caring for children removed from their families frequently renders removal essentially useless as a protective device. Wald, "State Intevention on Behalf of Negleted Children: A Search for Realistic Standards," 27 *Stan. L. Rev.* 985, 987 (1975). This subsection provides for designation of a specialized agency with demonstrated capacity to provide adequate emergency custody. We anticipate that such designated agency would also qualify as a report recipient agency pursuant to Standard 3.2, and—as envisioned in that standard—that some jurisdictions might have more than one such designated agency, thus enlisting a wider range of trained personnel and funding sources, both public and private, than now appears in current official child-protective practices.

4.2 Agency disposition of children in emergency temporary custody.

A. An agency taking custody of a child pursuant to Standard 4.1 should place the child in a nonsecure setting which will adequately safeguard his/her physical and emotional wellbeing. Such agency should be authorized to provide immediately, or secure the provision of, emergency medical care if necessary to prevent the child's imminent death or serious bodily injury, notwithstanding the wishes of the child's parent(s) or other such person(s). The agency should ensure that the child's parent(s) or other such caretaker(s) has opportunity to visit with the child, at least every day for the duration of custody pursuant to this Part (including without limitation the provision of transportation for the parent(s) or other such person(s)) unless such visits, even if supervised, would be seriously harmful to the child (due account being given, among other considerations, to the child's wishes regarding visits).

COMMENTARY

Authorization of the custodial agency to safeguard a child's wellbeing through appropriate temporary placement or the providing of medical care is a necessary corollary to the concept of emergency protective action. Assumption of custody by the agency would offer little benefit if the child's emotional and physical needs were not cared for. It is envisioned that these custodial facilities would not also primarily house children charged with or found guilty of delinquent acts and that these facilities would be open, nonsecure buildings.

Interference with parental or similar emotional ties is extremely painful for a child, irrespective of how well or poorly the custodial function has been served. J. Goldstein, A Freud, and A. Solnit, *Beyond the Best Interests of the Child,* 20, 31-34 (1973). A major danger in any case of a child's removal from home and particularly in instances of independent emergency removal by a stranger, is that the psychological difficulties of separation and removal may be as damaging to the child as the harm removal was intended to prevent. J. Bowlby, *Child Care and the Growth of Love,* 13-20 (2nd ed. 1965); Goldstein, Freud and Solnit, *supra*, note 9 at 19-20; N. Littner, *Some Traumatic Effects of Separation and Placement* (1956). That such psychological harm should be risked without the careful consideration afforded by court review is a major source of reservations on the desirability of emergency custody provisions. By providing the oportunity and means of parental visitation, however, the dangers of interrupting the continuity of relationships may be minimized.

Often a parent will lack means of transportation to visit his/her child. Because the child's need to maintain contact with that parent is typically so critical, no matter how aparently harmful the parent's past conduct, this subsection further envisions provision of state resources for transportation as preferable policy notwithstanding its expense.

In some cases, parental visits, even if directly supervised, might be seriously harmful to the child. The child's wishes regarding parental visits might be one important consideration in determining whether such visits would be harmful. In any event, if parental visits are denied, this action should be taken only after a person trained in child psychiatry or psychology (a psychiatrist, psychologist, or psychiatric social worker) has clearly found that the child would be harmed by such visits. If visits were curtailed, the agency should be required to justify its view regarding the inadvisability of parental visits in its submission to the court pursuant to Standard 4.2 B.

Some might support, on the other hand, parental visits in all cases, arguing as follows: 1. that the abrupt severance of contact between parent and child—even if the parent had been seriously abusive toward the child—would only add psychological injury to the child; 2. that the child could be protected both from this added injury and from possible additional abusive conduct by the parent if these visits were supervised; 3. that the agency that is willing to take the extraordinary step of emergency removal of a child is unlikely to view any parental claims for visits with adequately unbiased judgment and will therefore inappropriately discount the child's psychological needs for continued contact with his/her parents notwithstanding their possible abusive conduct; and 4. that the child's explicit wishes regarding visits in the traumatic setting necessarily accompanying any sudden removal from parental custody is likely to be an unreliable indication of the child's underlying feelings and, at least for the short time that emergency custody will continue

before court disposition of a petition, it is better in general to shield the child from being forced to choose between loyalty to his/her parents, however abusive they might appear to an outside observer, and need for protection from his/her temporary emergency custodians.

B. No later than the first business day after taking custody of a child pursuant to Standard 4.1, the agency should be required to report such action to the court authorized to conduct proceedings by Part V and to explain the specific circumstances justifying the taking of custody and the specific measures implemented to safeguard the physical and emotional wellbeing of the child. The agency should, at the same time, submit a petition without prior screening by the intake processing agency, under Standard 5.1 B., except that if the agency decides against such submission, it should immediately return the child to the custody of his/her parent(s) or other such caretaker(s).

COMMENTARY

This provision for speedy reporting of emergency action to the court and commencement of regular legal proceedings reflects at least three different intentions of the standard. First, custody assumed pursuant to this Part is intended to be strictly temporary. The bypassing of normal court review channels is justifiable only insofar as the shortness of time and the immediacy of the child's peril prohibit such review. Such custody should not be allowed to continue beyond the time when court review is obtainable. Second, the inherent danger of careless or erroneous use of emergency custody demands that such action be examined by a court as quickly as possible. The requirement of an immediate report, within the bounds of the business week, creates an additional safeguard against misuse of the statute by insuring that unwarranted assumption of emergency custody will be noticed and terminated with all possible speed. Third, the child's needs mandate strict agency accountability and quick judicial attention. In the interests of minimizing harm to the child—both physical harm and psychological damage risked by disruption of family and emotional ties—it is vital that the adequacy of measures implemented for protection and care of the child be insured. Hence, judicial scrutiny of the specific action taken should commence as soon as circumstances permit. Moreover, this standard is intended to encourage more careful and timely agency scrutiny of the handling of cases in anticipation of imminent court proceedings. Pre-court screening of the petition by an intake processing agency provided by Standard 5.1 B. would only delay court review and is not necessary because of the intensive agency screening that should precede the agency's continuing emergency custody of the child. If pursuit of court jurisdiction pursuant to Part V is not appropriate, the presumption of parental autonomy in childrearing mandates that the child be immediately returned home.

4.3 Court review regarding children in emergency temporary custody.

A. Immediately upon receipt of a petition submitted pursuant to Standard 4.2, the court should direct notification pursuant to Standard 5.1 D., appointment of counsel for the child pursuant to Standard 5.1 E., and referral of the petition for prosecution pursuant to Standard 5.1 F. On the same business day, the court should convene a hearing to determine whether emergency temporary custody of the child should be continued, to determine whether investigation of the petition should be authorized pursuant to Standard 5.2, and to approve the plan for investigation pursuant to Standard 5.2.

COMMENTARY

This section mandates specific court action under Part V of these standards. The guiding principle here is the recognition of the importance of certainty and permanence to the child's psychological wellbeing. If there is no compelling reason to displace the presumption of parental autonomy, return to the custody of parents or other such caretakers should take place immediately. If custody is to be denied to the child's parents or caretakers, it is in the child's best interests to make a judicial determination swiftly in order to speed and facilitate permanent placement of the child. The child's capacity to cope with loss and uncertainty is limited by what, in adult terms, seems a distorted sense of time. Delay in achieving a permanent status and resultant uncertainty and distress, therefore, may be of a longer duration in the child's world than in adult perception. See J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child,* 40-45 (1973). The prolonging of temporary custody performs a disservice to the child in that it disrupts and precludes the formation of meaningful, permanent, and stable emotional bonds.

B. The court should be authorized to continue emergency temporary custody of the child, pursuant to Standard 4.1, if it determines:

1. investigation of the petition is authorized pursuant to Standard 5.2;

2. custody of the child with his/her parent(s) or other such caretaker(s) named in the petition would create an imminent substantial risk of death or serious bodily injury to the child, and no provision of services or other arrangement is available which would adequately safeguard the child in such custody against such risk;

3. the conditions of custody away from the child's parent(s) or other such caretaker(s) are adequate to safeguard his/her physical and emotional wellbeing (including without limitation direction by the court to provide emergency medical care to the child if necessary to prevent the risk found pursuant to subsection 2.); and

4. the child's parent(s) or other such person(s) named in the petition would be provided opportunity to visit with the child at least every day for the duration of custody pursuant to this Part (including without limitation the provision of transportation for the parent(s) or other such caretaker(s)) unless such visits, even if supervised, would be seriously harmful to the child (due account being given, among other considerations, to the child's wishes regarding visits).

COMMENTARY

Efforts to proceed with all due speed notwithstanding, emergency temporary custody will, under certain circumstances, have to be continued while legal proceedings commence and judicial determinations are made. Such continuation, however, is only justified provided that certain guidelines, already reflected in these standards, continue to apply (see generally the commentary to Standard 4.2 A.):

1. appropriate steps toward final resolution of the child's status are being taken with all possible speed;

2. the necessity for emergency custody, because of the immediacy and seriousness of threatened harm to the child and the impossibility of other protective measures or procedures, is sufficient to outweigh strong presumptions of parental autonomy and the integrity of the family unit, and to outweigh as well risks to the psychological wellbeing of the child;

3. emergency custodial care and facilities are such that physical and emotional harms to the child are minimized by presence in such custody;

4. the child's need for continuity and the dangers of disrupted emotional ties are recognized and appropriately cared for with measures encouraging and fostering continued contact between the child and parent.

4.4 Custody during pendency of proceeding.

Upon motion of any party to a proceeding pursuant to Part V, at any time during the pendence pursuant to the criteria specified in Standard 4.3 B.

COMMENTARY

Court-authorized emergency temporary custody is perhaps a less problematic measure than independent action by a physician or agency worker. At least theoretically, the dangers of irresponsible and unnecessary use of emergency custody are lessened by judicial consideration given to the matter in a hearing. Nevertheless, most of the difficulties and dangers discussed in the foregoing commentary are still present and the standards and guidelines as noted in Standard 4.3 above must continue to be applied.

State of Louisiana - Juvenile Court for the Parish of Jefferson

GENERAL RULES OF COURT

A. Children in Need of Care; Abuse/Neglect; Termination of Parental Rights

RULE I

Instanter Orders—Court Hours

When an instanter custody order is desired during regular court hours, the OHD workers investigating the case shall execute a verified complaint in the form of a sworn affidavit and shall present it to either the Judicial Administrator or Court Social Worker to be filed. On the basis of the information contained in the affidavit, the court will either grant or deny the request. If the order is issued, the matter will be set for an initial hearing to be held within 48 hours. The worker shall notify the parents or other custodian of the hearing.

RULE II

Oral Instanter Orders

In exceptional circumstances arising outside of regular court hours, the court may issue an oral order that a child be taken into custody and placed temporarily in the custody of the Louisiana Health and Human Resources Administration, as authorized by Article 27 of the Code of Juvenile Procedure and LRS 14:403.

In these circumstances, the protective case worker or his/her supervisor shall telephone either judge at his home and shall provide him the following information:

A. The name and age of the child.

B. The facts known to the worker indicating abuse, neglect or dependency.

C. The reasons that the child should not be released to the custody of his parents.

D. The probable physical placement of the child.

The judge will either grant or deny the order. If the order is granted, the judge will notify the worker of the date and time of the initial hearing and will order the worker to notify the parents of the hearing.

RULE III

Affidavits in Support of Orders

Whenever an oral order is issued, the protective care worker investigating the case shall file with the Clerk of Court within 24 hours, exclusive of weekends and holidays, a verified complaint in the form of a sworn affidavit attesting to the facts of the case. The Court will then issue a written custody order.

District of Columbia Superior Court Neglect Proceedings Rules 4 and 5.

II. Temporary Removal

Rule 4. Order for Custody Prior to Petition.

(a) Application to the Division: Issuance. (1) Prior to Filing Complaint—If prior to filing a complaint it appears to a law enforcement officer that there are grounds for taking a child into custody under D.C. Code § 16—2309(2)—4), such officer may apply to a judge of the Division for an order for custody. The application shall be submitted by the Corporation Counsel to the judge and shall be supported by testimony or affidavit.

(2) Upon Filing Complaint—Upon filing the complaint, the child may be taken into custody by a law enforcement officer only upon an order for custody issued by the Division under this rule.

(3) Issuance—If the judge is satisfied that the application states grounds for taking into custody under D.C. Code § 16—2309, he may issue an order for custody for the child.

(b) Form—The order for custody shall be signed by a judge and shall specify a return date. It shall contain the name of the child to be taken into custody, his age, and his address.

(c) Execution or Service, and Return—(1) *By Whom.* An order for custody shall be executed by a law enforcement officer.

(2) *Territorial Limits*—An order for custody may be executed at any place in the District of Columbia, but not more than one year after the date of issuance.

(3) *Manner*—The order for custody shall be executed by the taking into custody of the child named therein. The officer need not have the order in his possession at the time of the taking into custody, but upon request he shall show the order to the child and to his parent, guardian, or custodian as soon as possible. If the officer does not have the order in his possession at the time of the taking into custody, he shall then inform the child and his parent, guardian, or custodian of the offense charged and of the fact that an order for custody has been issued.

(4) *Return*—On or before the return day, the person to whom an order for custody was delivered for execution, shall make a return thereof to the Division. At the request of the Corporation Counsel an order for custody returned unexecuted and not cancelled may be delivered by the Division to a law enforcement officer for execution. At the request of the Corporation Counsel any unexecuted order for custody shall be returned and cancelled by the Division.

Rule 5. Taking Into Custody.

(a) Notice to Director of Social Services and to Parents, Guardian or Custodian. Any person who brings a child alleged to be neglected to a shelter care facility or to a medical facility pursuant to D.C. CODE § 16—2311(a) and these rules shall give the Director of Social Services a signed report, setting forth the time the child was taken into custody and the reasons why the child was not released to his parents, guardian or custodian. The Director of Social Services shall notify the parents, guardian or custodian immediately that the child has been taken into custody, the name and address of the medical or shelter care facility where the child is in custody, and the name, address and telephone number of the Director of Social Services or his delegate with whom the parents, guardian or custodian may confer about the complaint.

(b) Notice of Hearing. If a child alleged to be neglected has been admitted to a medical facility pursuant to D.C. Code § 16—2311(a) (3) or to a shelter care facility after review by the Director of Social Services, the Director of Social Services shall notify the parents, guardian or custodian of the child that a hearing on the necessity for shelter care which they must attend will be held by the Division at a specified date and hour. The notice shall inform the parents, guardian or custodian of their right to counsel in accordance with D.C. Code § 16—2304(b) and SCR—Neglect 20.

(c) Criteria for Shelter Care. (1) *Protection of the Person of the Child.* In determining whether shelter care is necessary under D.C. Code § 16—2310(b) (1) to protect the person of a child alleged to be neglected, the following factors are deemed relevant:

A. Abusive or threatening conduct toward the child by a member or members of the same family or household.

B. Existence of illness or injuries on the child's body for which no satisfactory explanation appears.

C. Suicidal actions or tendencies or other seriously self-destructive behavior creating an imminent danger to the child's life or health, and

D. Narcotics addiction, chronic drug abuse or chronic alcoholism.

If shelter care appears to be necessary under the factors listed above, the person making the shelter care decision may nevertheless consider whether the child's living arrangements and degree of supervision might justify release pending adjudication of the petition alleging neglect.

(2) *Lack of Care or Supervision.* In determining whether shelter care is necessary pending adjudication of the petition because of lack of care or supervision under D.C. Code § 16—2301(b) (2), the following factors are deemed relevant concerning the child's ability to care for himself:

A. The child's age,

B. His existing living arrangements,

C. Length of existing living arrangements and child's adjustment to them, and

D. Evidence or likelihood of serious harm to the child's physical or mental health resulting from existing living arrangements, if any.

Richard Lohman, "A Practical Discussion of Temporary Custody Hearings, Reviews, and Adjudication," *Legal Representation of the Maltreated Child* (Denver: National Association of Counsel for Children, 1977), 73, 75-76.

Before discussing the actual hearing itself, two matters which negate the need for hearing should be discussed. The first is dismissal. When the police pick up a child because they feel the child is in danger if left in its environment, the police will, as indicated above, serve a notice upon the parents and file the original with the Court. The Court will, therefore, docket the case for hearing and the matter will in any case come before the Court. Should the caseworker who is assigned to the case feel, on the date of the temporary custody hearing, that no further Court involvement is indicated and that any services which are needed may be rendered on a voluntary basis, and that the child is in no danger whatsoever in returning to the environment from which it was taken, that caseworker may ask for a dismissal of the temporary custody proceeding. In order to do that, the caseworker must either be present at the hearing at which time an oral request that dismissal be made, or the caseworker must prepare a written report for the Court stating why the matter is to be dismissed and further must request the Department of Social Services attorney to prepare a Motion and Order to Vacate Custody and Dismiss Proceedings. It is important to note at this point that once the Court becomes involved, both substantive and procedural law dictate that the case may not be dismissed by the Court except upon proper motion supported by reasonable grounds; hence, the need for the appearance of the caseworker in Court or the written report supported by a written motion. It should be noted also that even if the caseworker appears in Court and brief testimony is taken and

an oral motion for dismissal is made and granted, in all probability, the Court will request that the Department of Social Services attorney prepare a written Motion and Order for the Court file.

The second matter which must be discussed before the actual hearing itself is Stipulation and Agreement for Temporary Custody. As indicated above, the law requires that a hearing be held within 72 hours after a child is taken into custody to determine the future custody of the child. This law has a grounding both in the constitutional due process requirements and in specific statutes. However, if the respondent-parents and the Department of Social Services are in agreement as to the future temporary custody of the child, there is no need for a contested temporary custody hearing. A Stipulation and Agreement for Temporary Custody may be presented to the Court assigned by the parties and there will be no necessity for a formal hearing. The form in essence, should provide that the Department of Social Services and the parents, guardians or legal custodians of the subject children, and counsel for said parents, guardians or legal custodians of the children, stipulate and agree to the terms and conditions for temporary custody set out in a Stipulation and Agreement for Temporary Custody. The form should provide for a specific number of days limiting the altered legal and physical custody of the child. There should also be on the form for any further stipulations and agreements concerning the filing of a Petition, placemcnt referrals, visitation; etc. The agreement should be signed by the caseworker the Department of Social Services attorney, the parent, guardian or legal custodian of the child, and the attorney, if any, for the parent, guardian or legal custodian. As grounds for the Stipulated Motion, parties should indicate that all interested parties in the matter are in full agreement with the terms and conditions of the Stipulation and Agreement, and, further, that the best interests of the children will be served by so ordering the terms and conditions contained within the Stipulation and Agreement. If the Court, after reviewing the Stipulation and Agreement for Temporary Custody and the Motion and Order for Temporary Custody, and after hearing a brief factual basis for the Motion, feels that the agreement is in the best interests of the child, the Court will enter an Order incorporating the terms of the Stipulation and Agreement for Temporary Custody as part of that Order for Temporary Custody. It should be noted here, however, that any party may upon five days' notice repudiate the Stipulation and Agreement and call the matter before the Court for further resolution by means of a contested temporary custody hearing. It is important to note that once the Stipulation and Agreement for Temporary Custody is made on Order of the Court, any violation of the "Order" is subject to the same sanctions of any other Order of the Court, such as contempt, etc. Therefore, if any party fails to follow through with a custody agreement as so Ordered by the Court, the opposing party or Guardian ad Litem should immediately notice the matter in for an appearance review or should, in the alternative, cite the offending party to show cause why that party should not be held in contempt of court.

B. Bringing Petitions to Juvenile Courts

New York Family Court Act, Sections 1032 and 1033, with commentary.

§ 1032. Persons who may originate proceedings

The following may originate a proceeding under this article:

(a) a child protective agency, or

(b) a person on the court's direction.

Practice Commentary

by Douglas J. Besharov

This section was amended in 1973 to erect a barrier against the indiscriminate initiation of child protective proceedings. Only a "child protective agency" may file a petition without prior court authorization. "A child protective agency" is defined by N.Y. Fam. Ct. Act § 1012 (i) (1976) as "any duly authorized Society for the Prevention of Cruelty to Children or the Child Protective Service of the appropriate local Department of Social Services or other agencies with whom the local department has arranged for the provision of child protective services under the local plan for child protective services." [See N.Y. Soc. Serv. L. § 423(3) (1976).]

For anyone else to initiate a proceeding, prior court authorization is necessary. Even when the court authorizes the filing of a petition, it may invoke the provisions of sections 1033 and 1034, infra, to ensure the involvement of an appropriate child protective agency.

Previously, a wide range of individuals were permitted to initiate court action on their own. This included "a parent or other person interested in the child" and "any person having knowledge or information of a nature which convinces him that a child is neglected." [N.Y. Fam. Ct. Act repealed § 1032 (1963).] As a result, many cases were initiated without the benefit of a child protective investigation, although the cases were screened by the probation intake service (a much more limited screening and service provision process).

> At the trial stage of the proceeding, the absence of evidence that could have been obtained through investigation can force the Family Court judge to dismiss the cases. Indeed, dismissal rates in child protection cases are extremely high—over 26% are dismissed, over 21% withdrawn. Pre-court investigations also act as a device to screen and divert cases before they reach the Family Court by (a) establishing them to be unfounded or (b) by resolving them through voluntary acceptance of social services. The absence of investigation needlessly adds to the workload of an already overburdened Family Court. Many of the cases the court is thus shouldered with are based on frivolous, unfounded complaints brought by a distraught spouse having marital difficulties. [N.Y. State Assembly Select Committee on Child Abuse, Report 64 (1972). Citations omitted.]

In the first after the 1973 amendment to this section, the number of new child protective petitions decreased by 15%. This number is startling because it occurred at the time when the statewide total number of reported cases of child abuse and neglect increased by over 25%. The difference results from the fact that child protective agencies, the recipients of such reports, typically handle 80% to 90% of their cases without resorting to court action. Although the number of new child protective petitions has begun to rise slowly (about 8% in calendar year 1975) it has not been anything like the continued rapid rise in the total number of cases reported to child protective agencies (about 20% each year). [N.Y. Judicial Conference, Annual Report, 1974, 380; N.Y. Judicial conference, Special Six-Month Report, 1975, Tables 33 and 34, pp. 62-65; N.Y.S. Dept. of Social Services, Annual Report for the Provision of Child Protective Services (1974).]

§ 1033. Access to the court for the purpose of filing a petition

Any person seeking to file a petition at the court's direction, pursuant to subdivision (b) of section one thousand thirty-two shall have access to the court for the purpose of making an ex parte application therefor.

Nothing in this section, however, is intended to prevent a family court judge from requiring such person to first report to an appropriate child protective agency.

Practice Comentary

by Douglas J. Besharov

This section implements subsection 1032(b), supra, by establishing a procedure for determining when "a person on the court's direction" may originate a proceeding. Under the original provisions of this section, prior to its 1973 amendment, all cases were initially referred to the Probation Intake Service. Most judges assumed that the provision prohibiting the Probation Service from preventing "any person who wishes to file a petition . . . from having access to the court for that purpose" meant that anyone could file a petition. [N.Y. Fam. Ct. Act repealed § 1033(b) (1973).]

As it presently reads, this section codifies the practice of a limited number of judges who denied potential petitioners the automatic right to initiate a proceeding. Echoing its prior wording, this section permits any person "access to the court for the purpose of making an *ex parte* application" to file a petition on the court's direction. A brief hearing is usually held on the application, with the applicant or other witness giving supportive testimony. If the evidence presented at the *ex parte* hearing is sufficiently serious, the court may authorize the immediate filing of a petition. Or, the court may order the appropriate child protective agency to perform an investigation "in order to determine whether a proceeding under this Article should be initiated"; it may adjourn the *ex parte* hearing until the results of that investigation are received. [N.Y. Fam. Ct. Act § 1034 (1975).] However, most applications are merely referred to a child protective agency for investigation and handling.

The provision authorizing the judge to require the applicant to "first report to an appropriate child protective agency" presumably means that if the potential petitioner is not satisfied by the handling of the case by the child protective agency, he may return to request appropriate court action. (A discussion of the child protective investigation and treatment process is found in the Practice Commentary accompanying § 1011, *supra*.)

The provisions for Probation Intake previously contained in this section were removed to end the duplication of efforts between the Probation Service and the child protective agency. Practice under this section's prior provisions was mixed. In most upstate communities, cases initiated by the child protective agency were not put through the Probation Intake process. On the other hand, in New York City and a few other communities, all child protective agency cases were also put through the Intake process. The result was a costly duplication of services by two equally understaffed agencies. Although the Probation Service adjusted a small number of cases initiated by child protective agencies, the Legislature apparently concluded that this was not sufficient justification for the continued double screening of cases.

> One example of the kind of overlap and duplication that, if ended, would produce significant efficiencies—and it is important to add, better serve children—is the duplication of Department of Social Services and Office of Probation functions in New York City and some other counties of the State. Even after the Department of Social Services has conducted its investigation which may have taken weeks, if the case is brought to the Family Court, the Office of Probation performs its own intake interview. Furthermore, if the child is adjudicated as abused or neglected and a disposition is to be made, the Office of Probation conducts a pre-dispositional investigation retracing the steps which are in every aspect similar to those previously performed by the Department of Social Services . . .
>
> There are legitimate reasons for a variety and diversity of social agencies. However, when two agencies such as the Department of Social Services and Department of Probation provide essentially the same services with essentially the same type of staff for essentially the same purpose, there is a wasteful dilution of resources. Moreover, if the Department of Social Services performed these functions presently performed by Probation (including intake/adjustment, post-adjudicatory investigations, and post-disposition supervision) State and local costs, now shared 50%-50% would be reduced to 12½% each as the federal government assumes 75% of the cost of such protective service expenses. [New York State Assembly Select Committee on Child Abuse, Report 70 (1972).]

Moreover, the child protective agency, as part of the local department of social services, can call upon a much wider array of services than the probation department. It possesses the resources to conduct home visits and provide on-going treatment and ameliorative services, such as homemaker care, daycare, and family counselling.

Nevertheless, there is still an important potential role for the probation service to play in Article 10 proceedings. Under section 252 (d), *supra*, the probation service is made "available to assist the court and participate in all proceedings under this Act, including supervision of the family or individual family members pending final disposition of a child protection proceeding under Article 10." [N.Y. Fam. Ct. Act § 252(d) (1976).] Thus, the court retains the probation service as a major additional preliminary alternative during the time between the filing of the petition and the final disposition of a child abuse or neglect case, when entrance into the home by the child protective agency can create some difficulty.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect — Tentative Draft* (New York: Ballinger Publishing Co., 1977), 5.1A. Reprinted with Permission.

Part V: Court Proceedings

5.1 Complaint and petition.

A. *Submission of complaint.* 1. Any person may submit a complaint to an intake processing agency alleging and specifying reasons why the juvenile court should find a child within the jurisdiction of the court, pursuant to the standards set out in Part II. Any complaint that serves as the basis for a filed petition should be sworn to and signed by a person who has personal knowledge of the facts or is informed of them and believes that they are true.

COMMENTARY

State statues typically place no restriction on the persons authorized to submit wardship petitions. In practice, however, greater credence is undoubtedly given to petitions submitted by child protective agencies familiar to the courts. It is anticipated that the demonstrated expertise of the abuse report recipient agencies, listed by the State Department of Social Services pursuant to Standard 3.2, will lead the intake processing agency and court to give special credence to petitions submitted by these agencies. Nonetheless, it is considered unwise to restrict access only through these agencies. It is likely that most complaints and petitions will be filed by the agencies, but these standards preserve access to the intake processing agency and courts for any person who believes a child is endangered.

2. Any person who obtains information indicating that a child would be found within the court's jurisdiction but is prohibited by other laws of this state from disclosing that information without parental consent should be able to submit to the intake processing agency a request for permission to submit a complaint. Such request should contain no information which would reveal the identity of the child or parents but should set out the specific facts allegedly demonstrating the need for court

jurisdiction. If the intake processing agency determines without hearing that these allegations satisfy the criteria provided in subsection B., it should grant the request for submission of a complaint identifying the child and other parties relevant to the complaint, notwithstanding the provision of other laws of this state to the contrary. If the intake processing agency grants the request, the requesting person is also thereby authorized to participate in, and testify at, any subsequent proceedings regarding the complaint or petition, if filed, notwithstanding the provision of other laws of this state to the contrary.

COMMENTARY

Under existing state laws, certain persons who see children in professional capacities—physicians, including psychiatrists, and in some jurisdictions psychologists and social workers—are (or appear to be) barred from communicating information about the child to any third party without express permission from the child's parents. This result appears to follow from the general rule that patients control access to their personal medical information and that parents exercise this control as proxies for their children. Some courts might construe an exception to this rule when it appears that parents are acting against their children's best interest, and thus authorize professionals to divulge information notwithstanding parental objections. Uncertainty on this score was, however, one important element which led states in the mid-1960s to adopt mandatory child abuse reporting laws. See Daley, "Willful Child Abuse and State Reporting Statutes," 23 *U. of Miami L. Rev.* 283, 330 (1969). States which have extensively broadened the scope of these mandatory reporting laws have, of course, eliminated the legal issue discussed here. But for the reasons set out in Part III, these standards restrict mandatory reporting to physical abuse. Thus certain professionals would be uncertain about their authority to report parental conduct which is seriously harmful to children but does not constitute abuse (that is, intentional infliction of physical injury).

It might be argued that any professional who believes that parental conduct warrants reporting should have absolute discretion for such action. We believe, however, that the general principle that all persons must give basic respect to parents' control over their children is most consistent with our social traditions and with the psychological tenet that an intense bonding between parent and child should be fostered in all ways possible. This principle does not warrant absolute respect, no matter what circumstances occur. But the principle should be strongly favored in the practical operations of state child protective legislation. A legal rule which authorized—and, in effect, invited—any professional to disregard the traditional norms of confidentiality in dealing with children would unduly denigrate the principle of parental control. A contrary principle, however, which forbade professionals in all circumstances from reporting their concerns about children would unduly derogate from the needs of some children to be protected from their parents.

A middle ground, which would encourage professionals to think twice before breaching confidentiality but which would permit that breach for "good cause shown," is struck by this standard. The professional person who is bound by general norms of confidentiality under state law could be freed from those norms upon application to the intake processing agency, see Standard 5.1 F. *infra,* indicating in anonymous format the information he/she possesses about a child and the harmfulness of the child's custodial environment. The agency would authorize reporting of the identity of this child if it determined that the professional's allegations, if proven, would justify court jurisdiction—if, that is, the child's condition and parental conduct described allegedly violated the society's minimum norms for childrearing conduct.

The procedure envisioned would not be at all cumbersome. No hearing would be required; the agency would review the professional's allegations on the face of his/her report. Even if agency review might not be especially rigorous, the discipline imposed on the professional to explain why the ordinary norms of confidentiality should be abrogated in the particular case should itself have salutary effect toward restraining inappropriate interferences with parent-child relations.

3. Any person submitting a complaint or petition for permission to submit a complaint pursuant to subsection A.2. or any person providing information upon which a complaint or petition might be based, should be immune from any civil or criminal liability as a result of such action, or as a result of participating in any subsequent proceedings regarding such action, provided that such person was acting in good faith in such action. In any proceeding regarding such liability good faith should be presumed.

COMMENTARY

This provision bestowing civil and criminal immunity for persons who in good faith submit complaints or petitions, or requests to submit complaints, or generally provide information to court or noncourt agencies (such as police or school authorities), is typical of the majority of existing state laws. Some eight states provide absolute immunity for such action, but we are persuaded that a "good faith" requirement is not onerous and provides needed protection against malicious or vexatious petitions, a problem which has particular relevance to bitter and prolonged divorce custody disputes. See Katz et al., "Child Neglect Laws in America," 9 *Fam. L. Q.* 1, 43-45 (Table IX) (1975).

Barbara Caulfield, ***Legal Aspects of Protective Services for Abused and Neglected Children*** **(HEW, 1978), 23-25.**

Preliminary Considerations

When to Go to Court—Introductory Overview

GENERAL GUIDELINES

One of the biggest problems the social worker faces is deciding when to go to court. Serious and/or continuing

physical abuse, of course, clearly warrants the use of the court's authority for the child's protection. However, many cases, particularly those involving neglect, are less clear.

Generally speaking, court action should be considered to remove a child temporarily or permanently from the home or to obtain adequate treatment if:

1. The child is in imminent danger of harm.
2. Attempts at treatment have failed, and parents have not made progress toward providing adequate care for the child.

Beyond these very general guidelines, the social worker should consider the following specific factors in deciding whether or not to petition the court for permanent or temporary custody, for protective supervision, or for returning the child to the home:

1. Necessity for emergency care for the child away from his/her parents because of conditions dangerous to the child's physical, moral, mental, or emotional well-being, and because parents are unable or unwilling to use the help offered to change the situation.
2. Inability or unwillingness of the child's parents, guardian, or other custodian to discharge their responsibility to and for the child because of incarceration, hospitalization, or physical, mental, or emotional incapacity.
3. Abandonment or desertion of the child.
4. Necessity for review of the child's legal status.[1]
5. Availability of other agency methods of handling the case; for example, a change of caseworker.
6. Possibility of the agency (public or private) losing the case. (There may be little point in taking a case to court to ask for removal; in such a case, the worker may decide to seek alternative ways of handling the situation.)
7. Possibility that treatment, which has been unobtainable through the agency's resources, can be obtained by a court order; for example, out-of-State treatment that is available pursuant to court order.

The social worker should also bear in mind that going to court has a number of negative aspects. Aside from the more obvious problems of procedural complexity and legal pitfalls, the social worker should also weigh in the balance the effects that facing the court can have upon the individuals involved.

Court proceedings, even in juvenile or family court, tend to be adversarial in nature and can result in disruption of the client-family and family member-family relationships. An unsuccessful attempt to involve the court in child protection matters—i.e., when the court finds insufficient evidence to warrant its intervention—can also lead to total rejection of agency help in the future.

REFERENCE

1 Child Welfare League of America, "Protective Services and the Court." In *Standards for Child Protective Services.* New York: The League, 1973. (p. 46.)

Safety of the Home

Lack of home safety is a major factor in deciding when to go to court. Dr. Ray Helfer lists some of the following criteria for assessing the safety to a child of his/her home.[1]

1. Do the parents or caretaker have a support system that includes relationships with other people (friends, neighbors, families) who can "bail them out" in a crisis? This is based on the premise that socially isolated parents who do not feel there is anyone they can ask for help are more likely to vent their frustrations on their children.
2. Is the spouse helpful? If the spouse appears to be sensitive to the needs of the other parent and offers help in stressful situations, this increases the likelihood that the home will be a safe place for the child.
3. Is child-parent role reversal low? Role reversal denotes interaction between parent and child in which the child actually is taking care of the parent's needs rather than the reverse. (Helfer says that some role reversal—i.e, child taking role of parent and vice versa—exists in every home. However, the less role reversal, the safer the home for the child.)
4. Is there a "special" child? The child who is the target of the abuse is often viewed by parents a "special" or somehow different (in a negative way) in physical appearance, personality, etc. than other family members.
5. Are there frequent or ongoing crisies in the home? (Crisis is broadly defined by Helfer as almost any stress-producing factor that triggers child abuse and neglect. Crises range from losing job to visiting in-laws.)
6. Do parents indicate that, most of the time, they enjoy the child's presence?

Many other factors, of course, may affect the safety of the home. The list used here is presented to offer an example of how the social worker might begin to assess home safety.

REFERENCE

1 See generally *A Self Instructional Program on Child Abuse and Neglect,* units 1 and 2, (Copyright 1974 by Ray Helfer, M.D., Professor of Human Development, College of Human Medicine, Michigan State University, East Lansing, Mich. 48824.)

Social Worker/Client Relationship

A good social worker/client relationship is one in which both can agree on the desired course of action and proceed toward a jointly identified goal with willingness and cooperation on both sides.

The resolution of parental child abuse and neglect requires parents to change their behavior toward their children and to alter what are often deeply rooted attitudes toward childrearing. If the cooperation of parents can be obtained without court intervention, and if the child does not appear to be in immediate danger by remaining in the home situation, then court action is unnecessary and not recommended. However, court action will probably be necessary if the social worker determines that the child should be removed from the home situation and voluntary release of the child by the parents is not possible.

Social workers generally agree that it is possible to use the court system to require parents to participate in treatment programs. But there is no consensus on the *advisability* of using such court action (or threats of court action) to achieve rehabilitative ends.

Most social workers feel that court action should not be undertaken until all other agency alternatives have been tried or are not feasible. Then, if attempts at voluntary treatment fail, court action may become necessary.[1]

Should agency efforts at rehabilitation fail, it may become necessary to ask the court for assistance in establishing: (1) an alternate living situation for the child (e.g., foster care, adoption, emancipation) through a court petition, (2) a court ordered treatment plan, or (3) protective supervision for the child. But any decision to request action from the court should be preceded by a consideration of the State's or agency's ability to provide a better alternative for the child.

Another area that bears mention here is institutional abuse. If the child has suffered injury due to negligence on the part of an institution (schools social services, etc.), court action may be necessary to require compensation or treatment for the injured child.

REFERENCE

1 Fay, Shirl E., "The Social Worker's Use of the Court." In *Child Abuse Intervention and Treatment.* Nancy B. Ebeling and Deborah A. Hill, Eds. Action, Mass.: Publishing Sciences Group, Inc., 1975.

ADDITIONAL READINGS

Becker, Thomas T., *Child Protective Services and the Law.* Denver, Colo.: American Humane Association, 1968.

———, "Protecting Legal Rights Through Judicial Process." In *Second National Symposium on Child Abuse.* Denver, Colo.: American Humane Association, 1973. (p. 47.)

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Fay, Shirl E., "The Social Worker's Use of the Court." In *Child Abuse Intervention and Treatment.* Nancy B. Ebeling and Deborah A. Hill, Eds. Action, Mass: Publishing Sciences Group, Inc., 1975.

Katz, Sanford N., *When Parents Fail.* Boston; Mass.: Beacon Press, 1971.

Wagner, Hon. Robert H., "The Role of the Court." In *A National Symposium on Child Abuse.* Denver, Colo.: American Humane Association, 1975. (pp. 57-58.)

New England Resource Center for Protective Services, *Preparing for Care and Protection Proceedings in Massachusetts; A Guide for Protective Service Workers,* 6-16.

III. Assessing Initiation of a Care and Protection Petition

Bringing a C & P action is a very serious step with significant consequences for a child and his/her family. Initiating court action should be seen as a *last resort* when other alternatives have been deemed inadequate. Except in extreme emergency situations, court intervention should be sought only after a case has been (1) identified, (2) investigated, and (3) services have been offered and provided to the child and his/her family. Thus, in general a C & P petition should be filed only when a child cannot be adequately protected through other means, e.g., homemakers, day care, voluntary placement, etc. or when the parents' lack of cooperation with a particular service plan places the child in the home at considerable risk.

The worker who is considering court action should recognize that filing a C & P petition is only one of several methods by which court intervention may be obtained. The worker should decide which type of court action would be most appropriate given the facts of the particular case. For example, if the worker feels that an abusive rarely present stepfather is the key variable in a case, the worker, rather than filing a C & P petition, may decide to assist the mother in filing a criminal complaint against the stepfather and applying for a restraining order to keep him out of the home.

The following types of court proceedings should be considered when handling a child abuse and neglect case:

A. Care and Protection (C & P) Petition.
B. Guardianship Petition.
C. Child in Need of Services (CHINS) Petition.

A. Care and Protection (C & P) Petition

1. *Relevant statute:* M.G.L.A.ch.119, §§24 et.seq.
2. *Type of proceeding:* Civil.
3. *Court:* Juvenile Court or Juvenile Session of District Court.
4. *Brought by whom:* any person.
5. *Purpose:* protection of child, ordering of services to protect child.
6. *Standard:* that a child under the age of 18 years is "without necessary and proper physical, educational, or moral care and disciplines, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent, or unavailable to provide such care."
7. *Comments:* puts burden on parent or guardian and not on child. While usually used for younger children, may be appropriate for older child in lieu of CHINS Petition where parent or guardian is viewed as primary problem.

B. Guardian Petition

1. *Relevant statutes:* (a) M.G.L.A.ch.201, §§2-15, b) M.G.L.Ch. 119, §23(c).
2. *Type of proceeding:* Civil.
3. *Court:* Probate.
4. *Brought by whom:* (a) anyone; (b) Department of Public Welfare.
5. *Purpose:* provision of legal guardian for child where parent's death, unavailability, incapacity or unfitness necessitates it.
6. *Standard:* where it appears "necessary" because of above reasons to appoint a guardian for the child.
7. Comments: Two different statutes apply here: (a) M.G.L.A. Ch. 201,§§2-15 is the general guardianship statute whereby anyone may petition for guardianship of a minor. Thus, for example, if a child's maternal grandmother has been caring for that child because the mother is a drug addict, the grandmother may petition the court to be appointed guardian of her grandchild. Under this statute, the guardianship may be temporary or permanent; however, court rules require that a petition for temporary guardianship and a petition for permanent guardianship be filed simultaneously. A Guardianship Petition can also be filed on behalf of a parent who is believed

to be unable to care for himself/herself due to mental incapacity. (See Chapter 201, §§6-15); (b) DPW may seek guardianship of a child under 18 years by means of a more specific statute, M.G.L.A.ch.119, §23(c) which provides that "the Department may seek and shall accept an order of a Probate Court the responsibility for any child under 18 years of age who is without proper guardianship due to the death, unavailability, incapacity or unfitness of the parent or guardian, or on the consent of the parent or parents." This section provides an alternative legal proceeding to the C & P, whereby the Department may obtain legal custody of a child. Section 23(c) seems to speak only to permanent custody, as it makes no provision for temporary orders.

In general, a worker or other person would choose to file a petition for guardianship if there is little or no possibility that a parent would be able or willing to resume custody and a long-term parental alternative is needed.

Additionally, it should be noted that §23(c) interfaces with voluntary placement arrangements. If a worker obtains parental consent to a voluntary placement of a child, and if a parent subsequently indicates a desire to terminate the voluntary placement, and if the worker determines that the child's best interests require the Department to retain custody, then the worker may (and perhaps must) seek legal custody through a 23(c) action in the Probate Court. (Although it is not entirely clear, the *BOYNS* case 276 N.E. Reporter 716 (Mass.) seems to indicate that the Department *must* bring a section 23(c) guardianship action in the Probate Court rather than a section 24 C & P action in the juvenile or district court in this situation. See Analysis of Care and Protection Statute, pp. 16-19 for further discussion of this issue).

C. Child in Need of Services (CHINS) Petition

1. *Relevant statute:* MGLA Ch. 119 §§39(E) et seq.
2. *Type of proceeding:* Civil.
3. *Court:* Juvenile Court or Juvenile Session of District Court.
4. *Brought by whom:* a) parent or legal guardian, police officer, or b) supervisor of school attendance.
5. *Purpose:* provision of services to child.
6. *Standard:* a) that said child persistently runs away from the home of said parent or guardian or persistently refuses to obey the lawful and reasonable commands of said parent or guardian resulting in said parents' or guardians' inability to adequately care for and protect said child; or b) that said child persistently and willfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.
7. *Comments:* A CHINS Petition is very much an action against the child, whereas a care and protection petition is an action *about* the child. Generally, in a CHINS petition, it is the child's behavior which is before the court; in a care and protection petition, it is the parent's. Whereas a CHINS petition may be brought only by a parent or a police officer (except that only a supervisor of attendance may take out a petition for truancy), a care and protection action may be brought by "any person."

In practice, there is occasional overlap between the C & P and CHINS, particularly with adolescents. For example, a healthy adolescent may run away from an abusive parent but find his running away, not the parental abuse, to be the subject of court action. Although the court procedures are different, as a practical matter, the available remedies are similar (but not always identical). But the child's perception of a CHINS proceeding is very different from his view of a C & P , since under CHINS the child is very much the defendant.

If there were no other distinctions between CHINS and C & P, it would appear that, where a choice is possible, the child would be better off with a C & P. However, social services professionals who have worked with both kinds of cases feel that CHINS cases more readily lend themselves to successful family counseling than do C & P cases. The reason seems to be that, with a C & P, parents are placed in a defensive position and are less willing to cooperate in solving a family problem. CHINS, on the other hand, allows parents to feel they are participating in solving a problem. It would seem that there is no clearly preferable choice between CHINS and the C & P if an option is available. One other consideration might be the availability of services under CHINS or a C & P. Each program is separately funded by DPW and the worker may want to ascertain which program has money still available for services.

IV. Preparation for Filing a Care and Protection Petition

Once the worker has decided to file a C & P, there are numerous things which he/she should do *before* approaching the juvenile or district court.

A. Review of Case File

The worker should first review the case file. The importance of a good case file cannot be emphasized too strongly. Cynthia Bell and Wallace J. Mlyniec, in their article "Preparing for a Neglect Proceeding: A Guide for the Social Worker," state that "building a legally usable record of facts for possible litigation begins *at intake* in all cases of suspected child abuse or neglect." (A suggested format for case recording may be found in the Bell and Mylniec article which is included in the Manual as Apendix A). A review of the case file can aid the worker in re-assessing the decision to file a C & P petition.

When reviewing the case file, it may be useful for the worker to make a separate "case chronology" of significant events and dates. This can serve as a summary outline of the case for the petitioner and his/her attorney throughout the C & P process. If significant pieces of data are missing from the case file, e.g., 51A form, birth certificate, etc., an effort should be made to locate them. When reviewing the case file, the worker should look for the names of persons who have had contact with the family and who may be valuable as witnesses at the C & P hearing.

B. Lining Up Potential Witnesses

The worker should consider contacting potential witnesses who can support the decision of filing a C & P

petition. If the worker is concerned that he/she might have a "weak" case, it is especially important to ascertain if there are other people with knowledge of the facts who can support the petition. While it is always possible to subpoena persons who are reluctant to testify, it is preferable to secure their voluntary participation from the outset.

C. Analysis of Statutory Standard

After reviewing the case history, the worker should focus on the factors which have precipitated the decision of file a C & P petition. The worker should then look at the statutory language of M.G.L.A. Chapter 119, §24, viz:

> " . . . that said child is without necessary and proper physical, educational, or moral care and discipline, *or* is growing up under conditions or circumstances damaging to a child's sound character development, *or* who lacks proper attention of parent, guardian with care and custody, or custodian, *and* whose parents or guardian are unwilling, incompetent, or unavailable to provide such care . . .

This language establishes a two-pronged standard: (1) some condition of the child, and (2) some condition of the parent, guardian or custodian. The worker should decide which statutory basis applies to his/her specific case. For example, if the major problem in a case is a chronic alcoholic mother who frequently goes on "binges" leaves her 3-year-old child unattended, the worker would reason that this is a case which falls under the statutory language of a child "who lacks proper attention of parent" *and* "whose parent is unavailable to provide such care."

Although the language in the C & P statute is very broad, the worker should always examine it before filing a petition in order to form an opinion as to which language best describes the facts of the particular case. This will help reassure the worker that he/she is justified in filing a petition and will assist the worker in convincing the clerk or probation officer that a petition should be issued.

Additionally, the worker should ascertain the appropriate court in which to file the petition (see subsequent section of Manual on "Where to File," Page 17), and should try to learn from another worker, attorney, about that particular court's expectations. For example, a particular court may expect a worker to produce a 51A report at the time the petition is filed. Knowledge of a court's expectations can prevent potential problems in filing.

D. Consideration of Recommendations

Next the worker should consider the recommendations which he/she intends to make to the court at the preliminary hearing. They should be consistent with the analysis leading to the decision to file the petition. In addition, the recommendations must be feasible. For example, if the worker is seeking court intervention to compel a young mother to accept a homemaker, then prior to filing the petition the worker should determine if homemaker services are available to meet the needs. Prior to filing the petition, the worker should be able to answer the questions: (1) What is the rationale for my filing a petition? (2) What are my recommendations as to what should be done? (3) Are the recommendations consistent with the rationale? and (4) Are the recommendations feasible given existing resources?

E. Notification of Parents

Although the C & P statute does not require the worker to inform the parent that he intends to file a C & P petition, in most situations it is advisable for the worker to do so. The worker should also describe the court processes to the parent and what is likely to occur. This will serve to reduce the parent's fears of uncertainty and animosity. In addition, informing the parent can increase the parent's feeling of participation in and control over the court process. There are cases, however, where informing the parent of the worker's intention to file a petition might increase the likelihood of risk to the child or the probability of the child's being removed from the court's jurisdiction. In such cases, the worker may choose not to inform the parent prior to filing.

V. Filing a Care and Protection Petition

The care and protection process is initiated by the filing of a care and protection petition, hereafter referred to as a "C & P Petition," in the appropriate court. Such a petition may be filed by "any person" who believes that a child under the age of 18 years is in need of care and protection for the reasons described previously.

A. Who May File

A C & P Petition, as noted above, may be filed by "any person." The term "any person" is construed by court clerks to mean a human individual; a hospital, social service agency, corporation, or other business entity would not qualify to seek a complaint in its own name. An individual must seek and sign the application even though acting in his/her official capacity as an employee of such an entity.

Generally, petitions are brought by social workers, hospital personnel, or the police. Occasionally a controversy may develop among the various parties as to who is a more appropriate person to being a petition where a number of agencies and individuals have been involved with the family. Various factors which should be considered when resolving this question are: the length of time of agency involvement with the family, the precipitating event leading to the decision to seek court involvement, the access of the agency to counsel, the physical location of child (at home, in hospital), and the court preference. As a general rule, the agency with the most substantial involvement with the family is the most appropriate and effective petitioner. In some situations, it may be determined that an agency with a secondary involvement with the family should be the petitioner, so that the agency with primary involvement is able to continue as the main "helping source." Occasionally it may be reasonable for two agencies (i.e., representatives from two agencies) to file jointly. In any event, it is important to discuss the various options and to agree to a particular plan.

Some courts have attempted to require that *all* petitions be brought by DPW workers; such a practice is contrary to the broad language of the statute. If such a practice exists and if it presents barriers to the adequate protection of children, it should be brought to the attention of appropriate parties (e.g., Chief Judge of District Courts, Office for Children, Children's Defense Fund) for remedy.

Occasionally a relative seeking custody of a child may approach the DPW worker or court for a C & P petition. The specific facts of the case should be examined carefully to determine if the matter would be more appropriate as a "guardianship petition" in the Probate Court. Such a petition is particularly appropriate if long-term care of the child by the relative is sought and there is little hope that a parent will be able or willing to resume care.

Recently, it has been suggested that a child could initiate his/her own petition as "any person." Traditionally, the law does not recognize minors as competent to initiate legal process without an adult acting as "next friend." However, several states have recognized a "mature minor doctrine" with regard to the capacity of a minor to consent to his/her medical care. The doctrine holds that a minor may consent to his/her own medical care if he/she is able to understand the nature and consequences of the particular procedure. By extending the mature minor doctrine to abuse and neglect, one may argue that a minor has the right to protect his/her health and well-being by initiating a care and protection petition. This view would give a child parity with his/her parents' ability to initiate an action against the child under CHINS.

C. Role of Juvenile Court Intake

(See Section I. C. and the New York statutes and commentary in Section II. B.)

Institute of Judicial Administration / American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect —Tentative Draft* **(New York: Ballinger Publishing Co., 1977), 5.1F. Reprinted with Permission.**

5.1F. Prosecution of the petition.

Upon filing, the court should refer the petition to a designated agency, which should be separate from the court and from criminal prosecuting agencies, for prosecution of the petition.

COMMENTARY

This subsection envisions reliance on a special agency, administratively separate from the courts, for prosecution of the petition. The separate existence of a prosecutorial agency is necessary to clarify the court's role in adjudicating petitions—to assure its neutrality and impartiality, that is. Where court staff act as proponents of the petition, harmful confusion about the proper court adjudicative role is created. This subsection further envisions that the prosecuting agency should be administratively distinct from criminal prosecuting agencies. Pursuant to the standards set out in Part III, this agency should have demonstrated expertise in the special problems of child welfare. The reference to Part III makes clear that this agency need not be single-mindedly limited to prosecution of petitions in endangered child cases. Rather, this agency can have many different child protective purposes. It may be publicly or privately funded; it may provide family treatment resources or it may serve as general coordinator of family services in the jurisdiction; or, indeed, it may be limited to the single purpose of prosecuting petitions. It is further envisioned that this agency may be the same as the agency responsible for prosecuting juveniles charged with delinquent acts. See the *Prosecution* volume. Because of the enormous variability of resources and conditions across the country, no single administrative model is recommended except for the general standard that the prosecuting agency shall be separate from the courts (and from criminal prosecuting agencies) and shall have demonstrated expertise in child welfare matters under criteria to be developed by the relevant statewide agency pursuant to Part III.

National Center on Child Abuse and Neglect, *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects* **(1978), Standards for Courts and the Judicial System I-1, I-2, I-10** *DRAFT.*

Administration, Management, and Procedures

Standard I-1

To divert the need for court action, the judicial system should refer reports of child abuse and neglect to the local child protective services unit for assessment and possible non-court handling.

GUIDELINES

Review, upon receipt, any reports of child abuse and neglect made directly to the court. This function should be performed by the juvenile court's intake workers, by the probation staff, or by the county attorney, taking the following into account:

(1) the nature of the report;

(2) information needed by the Local Child Protective Services Unit to act on the report;

(3) other alternatives already explored by the reporter to remedy the situation.

Recommend that the person or agency concerned with incident or suspected child abuse or neglect cooperate with the Local Child Protective Services Unit.

Refer the report immediately to the Local Child Protective Services Unit for its assessment of the child's situation.

Determine, with the Local Child Protective Services Unit, those child abuse and neglect reports which may warrant court action.

Standard I-2

The judicial system should ensure that child protective court proceedings are initiated only when necessary to protect the child's health or safety.

GUIDELINES

Designate a special attorney or staff of attorneys to review and file petitions requiring court action:

(1) the special attorney or juvenile court's intake worker may request additional assessment of the child's situation or refuse to file a petition;

(2) a person who desires to file a petition with the court when the attorney or juvenile court's intake worker has refused to do so may appeal the attorney's decision to the judge.

Act immediately upon petitions when:

(1) the child has been abandoned;

(2) protective custody has been exercised (Cross-reference to Standard I-3, p. III-181);

(3) emergency services are needed.

Act promptly on petitions initiated by the Local Child Protective Services Unit when:

(1) the court's authority is necessary to assist the Local Unit in making a plan for the child and his family such as:

(a) when court-ordered protective supervision of the Local Unit's authority for intervening into the family's life;

(b) when the court is needed to assist the Local Unit in fulfilling its treatment plan for the child and/or for any other family member.

(2) the child is in need of placement outside of his home.

Initiate criminal prosecution of a person alleged to have abused or neglected a child only in very grave situations, e.g., death of child, sexual molestation of child.

COMMENTARY

This Standard makes two recommendations to improve the quality of petitions and the presentation of evidence when court proceedings are necessary. First, the review by a special attorney increases the likelihood that only those cases necessary to protect a child's health or safety will be litigated. The proposed special attorney is similar in several respects to a district attorney; the latter however, investigates and prosecutes criminal cases. The special attorney has responsibility to prepare the petition, may prosecute the adjudicatory hearing, and suggest dispositional alternatives. Although new court staff could be established for these purposes, a State legislature or court may prefer to designate a county attorney or other existing authority who is independent of the court.

Resource Enhancement

Standard I-10

Judicial system personnel should receive training to increase their understanding and knowledge of judicial responses to child abuse and neglect.

GUIDELINES

Develop procedures to ensure that judicial system personnel at all levels receive training in the dynamics of child abuse and neglect.

Relate training to the specific needs of particular categories of judicial system personnel.

Focus training for judges, attorneys, prosecutors, and guardians ad litem on the following:

(1) their role in prevention;

(2) causes and manifestations of child abuse and neglect, including social and family dynamics;

(3) when it is appropriate to order or request psychological evaluations, temporary psychiatric commitments, protective custody, or counseling services;

(4) how to evaluate psychological, probation, medical diagnostic reports, and expert testimony;

(5) awareness that if the factors which produced the abuse and neglect are ignored at disposition, further maltreatment of the child may occur;

(6) the range of alternative dispositions, including services and facilities available for treatment, with emphasis on those available within the community;

(7) the role of the parents' attorney in interpreting the court and its processes to the parents, and in assisting them in accepting and cooperating with the dispositional order.

Focus training for court intake workers and probation counselors on the following:

(1) causes and manifestations of child abuse and neglect, including family and social dynamics;

(2) interviewing and counseling techniques;

(3) the process for referring a report of abuse or neglect to the Local Child Protective Services Unit;

(4) factors to consider in initiating court action such as:

(a) the child's age and the degree of harm or threatened harm;

(b) the family's previous court record or previous involvement with the Local Child Protective Services Unit;

(c) the child's or sibling's previous involvement in protective proceedings;

(d) the family's willingness to cooperate.

(5) the responsibility to provide advice to parents, child, and reporter(s) on their legal rights and responsibilities in court proceedings, if attempts at preliminary adjustment are unsuccessful, including:

(a) the right to counsel;

(b) the duty to appear when summoned.

(6) knowledge of availability, quality, and appropriateness of treatment services and facilities;

(7) understanding of the judicial system and legal processes; and the responsibility to review the court's jurisdiction over the proposed petition.

Utilize the following mechanisms to train judicial personnel, as appropriate:

(1) law school curricula; graduate and undergraduate courses;

(2) continuing education programs;

(3) seminars and workshops sponsored by bar or professional associations;

(4) formal and informal training provided by other judicial system personnel who have expertise in child protective cases, including examples of other jurisdictions' model programs;

(5) annotated bibliographies on child abuse and neglect;

(6) training sponsored by other agencies, professions, or multi-disciplinary groups.

New England Resource Center for Protective Service, *Preparing for Care and Protection Proceedings in Massachusetts; A Guide for Protective Service Workers* **18-19**

D. How to File

In each juvenile or district court in the Commonwealth, there is a particular person or category of persons responsible for processing C & P cases. Usually the clerk of court's office handles the filing of petitions, but occasionally the juvenile probation officer or juvenile police officer assigned to the court is the designated person. A worker intending to file a petition should call the court to find out whom he/she should contact about filing.

The purpose of the initial inquiry by the clerk or officer is to determine if the case would more appropriately be brought in another court (e.g., guardianship cases) or should be handled through another mechanism (e.g., CHINS complaint). In addition, the initial inquiry is meant to weed out cases which are unsubstantial or not based on sufficient evidence.

If the clerk or officer initially approves the petition, a complaint form is completed and sworn to by the petitioner. As stated earlier, the reasons given in the petition should meet two tests: The condition of the child and the condition of the parent or guardian. If these tests are not met, a petition may subsequently be dismissed upon the motion of the parents' attorney.

If the clerk or officer decides that the petitioner's evidence is insubstantial and does not warrant the bringing of a C & P action, he/she may refuse to allow the filing of the C & P petition. Should the clerk or officer refuse to allow the petition, the petitioner has the right to appeal the decision by asking to see a judge of the court. The judge will review the petitioner's evidence and decide whether it is sufficient to warrant the filing of a C & P petition. In the event that the worker's request to meet with a judge is denied or if the judge should also decline to act, the worker should contact the Chief Justice of the District Court, or, for more immediate action, proceed to seek custody of the child in the county probate court.

In addition to the information outlined above, the petition also provides that the court should notify the Department of Public Welfare of the petition, should bring the child before the court for identification, and should summons the parent(s) to appear before the court to "show cause" why the court should not commit the child to the custody of the Department or make some other appropriate order. This is standard language on the petition form, and is of no consequence to the worker.

The Social Service Board of North Dakota, Court Referral Project Final Report **(1977), 48-49**

V. North Dakota Juvenile Court Practices with Child Abuse and Neglect Cases

A. Present Practices

Juvenile court becomes involved with abuse and neglect cases when, pursuant to NDCC 27-20-06, the juvenile supervisor receives a written investigation report from social services. The juvenile supervisor reviews the report to consider action.

Since a small percentage of the reports referred to the court result in a formal hearing the juvenile supervisor frequently meets with social service personnel to determine the best method of resolving the case. The juvenile supervisor may direct any further investigation to determine the need for a formal hearing. If there is a need for legal action, the juvenile supervisor may, depending upon the jurisdiction, contact the state's attorney. In many instances, the state's attorney is only involved if it becomes necessary to prove the allegations in a hearing.

Before the juvenile supervisor makes a decision regarding the filing of a petition, he may meet with social services and the family. These meetings may aid determination of the necessity for a formal hearing. The juvenile supervisor may inform the family about the process of juvenile court hearings and advise the family about treatment recommended by social services.

If a formal hearing is necessary, the juvenile supervisor or other person authorized by the court must endorse on the petition that the filing of the petition is in the best interest of the public and the child. (From NDCC 27-20-19)

The juvenile supervisor usually schedules the hearing and makes sure the documents are properly filed and served. Also, the juvenile supervisor may testify in the dispositional hearing with recommendations for disposition of the child.

The following deficiencies have been found through the Court Referral Project in present juvenile court practices on child abuse and neglect cases:

1. Cases are not referred to state's attorneys early enough in the process of a case.
2. Meetings between social services and juvenile court staff regarding child abuse and neglect cases are not held frequently enough to provide caseworkers with instruction about legally oriented tasks which they must carry out.
3. Juvenile court staff is not assisting sufficiently with further investigation necessary after referral of social services' investigation report.
4. Informal detention hearings, when necessary for deprivation cases, are not being held.

B. Court Referral Project Suggestions

Coordination. To improve the referral process it is necessary that there be closer coordination of activity and better lines of communication between court staff and social services. Interagency staff meetings must be regularly convened at which the juvenile supervisor provides advice or instructions for investigation. The meetings might be also used to discuss cases which have gone to a formal hearing. Evaluation of evidence and testimony from past cases will improve the information social services provides the court in future cases.

The juvenile supervisor should contact the state's attorney early in the process of cases which may require legal action. In this way the state's attorney will have

timely access to information and can assist the juvenile supervisor with instructions for the social worker regarding evidence, testimony, and investigation.

The juvenile supervisor should work more closely with social services during any further investigation which may be necessary after referral of a substantiated report. When social services notifies the court staff of relevant records which are unavailable to social services, the juvenile supervisor should either obtain the records or bring the existence of those records to the attention of the court.

Record keeping. In order to simplify monitoring cases, juvenile court staff should develop a filing system for purposes of increasing accessibility of cases which need periodic review. Also, a face sheet (see example, page 166) could be a part of the file to keep a record of any court action on that case by the juvenile supervisor, referee or juvenile judge.

Delaware Family Court Rule 80

II. Intake Division

A. Referral of Proceedings to Intake Department

Rule 80. Reception of Complaint and Civil Petition.

(a) Determination of Legal Sufficiency. All complaints alleging neglect, dependency, delinquency, or a crime or a petition for civil relief shall be recorded and be referred to the Intake Department of this Court. The Intake Department shall make a preliminary determination, subject to review as provided in subsection (c) of this Rule, as to whether the allegations made by the complainant or petitioner appear to be legally sufficient to warrant the filing of a petition in the interest of a child, a criminal information or a petition for civil relief. In the case of a petition for civil relief prepared and filed by an attorney for the petitioner, no such preliminary determination shall be made. In such case, it will be presumed that counsel has reviewed the facts with the petitioner and determined that there is a legal basis for the action.

(b) Procedures. The Intake Department may (1) refer the case to an appropriate public or private agency, or (2) subject to subsection (c) of this Rule, recommend dismissal of the case or to refuse to authorize further proceedings if the facts and the interest of justice so warrant, or (3) conduct conferences for the purpose of affecting adjustments or agreements which could obviate the necessity for formal court action, or (4) authorize the filing of a petition in the interest of a child, a criminal information or a petition for civil relief.

(c) Review of Dismissal or Refusal to Authorize Further Proceedings. In the event the Intake Department recommends or takes any action other than to authorize the filing of a petition in the interest of a child, a criminal information or a petition for civil relief, the complainant or petitioner shall forthwith be informed of the reasons for such recommendation or action and of his right to a review of his complaint or petition.

(1) Child Delinquency and Adult Criminal Matter. The request for a review in a child delinquency or adult criminal matter shall be made to the Attorney General within 10 days after notification from the Intake Department that the filing of the criminal information or delinquency petition was not authorized. The Attorney General shall review the matter and thereafter (a) authorize the filing of a petition in the interest of a child or a criminal information, or (b) dismiss the complaint, or (c) refer the case back to the Intake Department for further adjustment. In all events the decision of the Attorney General shall be final.

(2) Civil Matter. The request for a review in a civil matter shall be made to a Judge of this Court within 10 days after notification from the Intake Department that the filing of the petition was not authorized. The Judge shall review the matter and thereafter (a) authorize the filing of a civil petition, or (b) dismiss the petition, or (c) refer the case back to the Intake Department for further adjustment. The reviewing Judge shall not preside at the adjudicatory hearing unless with the consent of the parties.

District of Columbia Superior Court Neglect Proceedings Rules 7-11.

III. Intake Procedures for Children Not in Custody

Rule 7. Referral to Director of Social Services

Complaints alleging neglect shall be referred to the Director of Social Services or his delegate (hereafter "intake officer" in Part II), who shall make a preliminary determination as to whether the facts as presented in the complaint warrant further action within the Division. Where the complaint alleges physical abuse or injury of a child, the complaint must be accepted for further investigation; in other cases, if the facts do not warrant further action within the Division, the complainant shall be so informed and may be referred to another agency for appropriate services. The person making the complaint shall also be informed in such cases of his right to review by the Corporation Counsel of the intake officer's decision.

ADVISORY COMMITTEE COMMENT

The second sentence of the rule ensures that those occasional child abuse cases that are referred directly to the Family Division (rather than to the police as is the usual practice) will be followed up by an intake investigation. The last sentence of the rule is required by D.C. Code § 16-2305(a).

Rule 8. Preliminary Investigation

If the intake officer has made a preliminary determination that the case warrants further investigation, he shall conduct a preliminary investigation to determine whether the best interests of the child or the public require that a petition be filed. Wherever possible, the officer shall ascertain from other records kept by the Division whether members of the child's family or household have been or are the subject of Division proceedings. The investigation may take place without consent of the parties affected, and may be based upon public records or other informa-

tion of a non-private nature, or upon oral inquiries directed to the child and his parents, guardian or custodian at an intake interview.

ADVISORY COMMITTEE COMMENT

The rule reflects an important policy of the Family Division: that the social services department should cross-check records and find out from other branches of the Family Division whether the family is known to or presently has other actions pending in the Division. This kind of pooling of knowledge about a given family is one of the major purposes of a family court.

Rule 9. Intake Interview

An intake interview may be scheduled by the intake officer if there is reason to believe that a personal interview would furnish necessary information or might lead to resolution of the complaint without the filing of a neglect petition. A parent, guardian or custodian requested to come to an intake interview shall be informed that the interview is voluntary and that they may have counsel present at the interview. Statements or information secured therefrom, made by a parent, guardian or custodian to the intake officer during an intake interview, or to the Corporation Counsel prior to the filing of a petition, shall not be admissible for any purpose at any hearing prior to the dispositional hearing, or in a criminal proceeding at any time prior to conviction. If the parents, guardian or custodian fail to appear at the intake interview when requested, the intake unit may immediately authorize the filing of a petition.

ADVISORY COMMITTEE COMMENT

The first sentence authorizes informal adjustment by the intake officer in appropriate cases. The third sentence, which is similar to a provision in the juvenile delinquency rules is designed to encourage full disclosure at an intake interview and to avoid possible self-incrimination problems.

Rule 10. Intake Criteria

In determining whether the best interest of the child or the public require that a neglect petition be filed, the intake officer shall consider the following factors, in addition to the factors set forth in D.C. Code § 16-2301 (9):

(a) Abusive or threatening conduct toward the child by a member or members of the same family or household;

(b) Existence of illness or injuries on the child's body for which no satisfactory explanation appears;

(c) Failure of the parent or parents to make any effort to contact the child or the child's guardian or custodian, or otherwise to maintain a parental relationship, over a continuing period of time;

(d) Failure of a child's parents, guardian or custodian to respond to informal adjustment efforts by the Social Services Administration of the Department of Human Resources or other accredited social agency over a continuing period of time.

ADVISORY COMMITTEE COMMENT

D.C. Code § 16-2305(a) requires that intake criteria be established by rule of the Superior Court.

Rule 11. Recommendation of the Intake Officer

If judicial action appears warranted, the intake officer may recommend to the Corporation Counsel that a neglect petition be filed and may also make recommendations with respect to the consolidation or disposition of causes before the Division relating to members of the same family or household. The parents, guardian or custodian shall be informed that the Division will assign counsel to represent them in accordance with SCR-Neglect 20 if a neglect petition is filed, unless counsel is privately retained by them.

D. Screening by Others

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect -Tentative Draft* (New York: Ballinger Publishing Co., 1977), 5.1B. Reprinted with Permission.

5.1 B. Intake processing agency review of complaints.

1. Upon submission of a complaint, an officer of an intake processing agency separate from the court should promptly determine, without hearing, whether the allegations, on their face, are sufficiently specific and, if proven, would constitute grounds for court jurisdiction pursuant to the standards set out in Part II. If the intake officer determines that the allegations, on their face, are not sufficiently specific, or, if proven, would not constitute grounds for court intervention, the intake officer should dismiss the complaint. If the sufficiency of the complaint is unclear, the intake officer should ask the appropriate prosecuting official for a determination of its sufficiency. If the intake officer determines that the complaint is sufficient, the officer should determine a disposition of the complaint. The following are permissible dispositions at intake:

a. Unconditional dismissal of a complaint. Unconditional dismissal of a complaint is the termination of all proceedings arising out of the complaint.

b. Judicial disposition of a complaint. Judicial disposition of a complaint is the initiation of formal judicial proceedings through the filing of a petition.

c. Referral to a child protective services agency. Referral to a child protective services agency is the referral of the child and his/her parents to a child protective services agency for further consideration.

2. In determining a disposition of a complaint at intake, the intake officer should:

a. determine whether coercive intervention appears authorized as provided in Standard 2.1 A.-F.;

b. determine whether judicial intervention appears necessary to protect the child from being endangered in the future, as provided in Standard 2.2; and

c. consider the resources available both within and without the juvenile justice system.

3. The state and local agencies responsible for intake services should promulgate detailed guidelines and rules setting forth specific criteria for intake dispositional decisions. The guidelines should be formulated in consultation with interested juvenile justice system agencies and community based agencies and should be periodically reviewed and evaluated. These guidelines and rules should control and structure the exercise of discretion by intake officers in the making of intake dispositional decisions to produce consistency, fairness, and effectiveness in such decisionmaking. The legislature and courts should encourage or require administrative rulemaking with respect to criteria for intake dispositional decisions.

4. Any person submitting a complaint who is aggrieved by the intake processing agency's disposition may appeal that disposition to the court. In this court review proceeding the prosecuting agency, pursuant to Standard 5.1 F., may in its discretion represent the aggrieved person or the court may in its discretion appoint counsel to represent the aggrieved person.

COMMENTARY

This provision follows the model of the intake processing agency provided in *The Juvenile Probation Function: Intake and Predisposition Investigative Services* volume for the juvenile court. It provides for an initial screening, by an agency separate from the court, on an *ex parte* basis without hearing, of all complaints submitted. The essential function of this screening is promptly to dispose of clearly meritless complaints, to ensure that all petitions accepted for filing contain sufficient specificity, to ensure that parents are clearly apprised of the charges against them, and to divert complaints to noncourt disposition where appropriate. The agency's disposition is appealable in court. Courts have ultimate responsibility under these standards for the application and elucidation of the basic norms of state child-protective activities. Delegating this role exclusively to a subordinate bureaucracy would limit the public visibility and articulation of those norms.

National Center on Child Abuse, ***Model Child Protection Act With Commentary*** **(1977 draft), Section 25, Right to Representation in Court Proceedings.**

25 (c) In every juvenile [*or family*] court proceeding concerning alleged child abuse or neglect in which it is a party, the local child protective service shall have the assistance of legal counsel [*provided by the local civil law officer of the appropriate county or comparable political subdivision or georgraphic area.*]

COMMENT

This subsection requires that the local child protective service have the assistance of counsel in any proceeding in which it is a party. Historically, prosecutors played a minor role in child protective proceedings. If evidence had to be collected or witnesses called to testify, that function was performed by the protective worker. As long as juvenile court procedures were informal and the rules of evidence relaxed, the petitioning protective worker did not need legal assistance. However, the increased participation of defense counsel has created greater formality in juvenile court proceedings, and has put the protective worker without legal assistance at a severe disadvantage. Without counsel to assist the worker in pre-trial investigation, case preparation, petition drafting, courtroom presentation, and legal argument, otherwise provable cases are often dismissed when the parent has the advantage of vigorous defense counsel.

If case preparation and presentation suffer, the absence of legal assistance for the petitioner might seem to be to the parent's advantage. It is not. Fearing that an abused child may be returned wrongfully to his parents, the judge tends to perform the function of the absent prosecutor. If the judge becomes the advocate of the petitioner's case, he cannot keep an open mind until the moment of judgment and then sit back and apply the presumption of innocence as he considers all the evidence.

In many communities, the distict attorney or similar criminal court prosecutor represents the child protective service in the juvenile court. Many prosecutors understand and strive toward the juvenile court's social purpose, which is broader than the criminal court's focus on criminal liability. Nevertheless, to minimize the punitive nature of the juvenile court proceeding, the locality's civil law officer, for example, the county attorney or city corporation counsel, should be appointed to represent the child protective service.

Consideration might also be given to hiring independent counsel or using the legal staff of the local department of social services, if it has its own counsel.

In any event, those appointed should understand the child protective system's emphasis on treatment and ameliorative services. And they must appreciate that their pre-eminent professional, constitutional, and ethical obligation is to fairly and honestly represent the interests of the child. If those interests seem to conflict with the position of the local child protective service, they must be prepared to disagree with the local service and take appropriate action. For example, if the local service decides that court action is required but the attorney concludes that there is insufficient evidence or that the child's interests otherwise indicate that court action is inappropriate, he must be free to prevent the commencement of the proceeding or, if it has already been commenced, to move for its dismissal.

Arnold Schuchter, ***Prescriptive Package, Child Abuse Intervention*** **(Washington, DC: LEAA, 1976), 93-95**

C. Civil Adjudication Process

1. *Referral to county/city attorney.* The referral of a case from the CIMC to the county/city attorney marks the commencement of the civil adjudication process. This referral represents either that the medical aspects of the

accidental/non-accidental issue have been resolved, as best they can be at the hospital, and that the injury appears to be non-accidential; or that a specified maximum period of time, e.g., 96 hours, from the time of a child's referral to the CIMC is about to expire and that the medical diagnostic process cannot be completed within that period.

The diagnosis concluding that the injury appears to be non-accidental may be based solely on a medical basis, i.e., the nature of the injury is such that it could only have been inflicted; or it may be based on a combination of medical findings and other factors. Such factors may include an explanation by the parents at intake that clearly does not correspond with the nature of the injury; previous unexplained old injuries; a record of a previous adjudication for child abuse in the family found in the CAIF; or these factors may include a history of foster placements of the child by voluntary agreements, or other factors which convincingly support a conclusion by CIMC staff that there is substantial risk that the child may be endangered in its present home environment.

Whenever a referral is to be made to the county/city attorney, the parents or caretakers should be informed of this fact by the hospital, the reason for the referral should be simply stated, and an explanation of the possible subsequent proceedings should be given.

2. *Pre-petition investigation.* The decision to be made by the county/city attorney upon a referral involves a determination of whether the hospital report provides a sufficient basis to support the filing of a petition. Not every case is expected to be conclusively resolved by the CIMC diagnostic process. Moreover, certain cases, because of the complexity of the injuries or of the testing and evaluation process, cannot be resolved within the initial 4-day (96-hour) time frame.

At the point where a pre-petition investigation is called for, there is only a *suspicion* of child abuse. (Where there is probable cause to believe an injury is the result of abuse, there is no need for any further pre-petition investigation.) Thus, in keeping with the reasons discussed previously (II. B. *supra*) the police should not be involved in this investigation process. Nor should protective services, welfare agencies, or other agencies which may be relied upon to provide services to adjudicated families be involved.

The perceived conflict between an agency acting as both an investigator (accuser) and subsequent helper, as discussed previously, may seriously affect the development of a therapeutic relationship at the dispositional phase. Court-based probation also is not the proper party to conduct this investigation. A key objective of the model system's civil court process is to develop a proceeding that is more truly analogous to civil litigation where the contesting parties stand equally before an uninvolved tribunal. The use of court-based staff in the decision-making function of one of the parties, i.e., the petitioner, whether it involves the decision to file a petition, the development of facts to prove the petition, or the determination of the relief to be sought, undermines such a strategy.

The limits on the scope of a pre-petition investigation are designed to control the potential for overzealous intrusion into the family. This is in keeping with the strategy to limit the scope of each intervention only to that which is necessary to make the decision to go on to the next step of the civil adjudication process. At the point of the pre-petition investigation there exists only a suspicion of abuse. Thus, only the information necessary to resolve that suspicion is essential at that point in the process.

Lastly, the pre-petition investigation should not be open-ended with respect to time for completion. A key principle of the model system is that injured child cases are emergency situations and should be dealt with as such from the point of initial contact through court disposition. Long delayed decision-making phases are to be avoided. Thus it is suggested that any pre-petition investigation be completed within 3 days of referral to the county/city attorney or by the time the medical diagnostic process is completed, whichever occurs last. Except in unusual cases, such a time-frame should be sufficient to conclude whether there is probable cause to support the filing of a petition.

The overall time-frame envisions a maximum of 7 days, from the time of referral of a child to the CIMC, to resolve the medical aspects of the child's injury, conduct a pre-petition investigation where necessary, determine whether to file or not file a petition, and in the case of the former, to resolve the issue of custody of the child pending the adjudication hearing. This time-frame is intended to minimize the period of disruption of the family unit and to promote a speedy resolution of the interim status of the case, by reducing the presently over-long periods of time a family is kept in legal "limbo," without knowing whether the matter is going to court or not. This proposed procedure implicitly recognizes the "limitations not only of the legal process but also of the predictive value of the knowledge on which its judgment is based."

In cases where a pre-petition investigation is called for, contrary to present practice, such an investigation should not be conducted by the probation staff, by police, or by any agency that could conceivably play a role in an eventual disposition service plan; nor should the investigation involve a social or psychological evaluation of the family. Instead, the investigation should be performed by the county/city attorney's staff or by an agency not involved in providing services to adjudicated families. It should be limited in scope to *additional* fact-gathering, i.e., the development of sufficient information to support a finding of probable cause that the injury was non-accidental or to support a conclusion that the injury was accidental. When such an investigation is commenced the court should be notified as well as the parents who should be afforded the opportunity to obtain counsel; and counsel for the child and a guardian ad litem should be appointed by the court.

The purposes to be served by the pre-petition investigation are either to develop additional information to determine the probable cause of the injury, or in the case where the medical evaluation is not completed (at the end

of the initial 96-hour period) to prevent any further delay in the decision-making process beyond that required to complete the medical diagnosis.

In situations where the diagnostic process is not completed, the pre-petition investigation may serve either as a collateral source of information to be considered in the diagnostic process, or as the basis for determining the position to be taken with respect to the child's custody pending completion of the medical diagnosis, or as an additional basis for determining whether a petition would be legally sufficient once the medical diagnosis is completed.

3. *Filing of the petition.* The ultimate decision to file or not to file a petition will be made by the county/city attorney. The county/city attorney may conclude that there is insufficient evidence or that, for other reasons, even where there is sufficient evidence, the child's interests indicate that action is inappropriate. As underscored elsewhere, specific harms to the child, and not parental fault concepts, should be the determining factor. Such a determination should be made in consultation with the CIMC's diagnostic team.

Whenever court intervention for child abuse is deemed inappropriate, the county/city attorney may refer the family to protective services or other appropriate agency if the child's situation involves substantial risk of imminent harm based on evidence of damaging neglect, failure to thrive or the like. Here again, this decision should be made in consultation with the CIMC's team of specialists. Under any circumstances, in lieu of court processing, the family may be referred to available community resources for voluntary services. Such referral, however, is non-coercive and unconditional. The decision to forego court processing is not contingent upon the parents seeking or not seeking the suggested services, and the county/city attorney's involvement in the case ends at the point of referral.

Petitioner discretion is incorporated in present court processing systems. The difference in the model system approach is to eliminate the coerciveness of such "diversion" decisions by making them non-contingent or final. The emphasis is placed on a decision based on a realistic appraisal of the expected harm to the child that is to be prevented and why the decision either to petition or not petition is best suited to protecting the child from that harm while not causing or promoting additional harms.

Focusing this discretion at one point in the process —the point of petitioning—and by limiting this discretion to one individual — the county/city attorney— increases the potential for monitoring the decision and minimizes the possibility of abuses of discretion. The need for earlier diversion points is not as pressing, since the model system concerns itself only with already injured children and the usually protracted time-frame from an initial report of suspected abuse to the petition filing stage is greatly reduced.

Section III.

Representation of The Child

This section examines many aspects of child representation in abuse and neglect cases. Judges can play an active role in establishing effective systems for representation of children and improving the quality of such representation. The first of six topics discusses whether abused and neglected children should be represented and, if so, when appointments should be made. The second topic compares the advantages of lawyer and nonlawyer representation. The next three subdivisions explore the effectiveness of the various methods of providing legal representation, the role of the child's lawyer in abuse and neglect cases, and ways to improve the lawyer's ability to argue effectively for the child. The final section discusses methods for providing representation by lay guardians ad litem.

A. Need for Representation of The Child

1. The child's interests may not be adequately represented by counsel for the parents or for the child protective agency.

Parents may not desire the state intervention needed to protect the child and improve family life.

The agency's position may be influenced by expediency resulting from its lack of resources.

2. There is a general trend towards adversary procedures in juvenile courts, especially after the *Gault* decision.

3. Competent representation of the child helps insure that judges will obtain all available information relevant to the jurisdictional and dispositional decisions.

4. State statutes or court decisions in many states require representation of children in abuse and neglect proceedings.

There is a strong trend toward such a requirement.

The appointment of a guardian ad litem in every case (who need not be an attorney) is required for a state to obtain assistance under the Child Abuse Prevention and Treatment Act (42 U.S.C. §5103(b) (2) (G).

5. The time of initial appointment and termination of representation are important factors.

The initial appointment is probably made in most courts at the beginning of legal procedures.

Representation may be needed earlier in order to insure that the child's interests are considered fully when the parents and the child protective agency reach a voluntary agreement.

Representation often ceases after the disposition hearing, but representation may be needed later to insure that the child does not linger in foster care and to monitor compliance by the parents and agency with the court's treatment plan.

B. Lawyer or Lay Guardian

1. Representation of the child is usually provided by lawyers, but in some states representation by lay volunteers or social workers is permitted.

2. Legal Representation is required by law in many states.

3. Advantages of lawyers:

Lawyers can be of greater assistance to children than lay guardians since most cases are going to involve mixed issues of law and fact as well as complex courtroom procedures.

Lawyers have a better understanding of the judicial "system" and how it can be used more effectively for the child's interests.

Lawyers are more likely to be familiar with the statutory and case law applicable to this process.

4. Advantage of lay guardians:

Lay guardians, especially volunteers, are usually less expensive than lawyers.

Lay guardians may have more time and ability to investigate than lawyers.

Professionsals acting as lay guardians usually have more knowledge of child development, social and psychological issues than lawyers.

Lay guardians, if highly motivated, may be more likely to continue representing the child after the dispositional stage.

5. Lawyers and lay guardians should have access to each other's services and knowledge. For example, the lay guardian should know when to seek expert legal advice.

6. The advantages of each type of representation can be obtained by appointing both a lawyer and a lay guardian, or by providing lawyers with professional assistance to investigate the case and provide recommendations for treatment. (See Section F.)

C. Organization of Legal Representation

1. One method of legal representation is by lawyers from the public defender's office or legal aid society.

There may be a conflict of interest if the same organization also represents the parents.

Public defenders often have excessive caseloads.

2. A second method of legal representation is by private practitioners appointed by the court on a case-by-case basis.

Such an appointment is typically from a panel organized either by the court or by the local bar association.

The major problems of this system are: (1) insuring that the lawyers have expertise in abuse and neglect cases, and (2) insuring that lawyers devote enough time to prepare their cases adequately. Bar association groups have been successful in both training and mobilizing attorneys for these cases.

3. Representation by law students is a growing method used to provide legal representation.

Law students can devote enough time to their case, but they lack experience.

Law students may be supervised by either a law school program or by a public defender office.

4. Special programs have been created for representation of children. Funding has come from the courts, state and local governments, and private foundations.

D. The Role of the Child's Attorney

1. If the child is very young and inarticulate, the attorney must determine what is in the child's best interest (unless a separate guardian ad litem has been appointed for this purpose). If the child is articulate, the attorney generally must rely on the child's determination of his/her best interests and advocate in accordance with the child's wishes.

2. An important question is whether the attorney should supplement, or even duplicate, the investigation conducted by the child protective agency. The answer may depend upon the attorney's time and ability to conduct a social investigation, the existence of alternative investigation resources available to the court, and the quality and comprehensiveness of the agency investigation.

3. In the courtroom, the diligent attorney may actively present the child's case by calling witnesses, submitting evidence, and making opening and closing statements. Some attorneys for children, however, have limited their trial involvement to cross-examining the witnesses called by other parties.

4. The ABA has recently approved a set of standards concerning these subjects (Juvenile Justice Standards Relating to Counsel for Private Parties).

E. Improving the Quality of Legal Representation

1. Better legal representation is typically provided by attorneys with substantial experience in abuse and neglect cases.

If legal representation is by a public defender organization, specialization can be obtained by assigning all abuse and neglect cases to one or a few attorneys.

If representation is by private practitioners, specialization can be obtained by restricting the size of, and turnover in, attorney panels.

2. Additional methods to improve the quality of representation by private practitioners include:

Establishing fees that are sufficient to attract competent lawyers and permit them to spend sufficient time on cases.

Judicial refusal to reappoint attorneys who have not performed well. If an attorney panel is established by the court, judges can remove attorneys who have performed poorly.

Early appointments well in advance of the hearing to provide time for sufficient investigation.

3. Judges can encourage attorneys to further their education by reading attorney manuals on abuse and neglect litigation or by attending seminars and continuing legal education courses.

4. Attorneys should be provided with sufficient support services such as professional investigators and experts, and have access to evaluative services from doctors, mental health professionals, child development specialists, etc.

5. Attorneys for children or indigent parents may request the court's authorization for payment of expert fees and services, if such assistance is not readily available at no cost.

F. Lay Guardian Programs

1. Lay guardian programs may use either lay volunteers or paid professionals, especially social workers.

The benefit of professional guardians is that they usually have better training.

If the social worker is from the child protective agency, there may be a conflict of interest.

Social workers may have an excessive caseload. Volunteers may be able to spend more time on each case.

2. There are several types of lay volunteer programs.

A lay volunteer may be assigned when the initial report is made or later when the child protective agency finds abuse or neglect. The volunteer continues to represent the child if a petition is filed.

A lay volunteer may be assigned by the court upon the initiation of court proceedings.

A lay volunteer may be assigned after the disposition stage to monitor children in placement. (See Section XIII. C.)

3. Lay volunteer programs require training sessions and typically require a professional staff to organize and train the volunteers.

Support Readings

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A. Need for Representation of Child

James Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases, 23* Villanova L. Rev. **521, 527-730, 534-539 (1978).**

Whether it is recognized that a child who is the subject of an abuse proceeding is entitled to the benefits of independent counsel,[35] such a need is clear. In any action to declare a child deprived or abused, a conflict necessarily ensues between the rights of the child and the parent or custodian. This conflict most often is resolved only through judicial proceedings.[36] Under these circumstances, "[t]he State becomes both arbiter and party."[37]

In child abuse or deprivation proceedings, the state and the parents frequently are each represented by counsel.[38] Under the doctrine of parens patriae, the state, historically, was charged with protecting the interest of the child.[39] Yet, in abuse cases as in other juvenile proceedings, the state is also an interested party. As one writer states:

> In theory, the State should represent the best interests of the child. It is possible, however, that the State may lose sight of the fact that the child's interests may be best served by rehabilitating the parents in keeping the family intact.
>
> . . . .
>
> . . . The parties to the proceeding, however, are in opposition: the social workers seek removal of the child; the parents are fighting to retain custody, the helpless child is caught in the middle. Thus, there appears to be a need that some consideration be given to the adversary nature of any such proceeding.[40]

Certainly, the attorney who represents the parents in a child abuse proceeding has, as his primary obligation to his clients, the duty to seek a finding most satisfactory to the parents and this translates itself most often into a position that "no abuse" has occurred.[41] The stigma attached to a parent as "child abuser" is one which the advocate must seek to prevent in his client's best interests—despite the consequences to the child.[42] The seriousness of being labeled a child abuser was recognized by Judge Spaeth in his separate opinion in the case of *In re Sharpe*:[43]

> It is therefore apparent that by its finding that James is an abused child the lower court has done appellant great damage. Many would characterize a child abuser as one of the most despicable and unworthy persons in the community, others, as one of the most pitiful. It is reasonable to suppose that the reputation of anyone labeled by a court as a child abuser has been destroyed. Not only has appellant been so labeled, but she will be so labeled for 15 more years. In addition to destroying appellant's reputation, the label of child abuser may have a decisive effect in subsequent legal proceedings relating to her child, not to mention the effect it may have on the relationship between her and her child when he is old enough to understand what a child abuser is.[44]

Given the nature of a child abuse proceeding, it is obvious, therefore, that the parents' position is adverse to that of the child, despite what natural love and affection the parent may possess for the child.

Although not as obvious, the state's position, as represented by the Department of Public Welfare and the county child protective services—the administrative unit in the Child Protective Services Law[45]—often collides with the child's individual interest. The representatives of the state are charged with the responsibility of advocating the state's interest, which is, at best, what the state deems will ensure the child's well-being[46] in light of the stated legislative mandate in the Pennsylvania Child Protective Services Law "to preserve and stabilize family life wherever appropriate."[47] Consequently, in all close cases, the county child protective service invariably advocates the return to, or the maintaining of a child in his own home. This is despite the fact that the home, in the vast majority of child abuse cases nationwide, has been the source of the abuse.[48] The child protective services thus often cannot seek a result that is in the best interests of the child while also serving the state's interest in preserving and stabilizing families.

Just as counsel for the parents must pursue the independent interests of his client,[49] so too, the attorney representing the state is bound to serve his client's interest.[50] In addition, the state's interests or problems may have an impact upon the recommendations made by a child protective service to the detriment of the child.[51] Insufficient funding may result in inadequate psychiatric, diagnostic and treatment programming, lack of sufficient staff to prepare cases properly and fewer contracts with service agencies. These factors may be far more responsible for the recommendations made in a particular case than the special needs of the child.[52] Because of these potential conflicts with both parents and the state, independent counsel is needed to represent the child if he is to be guaranteed an advocate for his interests and his interests alone.[53]

In part, the recognition that juvenile subjects of judicial or quasijudicial proceedings affecting their custody and the quality of their lives are entitled to independent counsel is a product of the more general recognition that the child is an individual;[54] not merely a product of a marriage or a chattel, subject to the unrestricted will of the parents, or the unsolicited protection of the state.[55] Once it is recognized that a child is not the property of either the parents or the state but is an individual with

personal rights, the question really becomes who is going to speak for the child in a proceeding which will affect or determine his future life?[56]

The evolutionary process begining with *In re Gault*[57] and continuing through the federal cases discussed[58] has developed the clear principle that any juvenile who is the subject of any proceeding which may affect his custody or quality of life is constitutionally entitled to independent counsel, regardless of the particular nature of the proceeding.[59] Applying this mandate to children in Pennsylvania who are subjects of reports of suspected abuse pursuant to the Child Protective Services Law raises extremely difficult questions, not the least of which is when that right should attach.

* * * * *

The more complex and timely issue, however, is when the subject's right to the effective assistance of counsel must be satisfied in the course of a child abuse proceeding. When is "as soon as possible after proceedings are begun as are realistically feasible[?]"[88] Or what are the earliest "significant stage[s] of the... process... at which a decision is, or can be, made which may result in a detrimental change in the conditions of the subject's liberty[?]"[89]

The stages of a child abuse proceeding under the Child Protective Services Law are:[90] Stage 1) from the filing of the report of suspected abuse to the completion of the investigation,[91] Stage 2) from the completion of the investigation and a finding that the report is "indicated" or "unfounded" through the attempts at voluntary adjustment to the filing of a petition with the court; and Stage 3) all court proceedings.

Section 23 of the statute provides for the appointment of a guardian *ad litem,* who must be an attorney, upon the initiation of a proceeding arising out of a child abuse.[92] This has generally been accepted as meaning when a petition has been filed with the court seeking an adjudication of abuse and remedial order, or "Stage 3." Such a construction is warranted as consistent with the legislative intent.[93]

To delay the appointment of counsel until "Stage 3" is, however, far too late to pass constitutional muster. It is neither the first significant stage of the proceeding nor as soon as realistically feasible.[94] In Philadelphia for instance, less than 15% of all reported cases of suspected abuse and neglect reach the court.[95] Over 85% of all reported cases were either dismissed as "unfounded" or adjusted voluntarily following an "indicated" determination. In each instance, the agency of the state made custodial decisions. From the time the report is first filed, the agency has the ability to proceed to obtain custody of the child. This may be done in some cases without a hearing at which the parents would be present or in other cases upon requests made to law enforcement officials.[96] From the time a report is filed, therefore, a decision regarding the child's custody is not only possible but is continually taking place because of the state's ever present power of direct action. As a result, all stages of a child abuse proceeding are "significant" in the sense used by the court in *Lynch.* Ideally, therefore, the right of a subject child to the effective assistance of counsel should accrue at the time a report of suspected abuse is filed.

Unfortunately, it is not feasible to provide a court appointed counsel to every subject child at Stage 1, especially in large metropolitan areas in which the volume of reported cases exceeds the ability of the system to supply effective counsel to all subject children.[97] Moreover, while the risk of tragedy following an inadequate investigation is great and the appointment of counsel during Stage 1 may result in a lower percentage of error, the role of the attorney during this stage would be limited principally to scrutiny of the investigation.[98] This use of an attorney to perform this "watchdog" function does not seem to be either the proper or necessary role of counsel.[99] Theoretically, the state agency should be capable of performing the investigative function adequately without the interjection of an outsider into the process.[100] While a child has the right to an independent counsel to insure that, to the extent possible within the system, a determination is in his best interest or to his least detriment as the least restrictive alternative,[101] it is doubtful that the appointment of counsel is constitutionally mandated at a time when the state agency is initially charged with determining probable cause to credit allegations of suspected abuse.[102]

The point in a child abuse proceeding by which counsel should be guaranteed would appear to be when the state agency determines that child abuse is "indicated."[103] Such a determination virtually assures that something will be done which will affect the custody of the child and determine to some extent the future quality of his life. Whether the action is taken as a result of the parents' voluntary commitment of the child to the state agency[104] or a court proceeding and order, the effect is the same, *i.e.,* the future life of the child is altered by direct state action.

The experience in Philadelphia adds a special urgency to the need for counsel as soon as possible after a report is listed as "indicated" and before any voluntary commitment is accomplished.[105] A voluntary commitment of the child by the parents to the welfare agency in Philadelphia rarely, if ever, includes a detailed program for the care and treatment of the child. This program is left wholly within the discretion of the agency which must first of all seek to maintain the family unit.[106] Moreover, the program is subject to the economic and political considerations of the agency as well as the needs of the child.[107] Consequently, a child may be placed in a group home or institution or returned home under supervision of the agency because of contractual commitments of the agency with the service delivery organizations—and not because the facility is best suited for the child's well being.

It has been also our experience that critical psychiatric or psychological treatment frequently is not provided in voluntary commitment cases simply because the agency has not expended the funds necessary to obtain minimally adequate diagnosis or has not contracted with facilities that offer such services.[108] Consequently, the most that can be expected in these cases is often only that the child will be boarded in a reasonably safe place. Since the intent of the law goes far beyond the mere safety of the person and aims to achieve that which is in the childs' best

interest, including custody, diagnosis, and treatment, participation of the child's counsel in the decisions of where and under what circumstances the child will live and the treatment to be provided is essential to due process. This would be true even when services are adequate simply because of the inherent conflicts of interest.[109]

The court in *Dixon* clearly recognized the importance to due process of the establishing of a treatment plan prior to involuntary commitment.[110] There, a federal district court in Pennsylvania found constitutionally infirm the prior state practice of blanket commitments to the state facility and required the participation of the subject's attorney or guardian in the establishing of the program to be effected during confinement.[111] So also in abuse cases, the custodial and treatment program must be developed at a time when the subject child has the effective assistance of counsel. Failure to provide counsel in all cases at this stage must necessarily result in a deprivation of due process.

FOOTNOTES

35. *See* SUSSMAN & COHEN, *supra* note 33, at 53-55 (1975). *See generally* Coyne, *Who Will Speak for the Child?* in THE RIGHTS OF CHILDREN, *supra* note 18, at 193-211; Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem,* 13 Cal. W.L. Rev. 16 (1976); MacDonald, *A Case for Independent Counsel to Represent Children in Custody Proceedings,* 7 NEW ENGLAND L. REV. 351 (1972).

36. *See* Coyne, *supra* note 25, at 193-211; Comment, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings.* 13 J. FAM. L. 803, 806 (1973-74).

37. Stapleton v. Dauphin County Child Care Ser., 228 Pa. Super. Ct. at 387, 324 A. 2d at 570.

38. *See* Paulsen, *The Law and Abused Children* in THE BATTERED CHILD, *supra note 18, at 178, 200.*

39. *See* Comment, *A Recommendation for Court Appointed Counsel in Child Abuse Proceedings,* 46 Miss. L.J. 1072, 1075-77 (1975). The doctrine of parens patriae refers to the "sovereign power of guardianship over persons under disability...such as minors." Black's Law Dictionary 1269 (4th rev. ed. 1968).

40. Comment, *supra* note 36, at 812-13 (1973-74). *See, e.g., In re* DeSavage, 241 Pa. Super. Ct. 174, 360 A.2d 237 (1976); *cf.* Stapleton v. Dauphin County Child Serv., 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974).

41. *See generally* Paulsen, supra note 38, at 178.

42. *See generally id.*

43. ___ Pa. Super. Ct. ___, *374 A.2d 1323 (1977).*

44. *Id.* at ___, 374 A.2d at 1329 (Spaeth, J., concurring in part and dissenting in part).

45. *See* note 3 *supra.*

46. *See* PA. STATE. ANN. tit. 11, § 2202 (Purdon Cum, Supp. 1977-1978).

47. *Id.*

48. *See* Gil, *Incidence of Child Abuse and Demographic Characteristics of Persons Involved* in THE BATTERED CHILD, *supra* note 18, at 33 & Table 16.

49. *See* notes 41 & 42 and accompanying text *supra.*

50. *See* Skoler, *Counsel in Juvenile Court Proceedings—A Total Criminal Justice Perspective,* 8 J. Fam. L. 243, 271 (1968).

51. *Id.*

52. *See* Fraser, *supra* note 35, at 32.

53. *See* Comment, *Courts: Seen and Not Heard: The Child's Need for His Own Lawyer in Child-Abuse and Neglect Cases,* 29 OKLA. L. REV. 439, 442 (1976); Comment, *supra* note 39.

54. *See* V. FONTANA, SOMEWHERE A CHILD IS CRYING 227-50 (1973); McGrath, *Early Sorrow: Some Children of Our Times* in THE YOUNGEST MINORITY II , 195, 201-02 (Katz ed. 1977); *United Nations Declaration of the Rights of the Child,* G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19, *reprinted in* THE RIGHTS OF CHILDREN, *supra* note 18.

55. *See* Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259 (1971).

56. *See* Coyne, *supra* note 35 at 193, 208-10.

57. 387 U.S. 1 (1967).

58. *See* notes 24-32 and accompanying text *supra.*

59. *Id. See* authorities cited note 35 *supra.*

88. Lessard v. Schmidt, 349 F. Supp. 1078, 1099 (D. Wis. 1972).

89. Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974). The subtle differences in the *Lessard* and *Lynch* standards should not be overlooked. "Realistic feasibility" and "significant stage" may not always coincide.

90. For the purposes of this discussion, emergency protective custody to prevent further abuse under § 8 of the Act and the 72-hour hearing provisions are not being considered. PA. STAT. ANN. tit. 11, § 2208(a), (c) (Purdon Cum. Supp. 1977-1978). In such cases counsel should be appointed immediately. The child's interest in immediate care pending final disposition would require in emergency cases that the right to counsel attach immediately and the counterbalance of administrative feasibility should not outweigh the child's interest. *See* note 131 *infra.* Moreover, § 23 guardians *ad litem* are probably required in these emergencies. For the text of §2223, *see* note 92 *infra. See* PA. LEGISLATIVE J. H3005 (daily ed. Oct. 15, 1975).

91. Section 14 of the Child Protective Services Law provides that each report of suspected abuse be investigated by the child welfare agency and be determined within sixty days of the report as "unfounded," "indicated" or "founded." If the agency has made no such determination within the time prescribed, the report is automatically considered "unfounded" and all records expunged. PA. STAT. ANN. tit. 11, § 2214(k) (Purdon Cum. Supp. 1977-1978). *See* note 95 *infra.*

Section 3 of the Child Protective Service Law defines an "unfounded" report as any report which is neither "founded" nor "indicated." An "indicated report" is a report of suspected abuse which, after investigation, appears to the child protective service agency to be based on "substantial evidence" that "abuse exists." A "founded report" is any report upon which there is any judicial adjudication based upon a finding of abuse. PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978).

92. PA. STAT. ANN. tit. 11, § 2223 (Purdon Cum. Supp. 1977-1978). The guardian *ad litem* provision states:

> (a) The court, when a proceeding has been initiated arising out of child abuse, shall appoint a guardian ad litem for the child. The guardian ad litem shall be an attorney-at-law. The guardian ad litem shall be given access to all reports . . . of examination of the child's parents or other custodian pursuant to this act. The guardian ad litem shall be charged with the representation of the child's best interests at every stage of the proceeding and shall make such further investigation necessary to ascertain the facts, interview witnesses, examine and cross-examine witnesses, make recommendations to the court and participate further in the proceedings to the degree appropriate for adequately representing the child.
>
> (b) The court shall have the duty, upon consideration of the petition of any attorney, for the child, to order a local child-protective service or other agency to establish and/or implement, fully and promptly, appropriate services, treatment, and plans for a child found in need of them. Additionally, the court, upon consideration of the petition of any attorney for the child, shall have the duty to terminate or alter the conditions of any placement, temporary or permanent, of a child.

Id.

93. *See* PA. LEGISLATIVE J. H3005 daily ed. Oct. 15, 1975); PA. LEGISLATIVE J. S926 (daily ed. Nov. 18, 1975). The legislature apparently believed that § 23 of the "Law" satisfied the child's right to counsel. It will be noted later that while the legislature may have intended the guardian *ad litem* system to satisfy the right of an allegedly abused child to counsel, it does not satisfactorily accomplish this purpose. *See* note 131 *infra.*

94. As delineated below, the guardian *ad litem* system as a means of providing counsel is, in and of itself, constitutionally suspect. *See* text accompanying notes 94-115 *infra.*

95. In 1976, 1,738 reports of suspected abuse were received by the Philadelphia Department of Public Welfare (DPW) — the county agency administering the statutory duties (*see* note 3 *supra*). In 1976, approximately 5,000 reports of suspected abuse and neglect cases were reported. Of that number, about 600 (12%) of these cases were made the subject of court petitions. The Philadelphia DPW would not inform this author of the number of cases reported in 1976 which were subsequently found to be "unfounded" or "indicated." *See* note 91 *supra.*

The 1976 Child Abuse Report of the Pennsylvania Department of Public Welfare, however, states that 48 (2.8%) cases were determined to be "founded," that 771 (44.4%) were "indicated" and that 915 (52.6%) were "unfounded." The number of cases listed as "unfounded" may be misleading since 587 cases were listed as "unfounded" solely because the investigations on these cases were not filed by the local DPW within 60 days. *See* PA. STAT. ANN tit. 11, § 2214(k) (Purdon Cum. Supp. 1977-1978). This frightening trend appears to continue unabated. The unofficial state totals for 1977 reveal that of the 4,537 reports of suspected abuse in Philadelphia, 1,550 were listed as "unfounded" merely because the Philadelphia DPW did not file results of investigations concerning them within the mandated 60 days. *See id.*

96. Under § 17(7) of the Child Protective Services LAW, PA. STAT. ANN. tit. 11, 2217(7) (Purdon Cum. Supp. 1977-1978), the child protective agency could obtain immediate temporary custody of a child through the procedure of § 8 of the statue, *id.* §2208, or by obtaining an emergency court order whenever necessary to protect the child. *Id.* § 2217(7).

97. *See* note 131, *infra.*

98. *See* Fraser, *supra* note 35, at 34.

99. *But see* Fraser, *supra* note 35, at 34, 45, wherein the author argues that this investigatory function is the cornerstone to the effectiveness of the guardian's role. *Id.*

100. *See* Fraser, *supra* note 35, at 34.

101. *See generally* THE BATTERED CHILD (ed ed. R. Helfer & C. Kempe eds. 1974); CHILD ABUSE AND NEGLECT: THE COMMUNITY AND FAMILY (R. Helfer & C. Kempe eds. 1976); J. GOLDSTEIN, A. Freud & A. SOLNIT. BEYOND THE BEST INTERESTS OF THE CHILD (1973).

102. The courts in both *Lessard* and *Lynch* stated that, as a general rule, the mandate of due process did not require counsel during the purely investigative stage. 349 F. Supp. at 1100; 386 F. Supp. at 389 n.5. However, the courts also agreed that the rights of the subject would be violated if counsel were to be wholly excluded from the effective means of evaluating the investigation at the time custodial decisions may be made. 349 F. Supp. at 1099-1100; 386 F. Supp. at 389. Consequently, the investigative agency must ensure access of counsel not only to the product of the investigation but the manner in which it was conducted as well. The example used by the court in *Lessard* and adopted by the court in *Lynch* was the taping of psychiatric interviews. 349 F. Supp. at 1100; 386 F. Supp. at 389 & n.5. One of the most questionable provisions in the Child Protective Services Law which developed as a compromise following substantial lobbying is that which provides for the expunging of the record in the event a report is determined to be unfounded either by investigation or the passage of 60 days. PA. STAT. ANN. tit. 11, §2214(k) (Purdon Cum. Supp. 1977-1978). The loss to the system of the ability to correct its errors seems potentially more tragic than any damage which could occur from retaining the information. The risk of tragedy is too great.

103. Fraser, *supra* note 35, at 34, also contends that counsel must be appointed after the investigation has been completed by the social agency and a preliminary diagnosis of the child's condition is made. Fraser too recognizes that such investigations are often incomplete or improperly conducted. Consequently, Fraser sets forth as the task of the child's counsel that of investigation, rechecking, and supplementing the investigation of the agency. Fraser, *supra* note 37, at 35-39 & nn.115-19. Our experience confirms the wisdom of this recommendation and the danger of blind reliance upon the investigative reports of the public agency. Unfortunately the institutionalization of counsel to represent children in abuse cases often results in high case loads and forced dependency upon the agencies' investigations as the sole source of facts. *See* note 131 infra. The inadequacies of the system are legitimized under the guise of due process and become self-perpetuating to the detriment of the child.

104. The standard practice in Philadelphia is that all voluntary commitments are confirmed by an *ex parte* court order which prohibits parents from regaining custody of their children without leave of court. The propriety of this practice is dubious at best.

105. For discussion of the number and disposition of reports in Philadelphia in 1977, *see* note 95 *supra.*

106. *See* notes 46 & 47 and accompanying text *supra.*

107. *See* notes 51 & 52 and accompanying text *supra.*

108. This conclusion is based upon the experience of the Committee on Child Abuse of the Young Lawyers Section of the Philadelphia Bar Association.

109. *See* text accompanying notes 48-53 *supra.* An important issue beyond the scope of this article is whether the child's custodian may be required by the court to undergo diagnosis and/or treatment.

110. 325 F. Supp. at 972-74.

111. *Id. See* note 77 & 78 and accompanying text *supra.*

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 5. 1E. Reprinted with Permission.

5.1(e) Appointment of counsel for child.

Upon filing, the court should be required to appoint counsel at public expense to represent the child identified in the petition, as a party to the proceedings. No reimbursement should be sought from the parents or the child for the cost of such counsel, regardless of the parental or child's financial resources.

COMMENTARY

This subsection mandates the appointment of counsel for the child named in the petition. There are good reasons to believe this guarantee is constitutionally mandated in light of the significant consequences to the child if court wardship were ultimately imposed. Though the court would obviously consider such imposition necessary to protect the child, nonetheless wardship might involve state imposed custodial arrangements for the child and might even carry some stigma invoked in the "abused" or "neglected" label. The reasoning underlying the Supreme Court's mandate of counsel for minors in *In re Gault,* 387 U.S. 1 (1967) thus applies readily to minors involved in wardship proceedings (though *Gault* itself applied only to proceedings in which the child was charged with conduct that would be criminal if performed by an adult). At present, the statutes of thirty-five states guarantee appointed counsel to children in neglect proceedings. See Katz et al., "Child Neglect Laws in America," 9 *Fam L. Q.* 1, Table I (1975). Further, the federal Child Abuse Prevention and Treatment Act, Public Law 93-247 (1974), requires that states appoint a guardian ad litem for children in these proceedings, as a condition of eligibility for federal program support. This subsection also specifies that counsel for the child should be compensated by public funds irrespective of the parents' or child's financial condition. Assuring that counsel is not compensated from the parents' funds is to guard against potential conflicts of interest, or even the appearance of conflict. Keeping the child's resources separate serves similar purposes because of the likelihood that the child's funds might be perceived as intermingled with general family resources; in any event, if a child subject to wardship proceedings did have separate resources, it would seem wise to preserve those resources for the child's future welfare rather than requiring their expenditure for services of counsel. See generally A. Sussman, *Reporting Child Abuse and Neglect: Guidelines for Legislation* 107-108 (1974).

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, ***Standards Relating to Counsel for Private Parties*** **(New York: Ballinger Publishing Co., 1976), 71-73. Reprinted with Permission.**

2.3(b) Child protective, custody and adoption proceedings

Counsel should be available to the respondent parents, including the father of an illegitimate child, or other guardian or legal custodian in a neglect or dependency proceeding. Independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody. Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters, except where temporary emergency action is involved and immediate participation of counsel is not practicable.

COMMENTARY

The present standard also calls for independent representation for children subject to any proceeding that may affect their custody or status, including those involving neglect, dependency, custody or adoption. Optimally, of course, two opposing counsel will already be involved in many of these cases. While the parties and their lawyers can be expected to present many of the legal and factual propositions bearing on the existence of neglect and the appropriate dispositional orders where neglect is established, it should also be apparent that neither of their interests can safely be assumed to coincide entirely with the child's. Each may bring a distinctive perception of social reality to the matter. See *In re Raya,* 255 Cal. App.2d 260, 63 Cal. Rptr. 252 (1967). For tactical or other reasons, factual propositions may be developed only selectively or not at all. Similarly, personal or institutional considerations may unduly constrict the dispositional alternatives investigated and presented to the court. Accordingly, independent representation for the child whose future is largely at issue seems desirable. See Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," 12 *Buff. L. Rev.* 501, 519 (1963).

B. Lawyer or Lay Guardian

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, ***Standards Relating to Counsel for Private Parties*** **(New York: Ballinger Publishing Co., 1976), 73-74. Reprinted with Permission.**

COMMENTARY

While independent representation for a child may be important in protective and custodial proceedings, a representative trained wholly in law may not be the appropriate choice for this function. See Boches & Goldfarb, *supra* at 163. Unlike delinquents, dependent and neglected children are typically very young; a California authority reports that 26 percent of the dependency cases involved children under four years of age and 57 percent were younger than nine years. The same is often true of children subject to adoption and custody matters. Surely it cannot be expected that five year olds can in any useful sense judge where their "best interests" lie or even communicate their desires to counsel. While many lawyers may, with training and experience, become intelligent consumers of psychological information and devices, they usually will not be expert in diagnosis and evaluation.

Accordingly, it would not seem irresponsible to suggest that a professional trained in psychology, psychiatry, social psychology or social welfare be assigned the initial responsibility for protecting children under these circumstances. There is, however, no evidence that this alternative is presently available, either in terms of numbers of competent personnel or in terms of occupational independence from official and interested agencies. Perhaps this circumstance accounts in part for the belief in New York that, despite the young child's inability to communicate usefully with counsel, "the law guardian should be a vital factor in developing the necessary facts before the court and in protecting the interests of the child in those proceedings." *Report on Legal Representation of Indigents in the Family Court Within the City of New York* 42 (1973). That this view has found support elsewhere is suggested by the existence of a number of statutes providing for appointment of counsel on behalf of the child subject to neglect proceedings.* The present standard shares the view that until there are sufficient numbers of independent, competent personnel trained in other disciplines who will undertake to ascertain and guard the child's interests in these proceedings, continued reliance on legal representation for the child is necessary.

FOOTNOTE

**E.g.*, Alaska Rules of Juvenile Procedure, Rule 15; Ariz. Rev. Stat. Ann. §8-225; Idaho Code §16-1809; Neb. Rev. Stat. §213-205; N.D.C.C. §27-20-26; Ohio Rev. Code Ann. §2151.35.2, Rules of Juvenile Procedure, Rule 4; Ore. Rev. Sat §419.498; Utah Code Ann. §55-10-96; Wyo. Stat. §14-115.23; N.Y. Fam. Ct. Act. §249.

Carmen Ray-Bettineski, ***Court Appointed Special Advocate: The Guardian ad Litem for Abused and Neglected Child,*** 29 Juvenile & Family Court Journal **65-67 (1978).**

Working on the major premises that a guardian ad litem is the most effective form of independent advocacy for the neglected or abused child, the county of King, Seattle, Washington, began training for the volunteer guardian ad litem program January 1977. The program began under the auspices of the presiding judge David W. Soukup. In the first year of operations the program provided 376 trained guardians ad litem for 498 children.

Nationally we are experiencing an increased public and professional awareness for the maltreated child. The courts' need to respond is critical. "It is estimated that 665,000 to 1,675,000 children are physically abused, sexually molested or seriously neglected by their parents each year.[1] The purpose of the program is to provide judges with a considered, thoughtful recommendation on what should be planned for the child, based on the guardian's independent investigation of the facts. The independent and open-minded position of the guardians gives them credibility with the judges; their sole function is to determine which course of action would be in the child's best interests. This may or may not be what the parents, the caseworker, foster parents, educators, or the children themselves advocate. When the child is an adolescent and capable of formulating an independent opinion, as determined by the Guardian, then his/her viewpoint should also be accorded full legal representation.

After a complete investigation has been made of the child's total life sphere, the Guardian is then in a position of submitting a comprehensive evaluation to the court.

Traditionally, a guardian ad litem is defined as a person appointed by the court to act as a guardian for the purposes of a particular court proceeding. A guardian ad litem decides what action to take in litigation on behalf of a minor or other person the law considers incompetent to make his own decisions.

Historically the guardian ad litem assumed an adversarial role, defending against the allegations made by another party. Today the guardian ad litem in the case of child abuse is an advocate. In most states the department of social services is the plaintiff on behalf of the child, and the adult who allegedly inflicted the injury is the defendant. Clearly the guardian's ad litem role is to make an independent evaluation as to what is truly in the child's best interest, both in terms of the present situation and also for long term planning.

When the program began it was viewed as a substitute for court-appointed lawyers who were acting as guardians ad litem in dependency hearings. This system of providing representation to children had two disadvantages that the volunteer program was designed to overcome: the cost of paying lawyers' fees was becoming prohibitive, as more and more dependency cases were coming to the juvenile court; and few lawyers were equipped to undertake the kind of thorough social investigation of all circumstances in the child's life necessary to arrive at a plan for the child. A volunteer program would provide less costly representation, along with an inherently more thoroughly researched position from which could be made.

Further, the trained volunteer program would insure long term commitment on the part of the guardian ad litem to follow each child through to a permanent, adequate and caring family. Few states require that the person appointed by the court to act as the guardian ad litem be an attorney. The purpose of the appointment is to advocate the child's best interest. That person need have knowledge of the juvenile justice system, and how it can be used most effectively for the child's interests.

One group especially concerned with maltreated children is the National Council of Juvenile and Family Court Judges, Concern for Children in Placement (CIP) project. The CIP project is based on the belief that every child has the right to a permanent, loving home. CIP is a post-placement monitoring process for use by local juvenile courts. To be effective monitors of children in court-ordered placement, judge must know where each child is and what plans are being made for that child's future. Regular, sensitive and demanding review of each child's placement is essential. The judge's responsibility is to ask the difficult questions that too often no one else will ask.

How long have these children been out of their home?

What are the parents doing to reestablish a home for their children?

What are we doing to assist?

Is it likely that within a reasonable time period this family can reunite?[2]

The overall goal of CIP is to ensure that each child has at least an annual judicial review with the objective of removing a child from temporary care and developing a definite treatment plan. This plan should aim at either returning the child to the biological parents or, failing that, free the child for adoption. In a few cases the court may intentionally place a child in a permanent foster home because of unusual circumstances.

The initial phase I of the CIP plan has been successfully piloted in twelve selected courts across the nation. The CIP project feels that since children who have drifted thru the "system" are now being identified and reviewed for permanent planning, it is essential to ensure swift appropriate action by the courts for all maltreated children. The CIP project is encouraging the concept of the trained volunteer guardian ad litem.

There is considerable misunderstanding over the definition and role of the guardian ad litem, specifically in maltreated children cases. "There are no specific guidelines concerning when a guardian ad litem should be appointed. It is generally agreed, however, that the appointment should be made when the child is first served notice of legal proceedings or at the point when a child's interests are first threatened. Similarly there are no specific standards which mark the end of the guardian ad litem's obligations to the child. Minimally, the guardian's responsibilities continue until the neglect-abuse proceedings terminate. However, if the final decision is adverse to the child's interests, the guardian ad litem has the option of taking an appeal. Some courts have even suggested there is an affirmative obligation to appeal an adverse decision."[3]

The Seattle project for trained volunteer guardians ad litem has addressed this issue by providing time commitment, goal, and role description. To avoid future role confusion, the CIP project has recommended the title "Court Appointed Special Counsel" (CASA). The title will clearly indicate the special court role essential in all child neglect/abuse cases.

Arnold Schuchter, *Prescriptive Package, Child Abuse Intervention* **(Washington, DC: LEAA, 1976), 46-47.**

a. *Legal representation for the child and guardian ad litem.* In a civil child abuse proceeding, the parties are state or local agency, on the one hand, and the parents or custodian of the child on the other. The primary focus of the dispute is the custody of the child with the representative of the state or locality arguing that custody should be removed from the parents and the parents presumably arguing, with or without assistance of counsel, that their custody of the child should continue. Without the child, there would be no dispute. Yet often, with the child thus caught in the middle, there is no one specifically designated to represent the child's viewpoint in the dispute. The attorney for the state or local agency ostensibly represents the "best interests of the child." In practice, such interests are represented, if at all, not independent from the position of the other party, but rather from the perspective of the attorney's client, i.e., the public agency.(75)

As noted above, a number of jurisdictions provide for either independent counsel or a guardian ad litem—who may or may not be an attorney—for the child. There are pros and cons to both approaches, and controversy over the question of whether a guardian ad litem needs to be an attorney. Where a guardian ad litem is not an attorney, it is argued that the child's legal rights will not be fully or adequately protected. On the other hand, in several of our site visits staff observed a tendency for the child's counsel to side with the position of the attorney for the petitioning agency. According to both counsel for the child and counsel for parents that we interviewed, the position adopted by counsel for the child is most often essentially identical with the position of the state (city, county, or welfare department) attorney at the adjudication stage.(76)

The model system proposes that the child's right to independent counsel be recognized and that such counsel be appointed at court expense or provided through an arrangement with a legal aid society, legal services program, or the like, when the child (not the parents) is unable to afford private counsel. This right to counsel should attach at the earliest point in the proceedings

In addition, under the model system, a separate guardian ad litem should be appointed in those cases where the child is not of sufficient age and mental capacity to comprehend the proceedings and participate in the representation of his interests. This proposal is made with full recognition of the fact that there is not now, nor will there be in the near future, adequate resources for implementation.

Persons of sufficient age and mental capacity are able to participate in the representation of their interests by confering with their attorney, participating in strategy decisions, expressing their desires and directing that these be recognized in the legal posture adopted by the attorney on the client's behalf. Obviously, this is not the case with small children. Where an attorney or guardian ad litem alone is assigned to represent the "best interests" of the child, this duty may conflict with what the interest or desires of a child would be if the child were capable of expressing them. Such conflicts have arisen in the representation of older children capable of expressing their opinion.(77) The presence of both an attorney and guardian ad litem for the child would permit a separation of roles in determining the "best interests" of the child.

The role of the attorney would be to insure that the legalities of the proceedings are correct, that the child's rights are being protected and that the child's interests are being adequately presented and considered. The role of the guardian ad litem would be to determine, on behalf of the child, what posture to adopt in the proceedings. The guardian ad litem would consider the child's separate interests as well as the child's interests as a member of a family unit. The guardian ad litem would perform a social investigation from the child's perspective and, on behalf of the child, explore dispositional alternatives that would strike a proper balance between protection of the child and the continued presence of the child in the family unit. Furthermore, the guardian ad litem would insure that the child's interests are protected in the post-dispositional phase so that (s)he is ultimately placed in a stable environment which promotes the establishment or re-establishment of a "psychological parent-child relationship" in accordance with the "child's sense of time."(78) For this reason, legal procedures (and laws) aimed at protecting children should reflect developmental differences, including the sense of time, among children at different ages.

It is not presupposed that a single representative of the child (who should be an attorney) cannot adequately perform both roles. However, in representing a young child incapable of providing assistance in the legal process, under such an arrangement an individual is called upon to do both the thinking and the acting of two persons, i.e., the attorney and the client.

C. Organization of Legal Representation

James Redeker, The Right of an Abused Child to Independent Counsel and the Role of Child Advocate in Child Abuse Cases, **23** Villanova L. Rev. **521, 542-543, n. 131 (1978). Reprinted with Permission.**

FOOTNOTE

[131] Various methods for providing counsel have been suggested generally and are in practice in Philadelphia and surrounding jurisdictions. Counsel are supplied to abused children in Philadelphia principally through three delivery systems. In terms of number of cases, the Child Advocacy Unit of the Defender Association of Philadelphia is the primary source for counsel. The stated goal of the Unit coincides with the statutory mandate of reuniting the child with his family and keeping the child within the family structure. This same mandate controls the operations of the child protective service agency. *See* note 3 *supra.* The Unit attempts to secure services to the child and child's family within the home structure which will resolve the problematic situation. The Unit provides counsel only to those children who are subjects of court petitions (less than 20 percent of the reported cases) and handles all juvenile cases of which abuse cases are only a part. The Unit currently employs three social workers, two investigators and five attorneys.

During the first year of its operation (1976) the unit employed three attorneys and handled in excess of 2000 cases.

Other delivery systems are the Juvenile Law Center and the Child Abuse Committee of the Young Lawyers Section of the Philadelphia Bar Association. The latter organization maintains a list of about 100 trained private practitioners who seek appointments as counsel to abused children in selected cases as referred by hospitals, doctors, the Department of Public Welfare and the courts. The attorneys act without compensation. In 1976 the committee volunteers became involved in approximately 75 cases. With funds from the Governor's Public Health Trust Fund, the Bar Association and the Philadelphia Bar Foundation, the committee has established a Support Center for Child Advocates which employs two social workers (one of whom is also an attorney) for the purpose of assisting volunteer attorneys in the preparation of cases and training new volunteers.

Delaware County utilizes approximately 36 private practitioners who are appointed on a rotating basis and receive a flat $40.00 fee for each case handled. Appointments are made only upon the filing of an abuse petition with the court. In 1976, 95 such appointments were made. When an abuse petition is filed in Chester County a single attorney is appointed to represent the child. That attorney received 20 guardian *ad litem* appointments in 1976. The attorney is paid $15.00 per hour to a maximum on any case of $250.00. Montgomery County appoints only private practitioners to abuse cases, but, as in all other counties surveyed, only after an abuse petition has been filed with the court. Just 12 appointments were made in the last year and the attorneys are compensated at cost level fee schedules. The public defender office in Bucks County represents all abuse children who are subjects of court petitions. In 1976, there were 129 such cases.

The report of the New York State Assembly noted that after a three-year study, the committee found the law guardian to be ineffective in most instances. N.Y. Select Comm. Rep., *supra* note 118, at 147. The assemblymen noted a distinction between the effectiveness of these lawyers in the urban and non-urban areas of the state. *Id.* at 148. In urban areas, the law guardians were generally attorneys attached to a legal aid society. Their effectiveness was undermined by their heavy caseloads and the lawyers "institutional bent." *Id.* at 148-50. The report noted that the law guardians from the legal aid society, who also often represented children in delinquency actions, had a bias towards preventing the removal of a child from the home — a bias which was wrongly carried over to the abuse proceedings. *Id.* at 148-49. Although the report found that the law guardians as a group had failed to assume a role of active representation, they did find that in the non-urban areas of the state, the attorneys more adequately fulfilled their role, conducting active pretrial investigations and playing a forceful part in the proceeding. *Id.* at 149-50. Because of their view as to the ineffectiveness of the law guardian, the committee recommended that a full-time "Children's Attorney" be appointed in each county. *Id.* at 153.

One writer suggests that reliance on individual practitioners is not an adequate means of providing the child with counsel. C. E. Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Their Rights Under the Due Process Clause*, 4 Suffolk U.L. Rev. 631, 687 (1970). The author recommends the development of a new type of institutional means since the individual practitioners will not have the time nor the interest to develop the expertise necessary to effectively represent a neglected child. *Id.* The article additionally cautions that the job should not be given to the attorney of the state agency which will assume the custody of the child upon a finding of abuse or neglect. In that case, in addition to the burden of the lawyer's existing caseload, as an employee of the agency, he, like social workers, may have biases which would inhibit him from giving the child the best representation to which he is entitled. *Id.*

A third view is taken by the authors of an article in the Chicago Kent Law Review. *See* Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 Chi.-Kent L. Rev. 45 (1972). In that article, the authors suggest that adequate representation in a child abuse case would take from 10-20 hours of preparation and that the high caseload of the public defender and the unavailability of adequate resources would preclude proper representation. *Id.* at 68. The article suggests the use of private attorneys as an alternative. *Id.* at 77-78.

It is the third view which is supported by this author and the Committee on Child Abuse of the Young Lawyers Section of the Philadelphia Bar Association. Based upon over five years of experience, the estimate of 10-20 hours of attorney time to handle a child abuse case properly is conservative and many cases have required in excess of 50 hours. In part, this is due to the failure of the Philadelphia Family Court to schedule most cases for certain times and their continuing to operate on the daily case list system. Nevertheless, the committee's volunteers are told that in accepting a case they must be prepared to spend 15-30 hours of their time. It is hoped that the Support Center for Child Advocates *(see supra)* will reduce this time requirement substantially.

It is our experience with the amount of time necessary to handle the representation of an abused child properly which causes us to question the adequacy of the systems utilized in Philadelphia and vicinity. Assuming 40 productive case related hours per attorney and two weeks vacation each, the Child Advocacy Unit of the Defender Association of Philadelphia could have averaged not more than 3.3 hours per case. Delaware County's system of $40.00 per case seems unlikely to stimulate extensive effort. For similar reasons, the Chester County System is inadequate. Montgomery County's experience is too limited to reveal anything more than the general and tragic lack of reporting and investigation. The Bucks County use of the Public Defender may or may not be adequate, depending upon the case load.

Los Angeles Superior Court, *Policy Memorandum Re Dependency Proceedings* (1976).

(2) Appointed Counsel in Dependency Proceedings

(a) The Juvenile Court will maintain a panel of attorneys who agree to accept appointments by the court to represent parents and minors involved in dependency proceedings. This panel will be called the 634 panel and the attorneys serving on it will be known as 634 attorneys.

(b) The rules set out in the court policy promulgated by the Juvenile Court Committee on 700 Attorneys and Psychiatrists relating to the appointment, conduct, payment and removal of appointed counsel are applicable to 634 attorneys, and all 634 attorneys should be thoroughly familiar with such rules and all amendments thereto. Your attention is particularly directed to the policy memorandum dated April 15, 1975, May 5, 1975 and May 12, 1975.

(c) 634 attorneys serve at the pleasure of the court and may be removed from the 634 panel at any time without the court having to show cause for such removal.

(d) The 634 panel will be reconstituted each quarter. It will be the court's practice to remove some 634 attorneys from the panel each quarter and substitute attorneys who are not then on the 634 panel in their place. The number of 634 attorneys removed from the panel each quarter may vary from quarter to quarter as the court sees fit.

(e) 634 attorneys will be judged as to punctuality, ability and conduct as officers of the court.

(f) By accepting appointment as a 634 attorney, an attorney acknowledges that his dependency case takes precedence over administrative hearings, matters in municipal courts and matters in other departments of the Superior Court.

(g) Fees awarded to 634 attorneys will be set by the appropriate judicial officer pursuant to the policy pro-

mulgated by the Juvenile Court Committee on 700 Attorneys then in effect. Normally, the fee will be set by the judicial officer who presided over the last proceedings (i.e., the disposition hearing). If the judicial officer who presided over the disposition did not preside at the adjudication (contested), the judicial officer presiding over the adjudication shall set the fee. Further, the fee for work done by a 634 attorney on his assigned day, whether it be for work done in his assigned department or some other department, shall be set by the judicial officer presiding in the attorney's assigned department.

(h) Payment of fees is within the discretion of the judicial officer. Complaints to judicial officers about the amount of a fee are strictly prohibited. In the event that there is substantial evidence that a particular judicial officer consistently refuses to follow the guidelines set forth by the Committee on 700 Attorneys and Psychiatrists, the complaining attorney may discuss the situation with the Supervising Judge at the Metro Annex or the Chairman of the Committee on 700 Attorneys and Psychiatrists.

(i) It is the policy of the court to limit the fees paid to 634 attorneys to $30,000 per calendar year. The court reserves the right to remove a 634 attorney or limit his appointments if it appears that his earnings from appointment in dependency cases are likely to exceed $30,000 during the calendar year.

(j) Except for the fee awarded by the court in the matter for which the 634 attorney was appointed, no 634 attorney serving on the panel may accept a fee from or on behalf of his client in any legal matter arising out of the circumstances which brought the client before the court.

(k) In the absence of circumstances to the contrary, 634 attorneys will be relieved as appointed counsel by the court at the end of the proceeding for which they were appointed. The court order relieving counsel shall be effective at the expiration of the time for filing notice of appeal. Notice of the next appearance hearing will not be given to counsel who has been relieved.

(3) Legal Representation of Minor

(a) The court shall appoint counsel to represent a minor whenever the minor is alleged to be a person described in WIC §600(d) or whenever the parent is represented by counsel and a conflict of interest exists between the minor and the parent.

(b) In all cases in which the court should appoint counsel to represent a minor, the court shall first determine whether an actual conflict of interest exists between the petitioner (DPSS) and the minor. Counsel should bring all relevant facts of such conflict to the court's attention to assist it in making its decision. If a dispute exists as to whether there is an actual conflict of interest between petitioner and the minor, the court may appoint counsel to represent the minor for the limited purpose of assisting the court in determining whether such conflict exists.

(c) If the court determines that no actual conflict of interest exists between the petitioner and the minor, the court shall make a finding to that effect and the clerk shall reflect such finding in the minutes of the court. In such case, the County Counsel, in his representation of the petitioner, shall be deemed to be acting as counsel for the minor pursuant to WIC §634, 634.5, and 700.

(d) If the court determines that an actual conflict of interest exists between the petitioner and the minor, the court shall appoint separate counsel to represent the minor.

(e) Your attention is directed to the policy memorandum relating to legal representation of parties in dependency cases dated September 5, 1974 and April 18, 1975.

D. The Role of the Child's Attorney

Henry Janssen, "What is Your Role," ***How to Handle a Child Abuse Case, A Manual for Attorneys Representing Children*** **(Philadelphia: Support Center for Child Advocates, Inc., 1978), 3-6.**

C. Guardian ad litem vs. Attorney

1. A guardian ad litem is generally regarded as a fiduciary appointed to represent in legal proceedings a person under a legal disability but without being entrusted with the care and management of the estate and/or person; Pa.R.Civ.P. 76. The guardian ad litem has actual supervision and control over the conduct of the litigation on behalf of the person under the disability; Pa.R.Civ.P. 2053. A mere attorney, however, is generally regarded only as an agent for a principal, and an attorney advances the lawful objectives selected by the principal/client.

2. The role of the guardian ad litem, however, in child abuse proceedings is complicated by the language of section 23 of the Child Protective Services Law which charges the guardian "with the representation of the child's best interests" and with "adequately representing the child."

3. There is no practical difference between the roles of attorney or guardian ad litem except where the child is articulate.

D. The Code of Professional Responsibility

1. A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means. DR 7-101(A) (1).

2. The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies. EC 7-11.

3. Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of his client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interest, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a fully constituted representative if legally incompetent. EC 7-12.

E. What Your Role Is

1. To independently ascertain that the child is being treated fairly and adequately provided for by the person or agency with custody.
2. To investigate the case thoroughly.
3. To obtain and collate advice and recommendations of qualified experts. The Support Center can help.
4. To follow-up on treatment and disposition of the child; see *Janet D. v. Carros*, 362 A.2d 1070, 240 Pa.Super.Ct. 291 (1976).
5. Be sensitive to value differences.

F. What Your Role Is Not

1. To second-guess expert advice or to otherwise substitute you own opinion for a qualified expert's opinion.
(a) The attorney must assure himself, however, that there is a reasonable basis to support expert opinion.
2. To be an avenging angel against the parents, since this will only cause lack of cooperation, possible resentment against the child and possible further disruption of the family unit.
3. To become emotionally involved or to alter your role unnecessarily to that of a party.
(a) Do not seek to adopt the child.
(b) Do not select adopting parents yourself.
(c) Do not take possession or custody of child.

G. Special Problems—Articulate Children

1. Are you the guardian ad litem or are you the attorney? Who advocates whose version of the child's best interests?
2. In one area, it does not make any difference. If you have obtained a psychiatric report which concludes that the child is unable to recognize and/or make decisions in his or her best interests, an attorney may advance the child's interests as the attorney sees them, but the existence of the report and the child's disagreement (if any) should be disclosed to the court.
3. If you do not have the said psychiatric report and if the child does not agree with what you see are in his/her best interests:
(a) an attorney must advance the objectives selected by the child without moving for a guardian ad litem.
(b) a guardian ad litem must move for the appointment of separate counsel for the child under Section 20 of the Juvenile Act.
1. the order must recognize the independence of the attorney from the guardian ad litem; otherwise EC 7-12 requires the attorney to follow the decisions of the *guardian ad litem.*

New England Resource Center for Protective Services, *Preparing for Care and Protection Proceedings in Massachusetts, a Guide for Protective Service Workers* 51-53 (n.d.).

D. The Child's Case

After the parent's attorney has presented his/her case, the child's attorney, if one has been apointed, may also present a case on the child's behalf. As previously mentioned, the judge presiding over a C&P case is required to appoint an attorney for the child when the "interests of justice" so require. Many of the judges of the Commonwealth have made appointing an attorney for the child a routine practice.

Some judges involved in C&P cases let it be known that the child's lawyer is to serve a monitoring function, i.e., conducting cross-examination and making objections where necessary to protect the best interest of the child, and nothing more. The child's lawyer is not, however, prohibited from assuming a more aggressive role. He/she may conduct a thorough investigation of the case and present witnesses to substantiate or refute the petitioner's allegations. He/she may also call witnesses to testify during the disposition stage of the hearing about appropriate care and custody arrangements. The petitioner should encourage the child's attorney to take a more active role than that envisioned by many judges. He/she may assist the child's attorney by suggesting how and where to best interview the child and by providing him/her with the names of persons he/she should contact during his/her investigation of the case.

E. Improving the Quality of Legal Representation

National Legal Resource Center for Child Advocacy and Protection, *The Child Abuse Legal Representation Project - Suggestions for Effective Implementation* (Washington, DC: ABA, 1979), 5-16.

II. Recruitment

Philadelphia's experience indicates that there are many untapped legal resources available for volunteer representation of children. Attorneys with no litigation experience should be recruited as well as those with such

experience, since many attorneys volunteer to represent children because they want to get litigation practice not available in their own firms. Projects may want to utilize litigators and more seasoned attorneys as supervisors, since these attorneys usually do not have the time necessary for individual representation of a child. Retired attorneys also should be solicited as volunteers since they often have more time to represent children.

Where there is statutory authority for payment of counsel, young attorneys, especially those starting their own practice, may be attracted. While these payment schemes tend to be marginal and not reflect the number of hours put into an abuse and neglect case, an assured monthly income of even $100 to $200 a month is an attractive inducement to the attorney striving to meet his/her overhead.

Bar association newsletters and general legal newspapers should be heavily utilized to recruit attorneys to represent children. The bar association's public relations person, if there is one, should be solicited to help organize any publicity campaigns. It is important that publicity not be "one shot", but continue on at least a quarterly basis. Articles should focus not just on recruitment of volunteers but also on the problem of child abuse and neglect generally, and the role of the project in trying to solve this community issue. This will serve to sensitize attorneys who later will be approached to participate in the project. In-person contacts are critical for effective recruitment of volunteers. An attorney from every major law firm should be asked to make in-person contacts with attorneys and paralegals in the firm. In addition, contacts should be made with elements of the appropriate bar association, such as state and local bar family and juvenile law sections and committees. Affiliates of the National Bar Association and any Women's Law Caucus should also be contacted. A lead time of at least one month for recruitment should be scheduled before holding any training session.

Paralegals are an invaluable asset in conducting research and following up cases to determine whether or not treatment plans are being implemented. They might also be used to edit the project's newsletter, coordinate publicity activities, and perform administrative tasks. Undergraduates and graduate students can, with proper training, make excellent paralegals. Secretaries from various law firms should be recruited to assist in the typing of manuals, training materials and newsletters. Investigators from law firms can be used to assist attorneys in locating missing persons and obtaining necessary legal evidence. Messengers can be used for process serving as well as delivering documents from one law firm to another. Conference rooms, videotape equipment and bulk xeroxing can be provided by the local bar association and various law firms. If the project has these facilities available, it should also consider offering the use of them to the non-legal child protective community, since many agencies and hospitals do not have them readily available. If the project can provide these services, it is not only reciprocating for agency cooperation but also promoting good relationships with other professional disciplines.

III. Training

A. Attorneys

The success of any given local project will depend upon the quality of its representation. It is critical that good training be provided and *mandated* of all attorneys. Good training sessions should incorporate important non-legal aspects. These might include the problems of family splits and divided loyalty, the dangers of stigmatizing abusers as "bad people," the resistance to keeping the family together, and the cultural biases which impact upon the child protective system. Philadelphia's experience has been that attorneys do not resist, but in fact appreciate the mandatory requirement of training. Persons have willingly come to Saturday sessions running from 9 a.m. to 4:30 pm. Evening sessions might also be utilized. Mandatory training sessions might be given quarterly, with supplemental sessions delivered on a monthly basis on specialized topics such as sexual abuse, treatment of the troubled adolescent, and new legislation. These sessions might be more informal, and non-legal professionals should be invited to attend so that social contacts can be developed.

The training sessions should be complemented by written practical guides such as the manual developed by the Support Center for Child Advocates, Inc., a program of the Young Lawyers Section of the Philadelphia Bar Association. This manual, "How to Handle a Child Abuse Case", and other materials listed in Appendix A are available for purchase and serve as excellent models for the development of local training materials. Periodic distribution of a newsletter outlining legal developments, local social service programs and project activities serves as a training vehicle for the legal, judicial and non-legal professionals and fosters good public relations. Written material, such as manuals and newsletters, might be printed by a public utility or large private corporation having duplicating facilities. Mailing might be done through the local bar association and/or law firms on a rotating basis. The content of all training and written material should be interdisciplinary, emphasizing not just the legal aspects of abuse and neglect but also the non-legal aspects, such as medical evidence of abuse and neglect, the social and psychological dynamics of maltreatment, and available diagnostic and treatment resources within a local community. This is extremely critical, since effective representation of children will involve the harnessing of worthwhile services to evaluate and rehabilitate families and protect the child while keeping him/her at home if at all possible. This is the area where attorneys have the least experience and expertise. Most communities have medical, mental health and social service experts who would be more than willing to provide free training on this subject to project attorneys.

IV. Social Work/Mental Health Component

Since child abuse and neglect is a result of disfunctioning in family relationships often requiring social service, medical and mental health intervention, child advocates can only be effective if they have the resources and skills

to permit independent investigations and assessments of the allegations of abuse/neglect and the ability to harness effective services to meet the needs of the children they represent. If this human service component is not built into the project, the child's attorney will most likely be forced to conduct minimal investigations and assessments based upon limited time, experience and expertise. Often, this will result in the attorney relinquishing his/her independent status and merely relying on the department of welfare for information and recommendations.

To meet these problems, each project must establish a non-legal component to be responsible for investigating the allegations of abuse and neglect and determining the needs of the child and family as well as identifying witnesses who might be needed for court proceedings. Since many non-legal professionals are resistant to involvement in a court proceeding, they often relate better to a non-legal person in conveying information. In addition, the development of a consistent personal liaison with agencies is needed for the project to successfully utilize quality resources in a short amount of time. The human service component is also needed to conduct adequate follow-up of treatment plans. Commonly, "beautiful" plans are developed and ordered by the court, but not implemented by the agency and/or family. Only by constant monitoring can the child's advocate identify when services are not working, and why and what modifications and revisions need to be proposed for effective treatment planning.

Ideally, a local project should explore providing this human service component through paid full-time staff. If money is available in a local community, consideration should be given to paying for at least a part-time staff person. Where no money is available, the following options should be explored:

1. Recruitment of a *volunteer* to provide weekly consultation to attorneys on case disposition and resource utilization. These volunteers might be recruited through private family services or children's protective services agencies or through volunteer civic organizations such as the National Council of Jewish Women, Association of University Women, and the Junior League. It is important that projects screen the volunteers and use only those persons with experience and training in child abuse and general welfare services.

The Junior League and the National Council for Jewish Women have organized strong volunteer programs in the area of child advocacy, juvenile justice and more recently, child abuse and neglect. A volunteer from one of these organizations might be willing to provide some kind of part-time staff assistance to the project chairperson, such as recruiting social service volunteers, coordinating multidisciplinary team meetings, identifying resources that are in the community, developing resource agreements, or coordinating speaking and training activities.

2. A *multidisciplinary team,* consisting of representatives from medicine, mental health, education, social work and law, might be organized to provide monthly or bimonthly consultation on case disposition. The problem with both options 1 and 2 is that the human services volunteers will have limited time, preventing assistance to all attorneys. Given limited time, their services should probably concentrate on making recommendations for case disposition rather than investigations or initial identification of needs.

3. Recruitment of a *social work/psychology clinical student.* Schools of social work require field placements for their students. Many schools are seeking interdisciplinary placements are are thus interested in placing a student to assist attorneys in investigations and resource utilization. If this option is chosen, it is important that the student be supervised by someone who has some knowledge of the protective service and child welfare system.

V. Development of Coordinating Agreements

In order to develop effective treatment plans, it is important that the project develop formal agreements, if possible, with the major hospitals, social service agencies, courts, department of public welfare, legal aid programs representing parents, and schools, to formalize procedures on obtaining information regarding a child and family and for making referrals for services.

Agencies involved with abused and neglected children are often large bureaucracies. Because time is of the essence in representing abused and neglected children, it is important that these agreements be developed early so that requests for information regarding a child and/or his family can be processed and commitments to deliver services can be given very quickly. A specific "contact" person should be identified within each agency to give immediate approval as to the sharing of information and acceptance of service.

In addition to hospitals, schools, the department of public welfare and police department, most communities have a variety of social services that can be provided to families while the children remain in the home (mental health services, family outreach workers, parental stress centers, day care, homemaker services, visiting nurses), or that can be provided to children and their families if placement is necessary (foster care, group home, residential treatment).

It is very important that the project gain knowledge as to what specific agencies are *effective* in working with abused children and abusing families. Working with abusing families is quite difficult, requiring skills and methodology different from routine services delivered to the broader community. Parents of children whom the project will represent are commonly isolated and alienated from their neighborhood and community and thus are resistant or are not motivated to utilize existing community resources. Agencies requiring appointments to be kept in an office may terminate service because an abusing parent does not arrive on time. Children, because of their love for their families, may often deny abuse, thus exhibiting behavior not commonly identified with abuse and neglect. A good service provider will be sensitive to these factors.

VI. System-Wide Advocacy

Based upon data collected in case representation and involvement with local agencies, new child representation projects will quickly learn of major gaps in the social service and mental health areas as well as the need for changes in the judicial and legal systems. Law reform activities dealing with such topics as the right to treatment and the right to counsel will probably be a necessary outgrowth of any new project. In the past, attorneys have not been involved in many citizen/agency coalitions established to improve services to children. Sending a representative to meetings of these committees can serve to educate the lay community in the utilization of the law as a tool of social change as well as to maximize coordination between the legal and non-legal communities.

Another area of reform local projects may address concerns payment of counsel. As a unique class of recipients of legal services, children, for the most part, are unable to compensate their attorneys. Consequently, in the absence of statutorily mandated and publicly financed compensation schemes, child advocacy has largely become a *pro bono* activity. While the participation of volunteer attorneys is to be encouraged, continued and commended, the child's attorney, as a rule, should not be viewed or treated in a lesser light than the tax, corporate, or any other private attorney. The American Bar Association, in its recently adopted Juvenile Justice Standards, supports this viewpoint:

> Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards, *Standards Relating to Counsel for Private Parties,* § 2.1(b)(i).

VII. Funding

Law firms and the bar association should be solicited to provide in-kind contributions in terms of office space, furniture, supplies, secretarial help, mailing, duplicating services, conference rooms, etc. Corporations may also be asked to provide assistance such as free duplicating services for manuals and newsletters. Because many activities can be supported through in-kind contributions, it is strongly recommended that a project use whatever money is available for the hiring of a social service staff person, either on a part-time or consultant basis.

D. Quality Control

Quality control is a major problem for any volunteer program. Constant monitoring of the effectiveness of the volunteers is critical. Many volunteers have never been in the Family or Juvenile Court or even tried a case. Few, if any, have any knowledge or experience in the non-legal aspects of child abuse and neglect. Many attorneys not involved with special child representation programs provide limited representation to children, see their client only in court, and conduct very few independent investigations due to their lack of knowledge and experience. When provided with support, however, attorneys are more than willing to spend from fifteen to thirty hours per case to investigate the allegations of abuse and neglect, interview the client and witnesses, develop legal strategies, conduct research, and participate in coordinating meetings with agencies as well as counsel to other parties.

IX. Sources of Technical Assistance

The National Legal Resource Center for Child Advocacy and Protection, located in Washington, D.C., is a program of the Young Lawyers Division of the American Bar Association. Services of the Resource Center are available to provide technical assistance to child representation projects. The nature of this assistance has been identified in the Preface. Where the staff is unable to respond directly to a request for information or assistance, it will at least be able to identify other helpful sources.

Another source of information which all representation projects should consult is the National Center on Child Abuse and Neglect (HHS) resource center in your region. The primary purpose of these centers is to support state and local efforts to prevent and treat child abuse and neglect.

Bibliography of Guides to Lawyers Representing Abused and Neglected Children

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Teri Talan, *et al.*, *Child Abuse and Neglect Legal Handbook* (The Child Advocate Association, Chicago, 1978).

Judge Enrique Pena, "Protective Conservatorship," *Child Abuse and Protective Services in Texas* (1976), D - 24-25. **Reprinted with Permission.**

How then can the courts make more effective use of the guardian ad litem? Texas law already plays an important role in suits affecting the parent-child relationship by making it mandatory in certain cases to appoint a guardian ad litem; in certain other suits it is within the discretion of the court to appoint a guardian ad litem. Once a guardian ad litem is appointed the court should insure

that: (1) the appointee be given adequate time to investigate the circumstances of the case; (2) the appointee be given access to all written matters, reports and files on the child; (3) the appointee, as an advocate, and as an officer of the court, should be given ample opportunity to present the child's case to the court; (4) the appointee exert his efforts to secure an ultimate resolution of the case which, in his judgment, will best serve the interests of the child; (5) the appointee should be given the opportunity of taking a position on the issue of whether the child should be removed from the home during the pendency of the legal proceedings; (6) the appointee should be given the opportunity of participating meaningfully in the formulation of the ultimate plan for disposition; (7) the appointee should be compensated for his services; and (8) the appointee should serve as an advocate for the child in the review of the status of the case at periodic intervals, and subsequent modifications.

Personal experience has shown that the appointment of guardians ad litem under our present system has not been effective in protecting children's rights. As a general rule, the newest and youngest members of the bar are appointed, without compensation. These young attorneys are usually appointed a few days before the legal proceedings; they usually do not see the records of the agency until a few minutes before the hearing; as a general rule they never interview the child; they seldom make an independent investigation of the case; they are seldom consulted about dispositions and they seldom, participate in the review process of children in placement.

F. Lay Guardian Programs

Carmen Ray-Bettineski, *Court Appointed Special Advocate: The Guardian Ad Litem for Abused and Neglected Child,* **29** Juvenile & Family Court J. **65-70 (1978). Reprinted with Permission.**

The Volunteer Guardian ad Litem

The volunteers are recruited and selected from the community at large. Initially, a major recruitment was done at a University child abuse and neglect conference, which brought together people from many disciplines with an interest in child welfare. Recruitment has since been continuous; people hear about the project from newspaper articles, from other guardians, and from public appearances by the staff at conferences and community service groups. Recently, a volunteer guardian agreed to take on many of the recruitment duties. The need for bringing new volunteers into the program is constant, as more and more cases are referred to the program by the judges.

The project director conducts an indepth interview with those who respond to recruitment efforts. This interview screens out those few applicants who are clearly unsuitable; for the rest, the question is not whether to accept the volunteer, but how to use the volunteer appropriately. It is at this level, in fact, that the professional judgement of the program staff comes into play. The clinical experience of the director facilitate determining in what areas the prospective volunteer may not be able to maintain an independent view with regard to special areas of child maltreatment. It is crucial to determine specific areas of expertise, so that these volunteers will be assigned to cases where they may be an expert witness, able to make conclusions at an adjudicatory hearing. Much of the project's success is believed to depend on the sensitive matching of the volunteer's individual sensitivity and capacities with the circumstances of a particular case. Geographical proximity within the county is considered. Project staff feel that matching the ethnic background of the guardian with that of the child is especially useful in creating a relationship of trust and in eliminating cultural biases from the volunteer's evaluation of the case. Seattle is a multi-racial city, and the program accordingly recruits extensively in the Black, Asian, Chicano, Eskimo, and Native-American communities. About a third of the volunteer force works professionally in the human, health or legal services; another third works full-time in other fields (real estate, retail store management, engineering); while the remaining third works outside the home only part-time or not at all.

Training

To fulfill his/her obligations to the child and the court, the CASA must assume four separate roles: first an investigator, then an advocate, a counsel, and a guardian. All volunteer guardians receive a three-hour orientation before receiving a case assignment. The seminar gives the volunteers an overview of their role within the juvenile court system, and provides training on such specific legal skills as writing recommendations to the court and testifying (and surviving cross examination). A videotape developed by the project of a hearing is a valuable part of the training, clearly indicating the role of all parties to the legal proceeding. The location of the session in an actual courtroom lends immediacy to the training materials and helps familiarize the volunteers with the legal environment. A volunteer who is also a professional in the human services discusses how the CASA can develop a relationship with those involved in the case that will enable him/her to obtain all the necessary information, and yet maintain an independent stance.

In addition to the orientation, a special training seminar is held monthly on topics designed to increase sensitivity and knowledge to volunteers. Attendance is not required. In the past, topics for these sessions have included incest, parent-child bonding, and interviewing.

Volunteer guardians choose to accept each case that is referred to them. The time commitment of the volunteer for each case accepted is to see it through to the permanent placement of the child. Time expended on any one case can range from 12 to 100 hours. About 60 of the volunteers have taken more than four cases and stand ready to accept new cases regularly; other volunteers join the program with the intention of accepting only one case at a time. Again, a flexible approach, supported by the project director's personal attention, ensures the best use of each volunteer.

The involvement with the child varies with the unique dynamics of each situation. However each CASA per-

sonally sees each child, in their own setting, minimally once prior to making a recommendation. If possible they are also seen with their parents, to observe the family interaction and dynamics. Additional contact is made as frequently as indicated for the CASA to determine the current progress and circumstances of each child.

Administration

The progam is part of the juvenile court administration structure. The project director is a department head in the court, answering directly to the Committee of Juvenile Court Judges. This administrative placement ensures close cooperation between the judges and program staff. The program would not survive without the constant support of the judges. Recruitment of highly skilled, motivated volunteers depends on the assurance that their role will be respected and influential in the courtroom. The judges have, in fact, sanctioned the volunteers' special position in the hearings by granting them "first party" status; their continued approbation depends of course, on the continuing high quality of investigation and decisions that the program has established for volunteer performance.

Cases are referred to the program by the judges. A staff member explains the case to the selected guardian, who then begins a social investigation. The investigation includes personal interviews with parents, step-parents, caseworkers, teachers, counselors, and others with an interest in and knowledge of the child. The child is, of course, extensively interviewed if he/she is old enough. Even if very young, he/she is met and observed by the guardian. The guardian may also request the court to order psychological or psychiatric evaluations, if the information is necessary to arrive at a recommendation. After all interviewing has been done and as much information as possible has been accumulated, the guardian is prepared to recommend disposition. The program staff reviews the recommendation with the guardian, and helps him/her prepare a one-page report including the facts of the case, assessments by the guardian, and his/her recommendation for the family.

Recommendations to the court address the following issues (1) where the child shall reside, (2) visitation with the parents, (3) treatment plan for the parents, (4) treatment plan for the child, and (5) date for the next court hearing.

Besides the availability of ongoing consultation, the guardians also have access to two attorneys in private practice who are on contract to the program. These attorneys do the initial legal training at the orientation sessions, provide consultation to volunteers on individual cases as requested by the program director, and represent the CASA at adjudication and other hearings where the guardian's recommendation on the child's interests is likely to be seriously contested, as in the case of termination of parental rights. The support and availability of consistent legal consultation have been effective in reducing anxiety among volunteers about testifying and in increasing their legal expertise. The accumulative legal expertise of the program legal counsel in the area of child maltreatment is proving very beneficial as evidenced by the high percentage of cases granted by the court to the CASA's position in adjudicatory and termination of parental rights hearings. Administratively, the approach has proven to be more efficient than the previous system of selecting legal consultants in rotation from a roster.

The project is cost-effective, since it is financed from savings made by not hiring attorneys to act as guardians ad litem. The budget includes the salaries of a program director, an assistant, and a secretary, as well as the cost of legal consultation and court-ordered psychiatric and psychological examinations in those cases where the program director and volunteer guardian believe it to be necessary in order to arrive at a recommendation. Increase in the program's case load will affect the budget only minimally, becuase of the voluntary status of most of the program work force.

The program works hard to maintain good relationships with the professional staff of the Child Service Agencies in King County. The director estimates that the social worker and the guardian have agreed on the recommendation to the court in eighty-five to ninety percent of the shared cases. At the time the program began, the director convened caseworkers and supervisors and the guardians ad litem, in order that each group could become familiar with the function of the other. A Child Protective Services Administrator is on the citizen's advisory board of the program, and the program director is sensitive to the need to keep channels of communication open between the program and other social agencies. The administration of the state department of social service had made available to all CASA their complete investigative files. When there is disagreement between the department caseworker and the CASA it is viewed as any other divergent point of view presented to the court as an advocate.

A CASA may be assigned to a case at any time, from the first referral of the child to the court until final disposition. For new cases, the referral is commonly made by the judge at the preliminary hearing. In this event, the guardian would be prepared to stay with the case and make reports for the adjudicatory and dispositional hearings. Cases that have been with the court for a long time may be referred to the program at a review hearing.

While a CASA may ask to withdraw from a case at any time, in fact they rarely do so, but generally stay with the case until final resolution. More and more the CASA program sees itself as mandated to ensure that children don't get lost in the system. The CASA can and do request review hearings for unresolved cases and see their involvement as necessary until for instance, a foster child is returned home, freed for adoption, or placed in a permanent foster home. Their advocacy of the child's interests creates continued pressure on the court and other service agencies to more quickly resolve the fate of children in limbo.

Conclusion

So far, program management believes that the program has successfully demonstrated the practicability of

using interested, concerned citizens in an influential way to promote the interests of dependent children. Among the factors it identifies as accounting for the program's success are:

> the high value placed on the program by the judges;
> the training provided for volunteers;
> the sensitive matching of volunteer to child;
> the ongoing consultation provided to each volunteer;
> responsiveness to minority interests;
> the highly qualified level of volunteers responding to recruitment efforts;
> effective legal consultation and representation;
> the cooperation of other Social agencies and the legal community;
> the economical way in which the program meets a critical need for intensive third-party advocacy in behalf of the child

The program has become a permanent feature of the King County Juvenile Court. The concept of volunteer non-lawyer advocates is gaining momentum in other cities around the country, and this use of volunteers has possible applications in custody hearings in family court. Certainly the program provides a very constructive use of the good will and concern felt by members of the community for dependent children, which so often in the past have not found productive expression.

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Los Angeles Superior Court, *Guardian ad Litem/ Dependency Court Improvement Project, Grant Application* **(1978), 12-23.**

II. Objective—Guardian ad litem program

Statement of the problem:

The need for a program of screening, training and supervising volunteers as guardians ad litem to minimize children "drifting" in placement and to meet needs in other critical areas.

The most critical needs for services of guardians ad litem in this county fall within the following six categories:

(1) Minors whom the DPSS has not referred to our Department of Adoptions for adoptive planning in cases where reassumption of parental responsibility appears virtually hopeless, the statutory conditions for termination of parental rights exist, and the minor appears in danger of "drifting" in placement.

(2) Cases in which the minor desires to remain home, the DPSS recommends that the minor be removed from the home, and the matter is before the court for initial dependency proceedings, or for subsequent review.

(3) Cases where the minor, who has been removed from the home, needs independent representation for medical or other needs and in placement issues.

(4) Minors who have legal/litigation needs because they are potential recipients of benefits as victims of violent crimes or because they have some other matter that requires litigation outside Juvenile Court.

(5) Minors who have been adopted but who have been rejected by the adoptive parents. Similarly, minors, without parents or guardians, who have been referred to the Department of Adoptions for termination of parental rights but who have been determined to be unsuitable for adoptive planning.

(6) Cases in which there are pending adult criminal prosecutions against the parents or others arising out of the abuse incidents for which the minor is before the court for protection as a dependent of the court.

Analysis of each of the foregoing categories of special need for guardians ad litem follows:

1. *Minors whom the DPSS has not referred to the Department of Adoptions for adoptive planning in cases where reassumption of parental responsibility appears virtually hopeless, the statutory conditions for termination of parental rights exist, and the minor appears in danger of "drifting" in placement.*

ILLUSTRATION

> The five-year-old child, before the court on annual review proceedings, has been a dependent of the court and in foster placement for three years. The father's whereabouts have been unknown during that period. The mother has been in and out of various institutions because of a narcotic addiction problem. She currently is living in a common law relationship after recently having been institutionalized. She claims, again, to be "cured". She has

visited the child twice during the past year, telephoned the foster parent once and sent the child a Christmas gift. She refuses to relinquish the child for adoption. The DPSS recommendation is that the minor child remain in foster placement for another year.

Inherent in this objective is the court's interest in reducing the numbers of CA/N children who have been removed from their home and lack opportunity to return. In those cases where there is little or no likelihood of reuniting children with their families the court is interested in moving these children more expeditiously into permanent homes. This general purpose has been adopted for guiding the whole range of activities of the Dependency Court.

All children are entitled to a home where they can be properly nurtured to adulthood in an atmosphere of security and permanency. Parents have the first right and responsibility to provide that home. When a parent is unable to unwilling to do so to the extent that a child is abused or neglected, who becomes a dependent of the court, and who is removed from the home, parents still have the first right to the return of that child if it can be done with security for the safety and well-being of the child. The law gives the parents that first right. (Cal. Welfare & Inst. Code, Section 502).

Parents as well as the child are entitled to services such as counseling or therapy in the efforts to bring the family together. However, if parents are unable or unwilling to make the adjustments required to reassume parental responsibility then the child is entitled to look elsewhere for his permanent home. He has every right not to be drifting in placement throughout his entire remaining minority.

The problem of finding the proper balance in individual cases as to when a minor should be referred for termination of parental rights and for adoption is an ongoing one in every jurisdiction. In Los Angeles the DPSS has set up definite guidelines for its children service workers. (See Exhibit G). These guidelines were instituted in a project initiated approximately five years ago, "Project Outreach", in the effort to place for adoption children under DPSS supervision who were otherwise drifting. However, while some overall success has been achieved in this direction, the court finds that reluctance of children's service workers to make referrals for adoptions and other problem areas has resulted in a substantial ongoing number of children drifting in placement until they are too old for adoption. It has been the unanimous view of the judges sitting in the department handling all termination of parental rights cases (Superior Court Department 44) that in most of those cases parental rights should have been terminated long before they were.

This problem remains unresolved. Efforts from an agency supervision standpoint to solve it remain ongoing. However, the children service worker has the dual role imposed by the law of the responsibility for protecting the interests of the minor and at the same time for bringing the family together. Thus, in a very real sense the social worker has responsibilities towards both the child and the parent. *There is no one who represents exclusively the child's interests.* Moreover, individual children services workers differ in their philosophical approach to a referral for adoption. As a result there is a lack of uniformity in making referrals.

Many parents verbalize great affection for a child, but visit this child only sporadically. The parent neither wants to assume responsibility for the child nor wants to risk a feared emotional guilt component by relinquishing the child. It is in this type of case particularly that social workers who have been assigned the responsibility for bringing the family together frequently find it difficult to recommend referral. As the result, the child drifts.

A well trained lay guardian ad litem could be of major assistance to the court in these cases. This GAL would assume the responsibility of advocacy for the child in whatever program appeared for that child's best interests, whether it be return to the parent or adoption. A GAL program geared in that direction could have a major impact in reducing the number of children drifting in placement.

A reverse side of the coin are cases in which without adequate offering of services to the families in the effort to bring the family together, a recommendation is made for referral to adoption. This problem is less frequent and has been minimized by a court-imposed requirement (See Exhibit B) that all referrals for adoptive planning be first authorized by the court on the basis of a written social report fully documenting efforts made to reunite the family. Nevertheless, instances appear also in these cases in which a GAL would be of assistance to the court.

The measure of effectiveness for this objective will be the extent to which the use of guardian ad litem results in abused and neglected children being safely reunited with their families or being provided permanent homes and no longer requiring court jurisdiction. The program has been designed to monitor children for whom guardians ad litem are assigned and will be able to establish short and long range cost savings to the taxpayers in terms of:

(1) Reduction of the number of children placed outside their homes;

(2) Length of stay of children in foster care (with relatives, foster homes, or institutions);

(3) Increase in the number of relinquishment proceedings and permanent planning for children who cannot be reunited with their families.

2. *Cases in which the minor desires to remain home, the DPSS recommends that the minor be removed from the home, and the matter is before the court for initial dependency proceedings, or subsequent review.*

ILLUSTRATION

All three children, ages 3, 6 and 9, wanted to return to their mother. They had come to California three weeks previously with her and were living in a motel. The mother, after separating from their father, had been living with her children with her parents in Connecticut. Against her parents' wishes she had taken the children to California to live with a boy friend who had no interest in the children and

was physically abusing them. The mother promised that she would never see the boy friend again if her children, now detained, were returned to her. The DPSS recommended continued detention because of the likelihood that the mother would simply take the children out of the state with her boy friend if they were returned to her.

Where there is no conflict of interest the existing practice in the dependency court in Los Angeles County is for the county counsel to represent the minor. This involves a dual representation because the county counsel also represent the DPSS who is the petitioner in all dependency cases. Where a conflict of interest appears, such as in the illustration where the DPSS recommends detention and the minor wishes to return home, an attorney from a panel of attorneys screened and selected by a special committee of the juvenile court is appointed to represent the minor as counsel. The panel consists of twenty-six attorneys who commit themselves to devoting a substantial portion of their practive to the dependency court. Each attorney on the panel is appointed quarterly and is required to rotate off the panel one quarter annually.

In most cases the attorneys represent parents who are indigent. Their representation of minors is only where a conflict between the minor and county counsel appears, as indicated. These attorneys are paid by the county on an hourly or daily basis at a fixed rate. Policy memoranda of the juvenile court relating to panel counsel (including counsel appointed in delinquency cases where a conflict appears with the public defender) are attached as Exhibit H.

In the above illustration the judicial officer at the time of the original arraignment and detention hearing would appoint a member of the panel attorneys to represent the minors. That representation would continue until time for appeal expired after the disposition hearing at which time counsel would be relieved. Counsel could again later be appointed at subsequent hearings such as annual reviews or for hearings on petitions to modify the court's previous disposition.

A deficiency in the system is that if a minor is not old enough to or is incapacitated from verbalizing a desire to return home, the county counsel continues to represent the minor even though, for a reason not apparent to county counsel, it may be in the minor's best interest that the DPSS recommendation not be followed. Another deficiency in the system is that since panel counsel represent the minors as counsel rather than as guardians ad litem they are professionally bound to urge what the minor wishes to do even though that may be contrary to the minor's best interest.

A third deficiency is that while California law provides for DPSS personnel to represent the child (as GAL) unless the court otherwise provides (Cal. Welfare & Inst. Code, Section 326), there exists no pool from which the court can make GAL appointments when a conflict between the DPSS and the minor exists or the interests of the minor otherwise require.

It is proposed through this demonstration project to minimize the foregoing deficiencies by appointing a specially trained lay guardian ad litem for the minor in cases where there is a conflict with DPSS or county counsel. Panel counsel will then be appointed to represent the GAL. This will broaden the basis for representation of the minor and enable panel counsel, through his representation of the GAL, to further the best interests of the minor.

Panel counsel will continue to be paid by the county for such representation without any charge to grant funds.

3. *Cases where the minor, who has been removed from the home, needs independent representation for medical or other needs and in placement issues.*

ILLUSTRATION

The boy's right leg was five inches shorter than the left. At eleven years of age he was a dependent of the court placed with foster parents because of parental neglect. A surgical procedure exists whereby with a minimal risk the leg can be extended to its proper length. It must be performed soon, however, while he is still in the age of bone growth. His parents and the boy refuse to consent to the surgery for reasons of religious pursuasion. He is faced with a life handicapped by a horrible limp.

The foregoing illustration, taken from a very recent case in our court, dramatizes the need for a GAL program in special case situations. In the actual case a GAL was appointed who was of the same religious pursuasion as the family. A surgeon was found willing to perform the surgical procedures without back-up blood. The GAL convinced the family and the boy that there was nothing in their religion that proscribed the surgery under these circumstances. The surgery is now scheduled.

Another area of need is for representation of minors in foster homes in specialized instances. Minors have the right in California to petition the court at any time for a change in disposition. (Cal. Welfare & Inst. Code, Section 387). While most foster parents are performing their function with competency there are instances in which the best interests of the minor would require a change.

4. *Minors who have legal/litigation needs because they are potential recipients of benefits as victims of violent crimes or because they have some other matter that requires litigation outside Juvenile Court.*

ILLUSTRATION

The seven-year-old boy suffered permanent hearing loss and scarring as a result of a series of severe beatings administered by his mother's boy friend. The boy friend was prosecuted, convicted and is now in prison. The boy friend has at all times been without visible means of support. The child has no practical means by which to be compensated from his aggressor for this injury.

Consistently with a trend nationwide, California has in effect a Victim Indemnification Program. (Calif. Government Code, Sections 13960 et seq.) This program pro-

vides for financial indemnification through public funds of victims of crimes of violence where indemnification cannot be had from the perpetrator.

This program, a new one, has not yet been implemented in dependency cases in this county. Only recently has an opinion been obtained by county counsel of the State Board of Control which administers the program that the program would apply to abused, neglected and sexually molested children. A copy of that opinion and of the letter from county counsel soliciting the opinion are attached as Exhibits I and J.

The minor in the above illustration clearly would be entitled to indemnification under this program. (See Exhibits I and J). However, a guardian ad litem would have to be appointed to represent the minor.

It is proposed as an intergral part of this demonstration grant that this program of indemnification be commenced in this county as to all dependents of the court who have been victims of violent crimes. In this instance panel attorneys who have had guardian ad litem training under the grant program would be appointed to represent the minor in the proceedings before the State Board of Control to obtain indemnification for the injuries.

5. *Minors who have been adopted but who have been rejected by the adoptive parents. Similarly, minors, without parents or guardians, who have been referred to the Department of Adoptions for termination of parental rights but who have been determined to be unsuitable for adoptive planning.*

ILLUSTRATION

> Before the judge was the eleven-year old boy with his arms wrapped around his head on the bar table sobbing uncontrollably. At the age of eight after abandonment by his mother he had been adopted out. The emotional damage that had been done the boy in the first eight years of his life had resulted in a series of incidents in the adoptive family that threatened to destroy the family. Therapy had failed. Vacation of the adoption was recommended professionally as the only solution to the family's mounting problems stemming from his presence in the home. After concurrence by a court appointed psychiatrist, the adoption had been vacated.
>
> Now, the twice-rejected child was before the court for further proceedings. The thought uppermost in the judge's mind was *"Quo vadis,* son?". Facing the boy were years of foster placement without the possibility of permanent ties.

Fortunately, cases of the type illustrated are relatively few. However, when they do occur they are among the most tragic and most difficult in terms of programming for the minor. Clearly, in the illustrated case, a carefully selected and well trained lay guardian ad litem, perhaps one with a background in psychology or in social welfare training, would be of major assistance to the boy.

The need for guardian ad litem similarly exists in cases in which minors have been referred to the Department of Adoptions for termination of parental rights proceedings but who have been determined to be unsuitable to adoptive planning. In Los Angeles, as in most large metropolitan areas, adoption proceedings, including termination of parental rights proceedings, are conducted in a separate, single department. Here the judge handles exclusively adoption matters but most of his time is devoted to contested proceedings to terminate parental rights. Most states, including California, have special statutes dealing with this subject. California termination of parental rights provisions are found in Civil Code Section 232, a copy of which is attached hereto as Exhibit K.

The Department of Adoptions is, in Los Angeles, a separate agency from the DPSS. Procedurally, when it appears that there is no reasonable hope for returning to the parents a minor who is a dependent child of the court and under DPSS supervision, it is the obligation of the DPSS social worker in charge of the case to call that fact to the attention of the dependency court. That court can then authorize the referral of the minor by DPSS to the Department of Adoptions (CDA) for adoptive planning. If accepted by CDA for adoptive planning, supervision of the minor is then transferred from DPSS to CDA and a social worker from CDA is placed in charge of supervising the minor. The minor's actual placement may be changed to that of a CDA agency.

Once that referral has been accepted by CDA the minor's expectations for a new home through adoption will, of course, be aroused. If the minor is found to be unsuitable for adoption his need for an ongoing guardian ad litem may be as critical as a minor who has actually been adopted but then must be returned.

6. *Cases in which there are pending adult criminal prosecutions against the parents or others arising out of the abuse incidents for which the minor is before the court for protection as a dependent of the court.*

ILLUSTRATION

> The pleading in the eyes of the eight-year old freckle-faced girl before the court was poignant. Would the judge take her from her mother as recommended by the DPSS? Her two oldest half-sisters, now 14 and 16, each had been victims of sexual abuse in every conceivable form from her father since they were ten years old. They, also dependents of the court, refused under any circumstances to return home.
>
> However, she as yet was untouched. She wanted desperately to remain with her mother. The question before the court was simple. Would she be the next victim? The answer—far from simple. What was the risk of her becoming molested? How could she be protected on an ongoing basis? Indeed, would she be better off to risk molestation than to have imposed upon her the certain trauma of being torn at that critical age from a perfectly healthy relationship with her mother?
>
> The father had arrogantly boasted on the witness stand of his exploits with other women. His denial of the incest had a hollow ring to it. It was overwhelmed in credibility by the minute sordid details

testfied to in sobs by his young victims. Chances of rehabilitation on his part appeared gloomy.

The mother was older than he. She wore the usual tired affect of one torn between the only man she probably had a chance with and her love for her daughters.

If only a third party were present who would establish an ongoing relationship with the freckle-faced girl beyond that possible for the overworked social worker assigned to the case. If only a trained, dedicated lay guardian ad litem were available—perhaps then, with appropriate conditions of probation imposed in the criminal proceedings against the father, the juvenile court could take that chance and let freckle-face remain with her mother.

The need for a guardian ad litem program in cases of this type, where coordination between the adult criminal court departments, their supporting agency, the probation department, and the dependency court with its supporting agency, the DPSS, is so critical, is discussed hereafter as a separate objective of this grant proposal.

SECTION IV.

Court Hearings

This section will examine procedural and other practical problems involved in child abuse and neglect hearings. It emphasizes judicial problems common in these proceedings, including the alleged need for prompt disposition, the conduct of the various types of hearings, and the rules of evidence. Major emphasis is on the optimal degree of regularity and formality in abuse and neglect cases.

A. Scheduling and Delay

1. Abuse and neglect cases often involve numerous hearings, including emergency custody hearings, preliminary hearings, jurisdiction (adjudicatory) hearings, and dispositional hearings. Thus, scheduling and delay problems may occur, especially in busy courts.

These problems often arise because conduct of the hearing requires the presence of several attorneys, social workers, expert witnesses, and recalcitrant parents.

2. It is often suggested that special emphasis should be given to expediting abuse and neglect cases.

Arguments for limiting delay include:

Statutes require hearings soon after emergency custody,

When the child remains in the state's custody pending a hearing, the presumption that the child should be with his parents requires that the case be expedited,

Long delays while the child is in the state's custody may coerce parents into accepting unwillingly demands by the child protective agency in order to obtain the child's release,

The trauma experienced by children who are removed from their parents' custody and are uncertain as to their future residence should be minimized, and

A child not in the state's custody pending a court hearing may become endangered.

Arguments for less emphasis on speed include:

The agency and attorneys need sufficient time to gather facts, and

Delay often permits the family situation to settle and emotions to subside.

3. Abuse and neglect cases can be expedited by several scheduling procedures.

The court can:

Give precedence to abuse and neglect cases (but this aggravates backlogs in other cases),

Establish strict time limits for the various hearing stages,

Grant attorneys' requests for continuances only when clear cause is shown, and

Permit continuances for only short periods.

Expediting abuse and neglect cases may require an unusual amount of court effort because the existence of three or more attorneys presents scheduling problems.

B. Conduct of Hearings

1. The formality of abuse and neglect hearings differs considerably from court to court.

Much depends on the views of an individual judge about how formal the proceedings should be.

Typically, adjudicative hearings are more formal than preliminary or disposition hearings.

Several things that act to give hearings a more formal atmosphere are:

Holding the hearing in a regular courtroom,

Wearing of robes by a judge,

Using a court reporter or recording equipment to make a record of the proceedings, and

Holding jury trials (available in several states).

Many courts have found the use of more informal proceedings to be successful, particularly where there are no major facts in disputes.

An informal hearing is more likely to put the family at ease.

It may facilitate a frank and open discussion of the family's problems and the means to resolve them.

2. The judge may assume the role of a passive umpire, or he may actively question witnesses.

The umpire role is probably more common in adjudicatory hearings and when all parties are represented by counsel.

3. The emotional issues involved in child abuse and neglect cases can also create problems.

A judge must learn how to handle emotional outbursts by parents or witnesses.

Outbursts by parents can usually be controlled by parents' counsel if they exercise sufficient influence over their clients.

Testimony by a child is often an occasion for emotional outbursts, as well as possible trauma for the child. A judge may, therefore:

Limit a child's testimony to cases where it is vital to support the petition,

Hear testimony from children in chambers with only attorneys present, or Remove parents from the courtroom while children testify.

The privacy of abuse and neglect hearings in juvenile courts helps to cope with the emotional content of issues. (See Section X. B.)

C. Rules of Evidence and Standards of Proof

1. Civil rules of evidence are generally applicable in adjudicatory hearings of abuse and neglect cases.

Some judges relax evidence rules, especially as to hearsay testimony—e.g., on the grounds that evidence rules need not be strictly applied when judges sit without a jury.

The trend, however, is towards stricter compliance with rules of evidence.

2. Several evidentiary issues are peculiar to child abuse and neglect cases, including:

The admissibility of social study reports. (See Section V. B.)

The availability of privileges. Many states have abolished privileges, particularly the husband-wife and doctor-patient privileges, in abuse and neglect cases, because these privileges often deprive courts of information necessary to protect the child. The attorney-client privilege, however, is restrained in almost all states.

Whether evidence of prior abuse of the child and evidence of abuse of siblings are admissible.

Whether circumstantial evidence is sufficient to establish abuse and neglect. (See Section VIII. D.)

3. A major issue is the level of proof needed for a finding of abuse and neglect. The traditional standard of proof is the ordinary civil standard of preponderance of evidence; however, there is a trend towards the clear-and-convincing-evidence standard.

The presumption that the child should remain with his parents suggests that a strong showing of abuse and neglect be required before state intervention, with an even stronger showing required before removing the child from the home.

However, the practical effect of a set standard of proof is uncertain. Judges may, in practice, vary the standard of proof according to the degree of intervention at issue.

Support Readings

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A. Scheduling and Delay

National Center on Child Abuse and Neglect, *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects* (1978), Standards for Courts and the Judicial System, I-5 and I-6 *DRAFT.*

Standard I-5

Judges, attorneys, and the courts should ensure that fair evidentiary standards are applied to preliminary and adjudicatory child protective hearings and that adjudicatory hearings are completed within 60 days.

GUIDELINES

Complete the adjudicatory hearing within 30 days *whenever a child has been placed in protective custody,* provided that in exceptional circumstances, upon motion and hearing, the court may extend this time period for good cause shown and so state this on the record.

Standard I-6

Judges, attorneys, and the courts should ensure that the child protective dispositional hearing is completed within 60 days.

Judge Homer B. Thompson, California Juvenile Court Deskbook, 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Jurisdiction Hearing, Part II, Cases Petitioned Under Sec. 300 (dependency cases), Section 8.43. Reprinted with Permission.

H. [§8.43] Calendar Preference for §300 Cases

Section 345 contains a provision which reads:

> Cases in which the minor is detained and the sole allegation is that the minor is a person described in Section 300 shall be granted precedence on the calendar of the court for the day on which the case is set for hearing.

See also Rule 1361(c). This provision seems to presuppose that all cases for a given day are set at one time, and that all persons on such cases are present and ready to proceed at the same time. Certainly, if such is the case (and it may well exist in many counties where caseloads are not strictly controlled), this section should be followed in selecting cases for hearing. However, as discussed in chap 5, many larger courts not only separate contested from uncontested cases, but also set different times for specific case hearings throughout the day. Even when two or three cases may be set for the same time in order to maintain a flow of matters through the court, the parties, witnesses, and attorneys do not necessarily all appear on time and at the same time.

Where calendar control is exercised, calendar clerks may also, in setting the calendar, keep this provision in mind. However, cases are set as received, and hence the opportunity for a priority in setting is not always present.

Los Angeles Superior Court, *Policy Memorandum Re Dependency Hearings,* pages 4-5 (1976).

(6) Continuances

(a) The dates assigned for hearings in dependency proceedings must be regarded by counsel as definite court appointments.

(b) Any request for a continuance, whether contested or uncontested or stipulated to by the parties, should be brought to the attention of the court in which the case is pending and to the attention of opposing counsel at the first available opportunity after the need for the continuance becomes apparent to the party or parties requesting it.

(c) A continuance will only be granted upon an affirmative showing of good cause requiring the continuance. The parties should not assume that a motion for continuance will be granted by the court, even when stipulated to by the parties. In ruling on a motion for a continuance, the court will consider all matters relevant to a proper and fair determination of the motion.

New York Family Court Act, Section 1049 with Commentary

§ 1049. Special consideration in certain cases

In scheduling hearings and investigations, the court shall give priority to proceedings under this article involving abuse or in which a child has been removed from home before a final order of disposition. Any adjournment granted in the course of such a proceeding should be for as short a time as is practicable.

Practice Commentary

by Douglas J. Besharov

Interestingly, the predecessor to this section, although only relating to neglect cases in which a child was removed from the home, reflected a concern, even in 1962, over the backlogs and delays that plague the majority of urban Family Courts in the State. Ten years later, a Legislative committee commented:

> The Committee finds this inability to handle increasing caseloads the most critical problem facing the Family Court. The need to "get through" the calendar before 5 p.m. causes judges to look for cases that can be put off to another day. The process of adjournment itself is time consuming and thus additionally limits the amount of time available for the consideration of cases. Children, parents, attorneys, police, social workers and physicians thus return and wait, and wait and return numerous times before a case is actually tried. When the case is finally tried, the judge is under the pressure of a heavy calendar of cases that still must be heard. Thus, the rush continues—testimony is abbreviated, decisions made quickly and for convenience. [New York State Assembly Select Committee on Child Abuse, Report 126 (1972).]

In a court generally overwhelmed and substantially backlogged with cases, the effect of this section is difficult to gauge. Although more recent statistics are not available—in itself a telling commentary on the status of Family Court administration—statistics from 1974 reveal the scope of the Family Court's problems. As of December 31, 1974, 11,231 child protective petitions were pending in New York City, and approximately 2,159 petitions were pending in counties outside of New York City. Since less than 4,000 new petitions are filed annually in New York City, there was almost a three year caseload before the New York City Family Court. While conditions outside New York City were much better, there was still almost an eight month caseload pending there. [See, New York State Judicial Conference, Special Six Month Report, 1975 Table 27, page 51.] During the period July 1, 1974 through December 31, 1974, the average child abuse case filed in New York City required four adjournments and the passage of thirty-one to ninety days between the initial fact-finding hearing and the dispositional hearing. [New York State Judicial Conference, Special Six Month Report, 1975 Tables 37-44, pp. 68-85.] Statistics relating to the length and number of adjournments for neglect cases are not maintained but practice experience suggests that the comparable neglect figures would be substantially higher.

By combining these statistics it seems fair to estimate that the average child abuse case is adjorned five times and takes approximately one half year to complete. Child protective cases generally (child abuse and child neglect cases considered together) take from two to three years to complete. Hence, it appears that child abuse cases are disposed of in one quarter to one sixth the time of child neglect cases. While six or seven months, for the City of New York, can hardly be considered "speedy justice" and is probably beyond the intent of the drafters of this section, it does appear as if the Legislative mandate for priority is having some effect.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect -Tentative Draft* (New York: Ballinger Publishing Co., 1977), 4.3, 5.3, 6.1. Reprinted with Permission.

4.3 Court review regarding children in emergency temporary custody.

A. Immediately upon receipt of a petition submitted pursuant to Standard 4.2, the court should direct notification pursuant to Standard 5.1 D., appointment of counsel for the child pursuant to Standard 5.1 E, and referral of the petition for prosecution pursuant to Standard 5.1 F. On the same business day if at all practicable, and no later than the next business day, the court should convene a hearing to determine whether emergency temporary custody of the child should be continued, to determine whether investigation of the petition should be authorized pursuant to Standard 5.2, and to approve the plan for investigation pursuant to Standard 5.2.

COMMENTARY

This section mandates specific court action under Part V of these standards. The guiding principle here is the recognition of the importance of certainty and permanence to the child's psychological well-being. If there is no compelling reason to displace the presumption of parental autonomy, return to the custody of parents or other such caretakers should take place immediately. If custody is to be denied to the child's parents or caretakers, it is in the child's best interests to make a judicial determination swiftly in order to speed and facilitate permanent placement of the child. The child's capacity to cope with loss and uncertainty is limited by what, in adult terms, seems a distorted sense of time. Delay in achieving a permanent status and resultant uncertainty and distress, therefore, may be of a longer duration in the child's world than in adult perception. See J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child,* 40-45 (1973). The prolonging of temporary custody performs a disservice to the child in that it disrupts and precludes the formation of meaningful, permanent, and stable emotional bonds.

B. The court should be authorized to continue emergency temporary custody of the child, pursuant to Standard 4.1, if it determines:

1. investigation of the petition is authorized pursuant to Standard 5.2;

2. custody of the child with his/her parent(s) or other such caretaker(s) named in the petition would create an imminent substantial risk of death or serious bodily injury to the child, and no provision of services or other arrangement is available which would adequately safeguard the child in such custody against such risk;

3. the conditions of custody away from the child's parent(s) or other such caretaker(s) are adequate to safeguard his/her physical and emotional wellbeing (including without limitation direction by the court to provide emergency medical care to the child if necessary to prevent the risk found pursuant to subsection 2.); and

4. the child's parent(s) or other such person(s) named in the petition would be provided opportunity to visit with the child at least every day for the duration of custody pursuant to this Part (including without limitation the provision of transportation for the parent(s) or other such caretaker(s)) unless such visits, even if supervised, would be seriously harmful to the child (due account being given, among other considerations, to the child's wishes regarding visits).

COMMENTARY

Efforts to proceed with all due speed notwithstanding, emergency temporary custody will, under certain circumstances, have to be continued while legal proceedings

commence and judicial determinations are made. Such continuation, however, is only justified provided that certain guidelines, already reflected in these standards, continue to apply (see generally the commentary to Standard 4.2 A.):

1. appropriate steps toward final resolution of the child's status are being taken with all possible speed;

2. the necessity for emergency custody, because of the immediacy and seriousness of threatened harm to the child and the impossibility of other protective measures or procedures, is sufficient to outweigh strong presumptions of parental autonomy and the integrity of the family unit, and to outweigh as well risks to the psychological well-being of the child;

3. emergency custodial care and facilities are such that physical and emotional harms to the child are minimized by presence in such custody;

4. the child's need for continuity and the dangers of disrupted emotional ties are recognized and appropriately cared for with measures encouraging and fostering continued contact between the child and parent.

5.3 Post-investigation proceedings.

A. Hearing following investigation report.

1. Upon request of any party to the proceedings, or upon its own motion, the court should be required to convene a hearing on the petition as soon as practicable after the investigation report is provided to the court pursuant to Standard 5.2. If the court determines, with or without hearing, that no party to the proceeding intends to pursue the petition, it should dismiss the petition, except as provided in subsections 5.3 A.2 or A.3.

2. If the investigation report indicates that the parents have agreed to placement of the child outside parental custody, the court should convene a hearing at which testimony should be taken regarding the propriety of and the anticipated duration of such placement. If, at the conclusion of such testimony, no party to the proceedings states an intention to pursue the petition, the court should dismiss the petition. In such event the case should then be handled in the manner specified in Part X (voluntary placements).

3. If the child remains in emergency temporary custody, no later than [two] working days following submission of the investigation report, the court should convene a proceeding to determine whether the petition should be granted, except that the court may grant motions made on behalf of the child or parent(s) or other such person(s) named in the petition, to conduct such proceedings no later than [six] working days following submission of the investigation report.

COMMENTARY

This subsection provides procedures for invoking a court hearing following submission of the investigation report. The court is mandated to convene a hearing upon any party's request, or at its discretion. It is envisioned that the court might exercise this discretion if, for example, the report indicated (pursuant to Standard 5.2F., *supra*) that the parents had voluntarily accepted services but the court suspected that this acceptance was not adequately voluntary. Even though none of the parties might have requested a hearing in this circumstance, there is nonetheless sufficient public importance to ensuring that parents are not inappropriately coerced as a result of a threat to invoke endangerment proceedings to justify a court-initiated hearing on this issue. Similarly, the court might suspect that, although the investigation report recommended dismissal of the petition, nonetheless the child's interests might not be adequately protected by such action. Accordingly, the court can initiate a hearing on this question to require all of the parties to justify that conclusion in a public forum. In this circumstance, however, the court is not given authority to proceed with the petition unless one of the parties so moves; the court can compel the parties to address this question at a hearing but cannot compel them to go forward with the petition. This latter power is withheld from the court in an attempt to assure that the proceedings will remain adversary proceedings—with all possibly conflicting interests represented essentially by the parties (parents, child and petitioner)—and the court will remain as far as possible an impartial arbiter in the proceedings. The court's power to convene a hearing, notwithstanding the contrary wishes of the parties, obviously gives latitude for an expression of court bias. But the court should make clear that such hearing is convened not because it has prejudged the issue (e.g., whether the petition should go forward) but rather because the public significance of the issue and the court's doubts about its proposed resolution in the investigation report require a hearing to press the parties to focus more precisely and intensively on that issue. The restraint, in the subsection, that the court is bound ultimately to accept the parties' agreed conclusion should tend to keep the court within this impartial stance.

Subsections 2. and 3. specify two circumstances in which court hearing is mandatory, notwithstanding the wishes of the party: when the parents have agreed to placement of the child outside parental custody, or when the child has been placed, and remains, in emergency temporary custody pursuant to Part IV. In both circumstances, the potential consequences to the child of separation from parents are sufficiently significant that court hearing should be mandated. At such hearing, the court should take care that the interests of the child are adequately protected under the standards specified in this Part and the standards governing voluntary placement (Part X) or emergency temporary custody (Part IV). Subsection 3. further provides stringent time limits within which hearings must be convened for children in emergency temporary custody to assure that home removal which began as a "temporary emergency" does not extend, by default, into a longer term arrangement without intensive examination of the consequences of such separation to the child and the possible alternative arrangements in the home that might better protect the child and family. Except for children in emergency temporary custody, no firm time limit is fixed for scheduling any post-investigation hearings. Subsection 1. does provide that such hearing shall take place "as soon as practicable" after submission of the investigation report, but in view

of the many varying circumstances that might be presented in the generality of cases, no time limit is fixed.

B. Appointment of independent experts. Any party to the proceeding may petition the court for appointment of experts, at public expense, for independent evaluation of the recommendations of the investigating agency. The court may grant such petition in its discretion.

COMMENTARY

In order to preserve the adversarial character of the proceedings, and to assure effective and vigorous representation of all interests in that proceeding, it is essential that all parties have fullest possible access to expert assistance. The investigating agency is of course expected to provide impartial, expert evaluation of the needs of the child and family. But no adequate assurance of impartiality, or of sufficient expertise, can be given unless that agency's report can be subjected to intensive scrutiny in proceedings following the report's submission. Accordingly, parties wishing to contest some aspect of the agency's report must be given fullest possible access to independent experts for evaluation of that report. The potential expense of that access must, in some degree, serve as a constraint. If the contesting party can independently afford access to experts, no such constraint appears. But in the typical case, the parents and/or child in particular will lack financial resources for such purpose and independent evaluation, if it takes place at all, must occur at public expense. This subsection authorizes public funding for such independent expert evaluation at court discretion. No specific standard is set out to guide the court's discretion in this matter. It is envisioned that the court will be guided by such factors as the severity of the consequences to the child or family proposed in the agency's report (e.g., if home removal is proposed), and the prima facie complexity or inadequacy of the data on which the proposed recommendations are based in the investigation report. These experts may be drawn from medical, psychological, social welfare, or other disciplines. The overarching principle that should guide the court in deciding whether to authorize such independent expert evaluation, is the imperative necessity to provide full adversarial scrutiny of matters affecting the interests of children and their families when state intervention into family life is at stake.

C. Discovery. The standards governing disclosure of matters in connection with proceedings to determine whether the petition should be granted, disposition of granted petitions (Part VI), or review proceedings (Part VI) should be the same for the child and the parents as for the respondent in delinquency cases set out in the *Pretrial Court Proceedings* volume.

COMMENTARY

The issues presented regarding scope of discovery in endangerment proceedings are the same, and mandate the same resolutions, as in delinquency proceedings. These issues have received extensive consideration in the *Pretrial Court Proceedings* volume for delinquency petitions, and the resolution of the issues struck there should equally apply in this context. The single difference is that both the parents and child, in the endangerment proceeding, have the same access to pretrial discovery as is provided for the subject of the delinquency petition.

D. Subpoenas. Upon request of any party, a subpoena should be issued by the court (or its clerk) commanding the attendance and testimony of any person at any proceeding conducted pursuant to this Part or commanding the production of documents for use in any such proceeding, except that the attendance and testimony of any children (including the child subject of the petition) should be governed by Standard 5.1 G. and H. Failure by any person without adequate excuse to obey a subpoena served upon him/her may be deemed a contempt of the court subject to civil contempt penalties, except that failure of the parent(s) to attend or to testify at any proceeding may be sanctioned only as provided in Standard 5.2 E. 2.

COMMENTARY

This provision is another aspect of the principle generally enunciated in these standards—to guarantee the fully adversarial character of the proceedings. The right of each party to compel attendance of witnesses is essential for adequate presentation of all interests at stake in the proceedings. The qualifications on compelled testimony from juveniles are the same as those set out in Standard 5.1 G. and H., *supra,* and the sanctions available in response to parents' refusal to testify pursuant to a subpoena are limited as provided, and for the reasons given, in Standard 5.2 E. 2. *supra.*

E. Proceedings to determine contested petition.

In any proceeding to determine whether the petition should be granted, the following should apply:

1. Upon request of the child or the parent(s), the sole trier of fact should be a jury whose verdict must be unanimous, and which may consist of as few as six persons. In the absence of such request from either such party, the trier of fact should be the court.

2. The burden should rest on the prosecutor of the petition to prove by clear and convincing evidence allegations sufficient to support the petition.

3. Proof that access has been refused to sources of or means for obtaining information, as indicated in Standard 5.2, or that the parents have refused to attend or to testify without adequate excuse pursuant to Standard 5.2, or regarding conduct of the parents toward another child should be admissible, if the court determines such proof relevant to the allegations in the petition; except that proof of either such matter, standing alone, should not be sufficient to sustain the granting of the petition.

COMMENTARY

Subsection 1. of this section provides a right to jury trial at the option of the child or parent named in the petition. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971),

indicates that this right is not constitutionally mandated in wardship proceedings since the constitutionally based arguments for such mandate are, if anything, stronger in the delinquency proceeding context of that case. A right to trial by jury is currently provided in eight jurisdictions and granted specifically to parents in another four. Statutes in twenty-four jurisdictions, however, contain language precluding trial by jury. Katz et al., "Child Neglect Laws in America," 9 *Fam. L.Q.* 1, 32-33 (1975). As a matter of policy, we believe that the right to a jury trial is important to ensure that state intervention into family childrearing practices reflects widely shared community norms that any randomly selected jury would adhere to. Under subsection 1. this right is withheld from the prosecution to ensure that the jury will be invoked only by a party—the parent or child—with the most direct personal interests at stake, and typically as a tactic to increase the burden on the proponent of the petition. This burden of persuasion appropriately reflects the general principle enunciated in these standards presuming against state interventions. Specifying that the jury may consist of as few as six persons reflects the greater flexibility regarding jury size now permitted even in criminal cases in light of *Williams v. Florida,* 399 U.S. 78 (1970), and *Colgrove v. Battin,* 413 U.S. 149 (1973).

Subsection 2. makes explicit that the burden of proof is on the prosecutor of the petition. The standard of proof specified is, however, not the criminal standard of "beyond reasonable doubt" but rather the civil law standard of "clear and convincing evidence." For the same reasons indicated in the commentary to Standard 5.2 D., criminal law norms are not fully applicable to these proceedings. Rather these proceedings are more hybrid versions of criminal and civil proceedings, reflecting the competing policies of guaranteeing families and children against inappropriate state intervention but giving adequate assurance that children will be protected against parentally inflicted harms. Because direct proof of parental conduct is frequently difficult to adduce, particularly regarding preschool children, the criminal law standard of "beyond reasonable doubt" would be unduly restrictive of the possibility that state intervention might adequately protect children in need. See Dembitz, "Child Abuse and the Law—Fact and Fiction." 24 *Record of N.Y.C.B.A.* 613 (1969).

Subsection 3. mandates the evidentiary weight that may be given to two items: proof that parents have refused to provide information in the investigation report or testify at the postinvestigation proceeding, and proof regarding parents' conduct toward another child. The subsection provides that either such matter may be relevant to ultimate adjudication of the merits of the petition and proof of such matters is thus admissible. But both such matters can produce an unjustifiably heavy pejorative impact on the factfinder and lead the factfinder wrongly to wish to "penalize" a parent who refused to "cooperate with investigators" or to conclusively (and wrongly) presume that a parent who behaves harmfully toward one child necessarily is unfit in dealing with all other children. To guard against the inevitably prejudicial impact of such proof, this subsection specifies that proof of either such matter, standing alone, would not be sufficient to sustain the granting of the petition, and that either such matter may only be cumulatively supportive of the petition. This subsection thus rejects the rule that the parents' uncooperativeness alone is sufficient to sustain a petition, compare In *re Vulon Children,* 56 Misc. 2d 19, 288 N.Y.S. 2d 203 (Fam. Ct. 1968) similarly rejecting such rule, or that parental abuse or neglect of one child is alone sufficient to sustain a finding of endangerment for other children in the absence of any evidence whatsoever regarding those other children, compare In re Milton Edwards, 76 Misc. 2d 781, 351 N.Y.S.2d 601 (Fam. Ct. 1972) adopting such rule.

Part VI: Dispositions

6.1 Proceeding to determine disposition of granted petition.

If the trier of fact determines that a child is endangered, the court should, as soon as practicable thereafter, convene a hearing to determine the disposition of the petition. If the child is in emergency temporary custody, the court should be required to convene this hearing no later than [two] working days following the finding that the child comes within one of the statutory grounds. However, in such cases the court may grant motions made on behalf of the child, parents, or other persons named in the petition, to conduct such proceedings no later than [six] working days from the granting of the petition. All parties to the proceeding should be able to participate in this hearing, and all matters relevant to the court's determination should be presented in evidence at the hearing.

COMMENTARY

After a child has been found endangered, this standard provides for a hearing separate from the adjudicatory hearing to determine whether continued state involvement with the family is necessary, and if so, what form this involvement should take. In accordance with general practice in most jurisdictions, this second hearing is called the dispositional hearing.

It is of central importance that the dispositional hearing be held separately from the adjudicatory hearing, even if they are held on the same day. At the dispositional hearing the court will be provided with substantial information about the family and the child. Some of this information might be very prejudicial if considered at the adjudicatory stage. For example, a trier of fact might be influenced by knowing that a family was the recipient of welfare services or that a parent was a drug addict; yet such information might be irrelevant on the factual issue of whether a child had been sexually abused, needed medical care, etc.

The standard specifies that all parties, including the child, should be able to present any evidence relevant to the question of the appropriate disposition. Each party should also have the right to examine evidence presented by other parties, to call his or her own witnesses, and to cross-examine witnesses of other parties, including the person who prepared the social report required by Standard 6.2 *infra.*

The standard does not establish any set time period for holding this hearing, except in cases where the child is in temporary emergency custody. Instead, the hearing will be heard upon the motion of one of the parties. This flexible time period is designed to enable the parties to work out a treatment plan that meets the needs of the child and family. Depending upon the services needed, this plan may be developed before the adjudicatory hearing or it may take several weeks or longer following that hearing.

However, in order to provide children with stable, continuous living environments as quickly as possible, very stringent time limits are established if the child is in temporary custody. Most temporary child care facilities are not able to provide a child with an adequate adult-child relationship, nor can they provide for the child's long-term needs. Therefore, it is essential to either have the child returned to his/her parents as rapidly as possible, or placed in an alternative setting designed to fully meet the child's needs.

B. Conduct of Hearings

New England Resource Center for Protective Services, *Preparing for Care and Protection Proceedings in Massachusetts; A Guide For Protective Service Workers,* **34-35.**

IX. Hearing on the Merits

The hearing on a petition for care and protection is the petitioner's opportunity to substantiate his/her allegation that a child's situation fits within the statutory criteria stated in chapter 119, Section 24. The format and tone of the hearing will vary considerably, depending on the specific nature of the case, the style of the particular judge, the personalities of the attorneys and parties involved, and what has occurred during the interim period.

Although all care and protection hearings deal with subject matter which is quite personal and emotionally laden, certain types of cases lend themselves to certain types of proceedings. For example, a physical abuse case, which focuses on how a particular injury occurred, will frequently assume a formal, adversarial format. A neglect case, on the other hand, lends itself to a more informal approach.

In addition to the specific nature of the case, the style of the judge will influence the quality of the proceeding. Some judges adopt a formal stance; the hearing is a trial in every sense of the word. These judges adhere to strict rules of evidence and are likely to divide the hearing into two distinct stages: adjudication and disposition. Other judges advocate a more informal or "conference" approach where all parties are encouraged to participate in a relaxed discussion of the issues. These informal hearings tend to blur the distinction between the adjudicatory and dispositional stages since the judges prefer to hear everything having a bearing on the parent's ability to care for the child.

Similarly the behavior of the parties involved, particularly the attorneys, will influence the nature of the hearing. For instance, if a lawyer asks to record the proceeding (using a stenographer or tape recorder), he/she invariably will create a more formal environment. He/she will also create a formal atmosphere by making a specific request that the judge clearly separate adjudication and disposition, or by raising numerous objections as to the presentation of testimony or the admission of the investigative report. In contrast, if the attorneys address the court in an informal and conversational manner, it is likely that the hearing will assume a more informal tone.

Finally, the formality or informality of the C&P hearing will depend, to some extent, on what has happened during the interim period. If the parties have negotiated an agreement, the focus of the hearing is going to be on the specifics of the agreements, rather than the presentation of extensive evidence about the parent and child. The judge may require that the presentation of evidence be sufficient to warrant a finding that the child is in need of care and protection, but this will be done in a cooperative, rather than adversary, manner. If the parties have tried but have been unable to negotiate an agreement, it is likely that all concerned will prefer a more formal proceeding.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* **2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 6, Conducting Juvenile Court Hearings, Section 6.1, 6.3, and 6.4. Reprinted with Permission.**

I. [§6.1] Goals of the Hearing

In general, the procedures for conducting the hearing should accomplish three things: (1) the parents and the minor should understand the purpose of the hearing, exactly what is taking place, and all rights that are guaranteed them; (2) they should have full opportunity to present their position in the matter in person or by counsel, or both; and (3) they should fully understand the court's decision and what is expected of them in the future.

II. General Considerations

B. [§6.3] Place of Hearing

Juvenile court is no longer the court it was even a few years ago. The entire approach to juvenile court work is changing. New ideas are being tested and old ones are being discarded when found inadequate. Historically, juvenile hearings were held in a small conference-type room or the judge's chambers. The minor, parents, and probation officer sat around a conference table. Attorneys were seldom present. The judge wore no robe. It was often hard to tell at first glance who was the judge. The hearing was entirely informal, almost conversational.

In recent years this approach has been steadily changing. Many judges now conduct juvenile hearings in a room that resembles a courtroom. In the author's county, where a new juvenile center was completed in late 1967, two courtrooms have been provided that are identical to the normal courtroom, except that they are smaller.

It is suggested that, no matter how meager the resources of the county, a room that resembles a courtroom may be prepared for hearings. A one-step riser with desk, flags, witness box, and general court arrangement will convey the dignity and atmosphere of a courtroom.

C. [§6.4] Place for Waiting

Most facilities provide a place for waiting before being taken into the courtroom, where the parents, child, and attorney gather prior to the hearing. Since many minors are in custody, this room is normally provided with the security of locked access and a probation officer or bailiff in charge. The room should be made as comfortable as possible, since the waiting period is often extensive. One central waiting room with access to each courtroom, to juvenile hall, and to the public reception room is most efficient.

Ideally, the parents and child should not be required to pass through the waiting room on leaving the court hearing. Often they are in tears at that point and the effect upon those waiting is disturbing. Many courtrooms provide an exit directly to a reception-detention area of the juvenile hall, where the details which follow a hearing are accomplished.

One or more conference rooms with accesss to the waiting room, for conferences between attorneys, parents, and children prior to the hearing, should be provided if possible.

E. [§6.6] Conducting Hearing—Formal or Informal

The general guidelines for conducting hearings are found in §§680 and 350, which provide:

> The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare with such provisions as the court may make for the disposition and care of such minor.

As previously observed, the practice in the past for all hearings was to conduct them with extreme informality. The tendency in more recent years is to be informal and at the same time maintain the general atmosphere and dignity of a court proceeding. In practice, jurisdiction hearings have become increasingly formal and disposition hearings have remained less formal. Many judges conduct contested jurisdiction hearings just like any other criminal (§601 or §602) or civil (§300) trial.

The ways in which the hearing might be made informal include:

1. The probation officer may bring in the parties while the court is seated. The probation officer may then introduce the parties and all others persons in the courtroom to the judge. This introduction procedure is reported and thus, a record of persons present is preserved. As each party is introduced the court might acknowledge the introduction.

2. The parents and child and any other person, other than the attorneys, may not be required to stand while addressing the court.

3. The court may put questions and observations directly to the parents and child, or other persons, rather than direct the inquiries through the attorneys present.

4. As observed previously, the court may, under certain circumstances during the disposition hearing, discuss matters with the parents privately.

5. Less self-control is expected than the normal court hearing. The parents or child may often be reduced to tears or may react emotionally to the proceedings; this is to be expected.

The ways in which the hearing might be made formal include: the judge may (and probably most now do) wear a robe; attorneys may be required to stand while addressing the court; and the hearings may be conducted in a serious and reserved, but courteous and friendly manner. The type of surroundings and the hearing procedures employed will, of course, affect the formality of the proceeding.

Judge Homer B. Thompson, *California Juvenile Court Deskbook*, 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 7, Detention Hearing, Part II, Cases Petitioned Under Sec. 300 (dependency cases), Section 7.24. Reprinted with Permission.

C. [§7.24] Oral Form: Conduct of Detention Hearing in §300 Case

(All parties enter and sit down.)

(Probation officer introduces the parties to the court.

(Court considers any motion to continue.)

COURT: Mr. Clerk, please read the petition and swear all persons who may wish to speak during the proceedings.

(Clerk reads the petition and swears all parties.)

COURT OR PROBATION OFFICER: Does each of you understand the petition just read, or do you have any question about it you would like to have answered by the court?

COURT: As you are aware, [name] has been placed in protective custody because of the circumstances which are alleged in the petition that was just read to you.

COURT: Juvenile court proceedings are divided into three separate hearings: (1) a detention hearing, (2) a jurisdiction hearing, and (3) a disposition hearing. You are in court today for a detention hearing. The purpose of this hearing is to decide whether [name] should remain in protective custody in the shelter from today until the date of the jurisdiction hearing, which has been set for [date]. When you appear in court on [date] for the jurisdiction hearing, the court will then decide whether or not the facts in the petition that has just been read are true. If they are found not true, the court will dismiss the case. If they are found true, the court will then conduct the third, or disposition, hearing. The purpose of a disposition hearing is to decide what action, if any, the court should take in view of what has been found to have happened.

COURT: (If parents unrepresented by counsel.) The court would like to explain to you that you have a right to

be represented by an attorney during this detention hearing, and during all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so. If you want an attorney, but feel you cannot afford one, the court will refer you to the local legal aid office. If you qualify for such assistance, legal aid will provide you with an attorney at no expense to you. If you are unable adequately to present the case and face a substantial possibility of loss of custody or of prolonged separation from the minor, you have a right to be represented by an attorney, whether you can afford one or not. This is a serious and important matter. If the court should find that grounds for detention exist, this hearing could result in [name] being placed in the shelter from today until the jurisdiction hearing on [date]. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

COURT: (When applicable.) The court now finds that the parents have intelligently waived their right to counsel at this hearing.

COURT: You have certain additional rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing, (2) the right to cross-examine, that means ask questions of, any witness who may testify at this hearing, and (3) the right to present to the court any witnesses or other evidence you may desire.

COURT: Would the probation officer now explain to the court the facts and circumstances under which you placed [name] in protective custody.

(Court reads any written report or data prepared by the probation officer and permits the parties to review the same.)

(Court reads the police report and other written matter, and permits the parties to review the same.)

(Court states for the record all material read by the court.)

(Court should orally examine the minor, if present, and the parents or other persons with relevant knowledge bearing on the grounds for detention.)

(Court allows cross-examination of any witness who may testify.)

COURT: Now is the time for you to present any evidence or make any statement you may wish to make before the court decides whether [name] should remain in protective custody.

COURT: The court finds that [name] should (or should not) remain in protective custody in the shelter pending the jurisdiction hearing upon the following ground (or grounds) [insert ground or grounds].

(If released, the court should announce the conditions, if any, of such release.)

(If detained, the court should announce the conditions under which the court would permit a detention rehearing, if any.)

(If the decision is to detain, the court might explore the alternative of placing the child with relatives or friends pending the jurisdiction hearing, with the consent of the parents, instead of placing the child in the shelter.)

COURT: Do you have any questions about the court's order or what is going to take place in the future?

(Court signs the order specifying the ground of detention, orders reimbursement of the county for detention, if appropriate, and refers the parents to the finance section of the probation department to make arrangements regarding payment.)

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Detention Hearing, Part II, Cases Petitioned Under Sec. 300 (dependency cases), Section 7.24. Reprinted with Permission.

An outline for procedure to be followed in conducting a jurisdiction hearing in §300 cases might include the following steps:

The probation officer should brief the minor (if present), parent or guardian, and attorney before entering the hearing room.

If the minor is not a very young child, the minor may be brought in and introduced to the court, even though he will not be present at the hearing.

All parties enter and sit down.

The probation officer introduces the persons present.

The court considers any motion to continue or other preliminary matter.

The court asks the clerk to read the petition and swear all persons who shall wish to testify in the proceedings, or whose attendance has been compelled by the court (§§8.5-8.6).

The probation officer or the court asks whether the parents understand the petition and whether they have any questions about its meaning or contents; if there are questions the court explains the petition.

The probation officer or the court asks whether the parents understand the nature of the hearing and juvenile court procedures. If any question arises, the court explains the nature of the proceeding.

If the parents are unrepresented, the court advises the parents of their right to be represented by counsel at the jurisdiction hearing, and at every other stage of the proceeding. If counsel is waived, the procedure for taking an intelligent waiver in §602 cases is sometimes followed, even though not required. The court makes a finding that the right to counsel is waived.

When representation is requested, the court either permits the parents to engage private counsel, or refers the parents to Legal Aid when they are unable to afford counsel, and continues the hearing to allow for appearance of counsel.

If the hearing is contested, the court should next ask the parents whether they admit or deny the petition and, upon denial, should proceed with the trial of the factual issues presented by the petition.

If the hearing is uncontested, the court should satisfy itself that the parents understand that by admitting that the petition is true they will be waiving (giving up) the right to a trial of the factual issues, and that the court will thereupon find the facts set forth in the petition true and

will assume jurisdiction over the minor. The admission of the parents should be made personally by the parents and not by or through their attorney.

If the parents admit the petition, the court should next:

1. Find that the allegations of the petition are true; and

2. Find that the minor comes within the provisions and description of §300 of the Juvenile Court Law.

If the petition is denied, the court should hear the evidence and, if the facts set forth in the petition are found to be true, make the findings set forth directly above; or, if the facts set forth in the petition are found not true, should:

1. Find that the allegations of the petition are not true;

2. Order the petition dismissed; and

3. If applicable, order the minor released from protective custody.

All findings should be noted in the minutes of the court.

The court should explain that this completes the jurisdiction hearing.

If, upon completion of the jurisdiction hearing, the disposition hearing is to be continued to a later date, the court should make the order of continuance to a date not to exceed ten judicial days (if the child is in protective custody) or 30 calendar days from the date of filing the petition (if the child is not in protective custody), plus 15 additional calendar days for good cause shown (if the minor is not in protective custody), unless the parents waive these time limitations. §356.

If the case is continued for the disposition hearing, the court should advise the probation department of any special information that the court feels will be of importance to the disposition of the matter, and direct that it be incorporated in the social study, which will be presented at the disposition hearing.

If the case is continued, the court should determine and make its order as to whether the child (if out of protective custody) is to be admitted and detained in the shelter, or otherwise placed, pending the disposition hearing. If the child is in protective custody, the court should determine and make its order as to whether the child should continue in custody, be otherwise placed, or be released to the parents pending the disposition hearing.

If the case is continued, the probation officer should, upon leaving the hearing room, brief the parents regarding further proceedings and subsequent contacts with the probation department.

If the case is not continued, the court should announce that it is now turning to the second portion of the proceedings, called a disposition hearing, during which the court must decide what action, if any, should be taken in view of the fact that the court has found that the facts set forth in the petition are true.

Judge Homer B. Thompson, *California Juvenile Court Deskbook*, 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 9, Detention Hearing, Part II, Cases Petitioned Under Sec. 300 (dependency cases), Section 7.24. Reprinted with Permission.

E. [§9.28] Conduct of Hearing

In the conduct of the disposition hearing in §300 cases, there is probably not as much variation among judges as there is in §§601 and 602 cases. Here the parents, not the minor, are charged with conduct or acts upon which the petition is based.

Assuming that the disposition hearing is held on a separate date from the jurisdiction hearing, the preliminary proceedings should cover the following:

1. The probation officer should brief the minor (if present), parent or guardian, and attorney before entering the hearing room. Minors under 14 years of age are generally not present, buy may merely be brought in and introduced to the court prior to the hearing or seen by the court at the shelter. The briefing normally includes advising the parties as to the probation officer's recommendation regarding disposition.

2. All parties enter and sit down.

3. The probation officer introduces all persons present to the court.

4. The court considers any motion to continue or other preliminary motion. At this point, modifications in the facts alleged in the petition are normally made.

5. The court explains to the parties present the nature and purpose of a disposition hearing.

6. The court advises the parents or guardian of their right to be represented by counsel at the disposition hearing. See §7.14.

7. When representation is requested, the court makes arrangements for the presence of counsel before proceeding further, and continues the case, if necessary, pursuant to §353.

Assuming that the disposition hearing is held immediately after the jurisdiction hearing, or that the court has completed the above proceedings on a date subsequent to the jurisdiction hearing, the court might then proceed as follows:

1. Explain the nature and purpose of a disposition hearing.

2. Explain that, in order to assist the court in making a decision, the probation officer has presented a social study that contains background information regarding the minor and his family.

3. Order the social study admitted into evidence.

4. Explain the contents of the study to the parties. Although it is available in advance, frequently the parents will not have read the social study prior to the hearing. One way to explain it is to state that it contains the following information, and then go through it reading the section headings and stating generally what they contain (e.g., prior referrals, statement of minor, statements of the parents, school and medical records).

5. Explain that at the end of the social study the probation officer has made his own recommendation regarding disposition.

6. State the recommendation of the probation officer, explaining that this is only a recommendation and that the court must make the decision.

7. If the judge has doubts about the probation officer's recommendation, he should state that fact, thereby warning the attorney and parties that they must present all

possible evidence available to them in support of their position. Unless this is done, the attorney or parties may be led into believing that the court is going to follow the probation officer's recommendation, and may present little or no evidence.

8. Advise the attorney and parties that now is the time for them to present any evidence and/or make any statement they wish as to what the proper disposition should be.

9. Hear and weigh the evidence and statements presented.

10. Depending upon the evidence and/or statements made, the court may wish to ask questions of the parties or discuss portions of the social study with them.

11. Assuming the decision is going to be out-of-home placement, the court will normally not engage in lengthy discussion, but will simply state its decision giving the reasons for such decision, if deemed helpful.

12. The court should then give its specific order verbally so that there will be no misunderstanding as to the decision. Any order of financial reimbursement should be made at this time. The order should contain an order for continuance of the case for annual review as required by §366 and should include the specific advice required by that section (set forth in §9.41).

13. Assuming that the court is going to attach conditions to its placement order, it should state these conditions and explain what is expected.

14. The court may wish to ask the parents whether they have any questions about the order or what is expected.

15. Assuming that the jurisdiction hearing was contested and the court desires to advise the parent, guardian, or adult relative orally of any right to appeal, the court should next state the right to appeal, the necessary steps and time for taking an appeal, and the right of an indigent person to have counsel appointed by the reviewing court. Rule 1377(e). See §9.53 for oral form.

16. The probation officer should brief the parents after leaving the hearing room regarding subsequent contacts with the probation department. Assuming that the jurisdiction hearing was contested and the court desires to advise the parent, guardian, or adult relative in writing of any right to appeal, the probation officer should explain the written form to the parent, guardian, or adult relative and have that person sign the written form.

Judge James J. Delaney, "The Battered Child and the Law," in Kempe and Helfer, *Helping the Battered child and His Family* 202-203 (1972). Reprinted with Permission.

Where a child abuse case cannot be settled in a pretrial conference (there will always be some lawyers and judges who will insist on strict adherence to the adversary system, and some cases which simply don't lend themselves to such disposition) a trial is necessary.

The child abuse trial, especially if the occurrence was flagrant and if pretrial publicity was overzealous, may attract a crowd of morbidly curious spectators. Whether such trial should be public or private is largely discretionary with the judge and the wishes of the involved parents. If the parents want a public trial they are entitled to one as a matter of right. However, as a means of improving parental care, it is ineffectual. The naive assumption that a mentally ill or emotionally disturbed parent can be "shamed" into being a better parent through public exposure, is an obvious fallacy.

A private hearing, conducted in the judge's chambers, and with only those directly interested present, is more conducive to reaching the truth with a minimum of hostility than a public, adversary trial. This is a critical time in the life of both the child and the parents. The hearing should be unhurried. The judge not only should allow all time necessary to solicit the legal details which give the court jurisdiction and form the basis for subsequent court action, but he should also invite the parents to express their feelings and discuss their problems as they see them. Where it is established that a child has been battered or abused by a parent, it is the judge who must make the dispositional judgment. Regardless of the seriousness of the offense, the object should be to reunite the parent and child if possible. Based on sound professional advice, the judge should use the court's authority to insist the parents follow the prescribed course of treatment as a condition to considering a return of custody. To insure that the court's directives are followed, periodic reviews by the *same* judge should be scheduled to assess progress.

Admittedly, the conference method of conducting a child abuse trial is time-consuming. Yet a judge will seldom face a more important decision. If he returns the child to the parents prematurely, or because not enough evidence was presented to retain the court's protective jurisdiction, he may well invite further abuse, even the child's permanent injury or death. Probably every metropolitan court has recorded several such gross and needless failures. On the other hand, if the child is detained in protective custody longer than necessary because no plan is evolved for treatment of the family and a guarded phasing back of the child into the home, he may become so isolated from his family that he loses the chance to return. This alternative spawns the permanent institutional or foster home inmate.

C. Rules of Evidence and Standards of Proof

George R. Sharwell, "Child Abuse and Neglect: A Survey of Judges' Opinions." Fall 1978 *Public Welfare*. Copyright 1978 American Public Welfare Association. Reprinted with Permission.

How are child abuse and neglect proved?

There is no easy answer. Statutes dealing with child abuse and neglect vary from state to state, making it difficult to discuss the question in specific terms. Judicial interpretation of child abuse and neglect statutes has been limited, so that concerned citizens and courts alike often have no clear guides to statutory meaning.[1]

Statutory definitions and legal concepts often are at variance with those of the behavioral and social sciences. Downs notes that the term "neglect" is a legal term with a

legal meaning. He suggests that the social work definition of neglect not be used in the courtroom because socially defined neglect "is really a condition that is either something less than neglect in the legal sense or something that social workers cannot communicate or describe to the court."[2] His comments on neglect apply equally well, of course, to any concept that has both legal and social or extra-legal definitions. When courts and protective service workers attach different meanings to seemingly identical concepts, communication is seriously distorted and this occurs without an awareness on the part of those involved that any communication problem exists.

Because they are in the unique position of deciding what constitutes child abuse and neglect, 100 juvenile and family court judges were asked to respond to the open-ended question: "How are child abuse and neglect proved?"[3] They were given the following instructions:

> Please frame your answers to communicate with social workers who are involved with cases of suspected child abuse and neglect, answering in as much or as little detail as you wish. Include any pet peeves or gripes you may wish in your answer, and offer any advice or commentary you believe may be helpful to social workers.

Eighty-nine completed questionnaires were returned. The response was unusually good because of high interest in the question on the part of the judges, the desire of many judges to express their opinions to a social work audience—and dogged follow-up of those who did not return questionnaires promptly. Respondents also were promised and provided a summary of the sample findings.

The use of "child abuse and neglect" in this article follows the definition found in the Child Abuse Prevention and Treatment Act (Public Law 93-247), commonly known as the Mondale act:

> . . . the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary [of Health, Education, and Welfare].[4]

Primary Findings

The open-ended question was expected to produce a broad range of responses. Apart from the occasional discussion by a judicial respondent of statutes unique to that particular state, responses tended to differ less in substance than in emphasis.[5] Thus the substance of the following four responses emanated from more than 80 percent of the judicial respondents.

1. *Proof of child abuse and neglect must come principally or totally from facts, not unsupported conclusions.*[6] This assertion seems obvious. Yet the survey indicates that a preponderance of respondent judges believe that social workers and other witnesses in child abuse and neglect cases often are unable or unwilling to differentiate between the two. One judge said:

> Some social workers come into court believing that their function is to certify to the court that a child has been [abused and neglected], and that my function is to rubber stamp their conclusion, without giving the court more than a few dates, some names, and a statement that amounts to a conclusion that the agency knows the child to be [abused and neglected].

Another judge wrote:

> Probably it is because they [protective service workers] are overworked and often do much in the little time that they have available, but many times the facts presented to the court are disappointingly sparse, even when a child and his family have been known to the agency for a long period of time.

Still another judge stated the apparent consensus of the judicial respondents as to the exclusive function of the ocurt in these terms:

> Historically courts have provided a forum in which the protection of the rights of all parties to a dispute is paramount. A court does not perform its necessary function if it does the bidding of any government agency—or anyone else.

In sum, judicial respondents agree that the job of the protective service worker is to marshall facts before the court—facts that are necessary to a proper and just judicial decision.

2. *All evidence touching upon child abuse and neglect in all its physical and nonphysical aspects should be presented to the court.* Judges feel, of course, that all relevant and material evidence should come before the court. But more than that, they claim that some protective service workers seem to place greater emphasis and attention upon emotional and other nonphysical aspects of child abuse and neglect evidence of physical aspects of child abuse and neglect. Thus, one judge wrote:

> Social workers have considerable knowledge of emotional stress, mental disorder, and related psychological states. This is commendable. Such knowledge often is helpful to a court. I have the feeling, however, that on some occasions social workers focus upon emotional and psychological conditions and lose sight of physical aspects of [child abuse and neglect].

Judicial respondents say also that it is easier to prove physical injury to a child than it is to prove emotional or other nonphysical injury. One judge explained this in these words:

> Physical injury of most sorts—burns, cuts, bruises—is observable, and injury therefore is obvious to anyone with powers of observation.
>
> Emotional injury is not directly observable. It must be inferred from a person's behavior, and human behavior flows from many wellsprings. In brief, emotional injury never is obvious, and its causes are always open to question.

3. *In order to prove child abuse and neglect, reliance upon circumstantial evidence often is necessary.* The judges state that proof of child abuse and neglect often must depend on circumstantial evidence, i.e., the accumulation of evidence in bits and pieces, meaning very little in isolation, but together producing some kind of pattern. This is because those who abuse and neglect children seldom admit it, and because acts of child abuse and neglect rarely are observed by potential witnesses. The advice and comments of one judge are typical of the responses, although more thorough than most:

> Normally the best proof of [child abuse or neglect] is to have one or more witnesses testify that they saw specific persons commit specific acts or testify that a parent or caretaker was aware of a child's need but failed to do what was in his power to meet that need. Such testimony would be strong because it would provide a close connection among person,

act, and consequence, i.e., a specific person performed a specific act (or failed to act) in relation to a specific child, with a specific consequence. But this kind of evidence is seldom available in [child abuse and neglect] cases. For this reason, proof often must rely upon circumstantial evidence. . . [T]here often is the need to show a pattern of [child abuse or neglect] over a period of time by circumstantial evidence. Almost any single act of abuse or neglect is subject to a number of alternative explantions including unavoidable accident or childish indiscretion. But evidence of a number of incidents which suggest abuse or neglect over a period of time tends to support the inference of abuse or neglect and to negate alternative explanations. Thus circumstantial evidence can be extremely imporant, much more important than many believe it to be. It can develop considerable evidentiary weight because the whole is greater than the sum of the evidentiary parts.

Thus, facts that mean little in isolation can carry considerable evidentiary weight together as they sketch the broad outlines of a situation constituting child abuse and neglect.

4. *Corroborative testimony is important because it establishes the credibility of witnesses.* Is it necessary for more than one witness to testify to essentially identical facts? Judicial respondents report that it may not be necessary in all cases, but corroborative testimony can be more important in child abuse and neglect than in other types of cases. In all classes of cases reaching the court there is the problem of limited human abilities of observation and recollection. In child abuse and neglect cases there is the additonal problem of diverse standards of child care that exist even within a single community. Additionally, the absence of a competent witness can sometimes raise questions about why that witness did not testify. One judge said this:

> Corroborative testimony is important for several reasons. First, to the extent that it agrees with the testimony of other witnesses, it heightens the credibility of those witnesses. Usually there is no question as to whether an individual witness is telling the truth as he or she sees it, but there always is the question as to how well a person is capable of observing events when they occur and recalling them after the passage of time. Second, if potentially competent witnesses do not appear in court it raises questions as to why they do not testify. Does it mean that the testimony of the witnesses would agree to a substantial degree? Or does it mean that only the welfare department believes the child to be [abused or neglected]?

Clearly the judicial respondents want to have all persons before the court who are competent to testify.

Additional Findings

Twelve judges reported that photographic evidence can help the court because it depicts observable conditions more accurately and more vividly than oral testimony can. One judge commented: "It is often difficult to describe injuries to a child, and it is hard to judge whether a verbal description is exaggeration or merely accurate description of a ghastly act. Photographs in such cases can be worth much more than the proverbial one thousand words."

Perhaps not surprisingly, fifty-eight judges commented on the need for better communication, coordination, and cooperation among agencies that perform functions related to child abuse and neglect. Most commonly the judges saw the need for improved contact among protective service agencies, their legal counsel, courts, and police; although schools, health departments, and other agencies also were often mentioned. Two examples may illustrate the character of their comments:

> Cases would be better presented if the welfare worker and the solicitor's office would communicate in a more than hurried fashion—often just prior to a hearing.
>
> Differences in education, agency function, priorities; previous bad experiences between agencies; and impossibly heavy workloads—all these make it difficult for agencies to understand each other, let alone cooperate. These things must change, although I am afraid that improvement will not come easily or quickly.

Judges saw improved contact between protective service agencies and their legal advisors as most urgent, feeling that more frequent contact would lead to better prepared cases and to improved work satisfaction for social worker, lawyer—and judge.

Finally, more than a third of the judicial respondents suggested the need for ongoing training programs for protective service personnel. One judge wrote:

> I am struck by the wide range of competence among [protective service workers]. Most are very competent. Others leave much to be desired—much like judges, I suspect. In my county [protective service workers] sometimes do not remain in their jobs for very long, so that learning from experience is not possible for many.

So the judges surveyed provide excellent guidance on proving child abuse and neglect. But their major concerns are that the protective service worker base his presentation before the court on facts rather than unsupported conclusions, that all evidence—physical and nonphysical—be presented, that circumstantial evidence can carry considerable weight, and that corroborative testimony can be important in establishing the credibility of witnesses.

One judge sums up: "Advise the court of any facts that would show the court that a child has not been treated with that degree of care that reasonable persons would expect."

FOOTNOTES

1. This point has been made especially well by William T. Downs in "The Meaning and Handling of Child Neglect: A Legal View," *Child Welfare* 42, no. 3 (March 1963): 131-34.
2. Ibid., p. 131.
3. It was difficult to develop a probability sample of juvenile and family court judges because there is no known single list of such judges. The sample was selected in three steps. First, a state was randomly selected from among a list of the fifty states. Second, a court was selected at random from those family or juvenile courts which have jurisdiction child abuse and neglect in the state. Finally, a name of a judge was randomly selected from among those judges assigned to that court.
4. The regulations promulgated by the secretary under the Mondale act are found at 45 Code of Federal Regulations, Part 1340.
5. These responses are not reported in this article since the commentaries had relevance only for a single state.
6. Expert opinion testimony is the sole exception to the rule that proof must rely upon facts. Expert opinion can be given only after a witness has qualified as an expert in a particular field of knowledge. Expert opinion testimony in child abuse and neglect cases is provided most often by physicians and psychologists, when such testimony is given. Although social workers and other professionals sometimes serve as expert witnesses, protective service workers in the usual case serve as lay witnesses—and therefore are limited to factual testimony.

(See also Support Readings at VIII. E.)

National Center on Child Abuse and Neglect, ***Federal Standards for Child Abuse and Neglect, Prevention and Treatment Programs and Projects*** **(1978), Standards for Courts and the Judicial System, I-5 and I-6** *DRAFT.*

Standard I-5

Judges, attorneys, and the courts should ensure that fair evidentiary standards are applied to preliminary and adjudicatory child protective hearings and that adjudicatory hearings are completed within 60 days.

GUIDELINES

Complete the adjudicatory hearing within 30 days *whenever a child has been placed in protective custody,* provided that in exceptional cirumstances, upon motion and hearing, the court may extend this time period for good cause shown and so state this on the record.

Devote the preliminary or adjudicatory hearing solely to the determination of whether or not the child's health and/or safety is in danger, unless the parents admit to abuse or neglect (Cross-reference to Standard I-6).

Require that the injuries (of such a nature as would not ordinarily exist except by reason of the acts or omissions of the person alleged to have abused or neglected the child) constitute prima facie evidence.

Require a preponderance of the evidence to substantiate a finding of abuse or neglect.

Admit proof of previous abuse or neglect of the same child to prove current charges of abuse or neglect.

Provide that previous statements made by the child relating to his abuse or neglect can be admitted as evidence.

Admit proof of previous or current abuse or neglect to the child's siblings.

Admit as evidence any photograph or X ray relating to the child made by a hospital or public or private agency, and any records that are legally admissable as evidence.

Permit the child to be a witness when he is found competent to testify by the court; however, the judge may bar his testimony for good cause.

Provide that the court may, in the exercise of its discretion, limit the nature or duration of examination or cross-examination of the child.

Grant that the attorneys for the parents and the child have the right to confront and cross-examine witnesses and to present evidence.

Abrogate privileges attached to confidential communications between husband and wife and any professional person and his client, except privileges between attorney and client.

Standard I-6

Judges, attorneys, and the courts should ensure that the child protective dispositional hearing is completed within 60 days.

GUIDELINES

Provide that dispositonal findings be based on material and relevant evidence.

Require that a report, which is to be prepared by the special attorney, the court's intake worker or the Local Unit's child protective services worker assigned to the case, be sent to the judge three days prior to the dispositional hearing.

Make available to the attorneys for all parties all reports submitted to the court for inclusion in the dispositional hearing, subject to deletions after *in camera* study reveals that disclosure of the information is likely to be harmful to confidential sources or the subject of the report.

Admit all material and relevant evidence, including the statements of those who have direct knowledge at the dispositonal hearing.

Grant the attorneys for all parties the right to present evidence and to confront and cross-examine witnesses.

Consider the need for ordering continued protective services, and/or psychological examinations and evaluations, during the pendency of an action.

Base a disposition on the evidence presented during the formal hearing.

Provide that specific written findings of fact upon which the dispositional order is based be made a part of the record.

National Center on Child Abuse and Neglect ***Child Abuse and Neglect State Reporting Laws*** **9, 12-13 (1978).**

Abrogation of Privileged Communications

There are certain classes of communications between persons who stand in a confidential relationship with each other which the law will not permit to be divulged or will not allow inquiry into during a judicial proceeding, unless the person to be protected voluntarily waives the privilege. In order to make available all relevant evidence in a judicial proceeding, the laws of most jurisdictions make these legal restrictions on divulging confidential information inapplicable in child abuse and neglect cases.

Table D records the specific privileges excluded. The physician-patient privilege is explicitly excluded in 32 jurisdictions. Another 14 abrogate the physician-patient privilege by excluding "all" privileges or "all other privileges except the attorney-client privilege." Some remaining jurisdictions exempt physicians by inference, by excluding, for example, "any privilege . . . provided for by professions or a code of ethics."

Explicit restrictions on the husband-wife privilege are found in more than 30 jurisdictions. Another 11 states restrict the husband-wife privilege by inferences such as exclusion of "all" privileges, "all other privileges except attorney-client," or "any similar privilege or rule against disclosure."

Four states specifically abrogate the confidential communications privilege for social workers. Six states restrict the minister-penitent communications privilege and five jurisdictions restrict the psychotherapist-patient privilege. Thirteen jurisdictions abrogate the privileges between other professionals, such as counselors, and their clients, or waive any privilege provided for by professions or a code of ethics.

Abrogation of Privileged Communications

States and Territories	All Privileges	Physician Patient	Husband-Wife	Any Similar Privileges	All But Attorney-Client	Social Workers	Psycho-Therapist-Patient Privileges	Ministers	Other[1]
Alabama					X				
Alaska		X	X						
Arizona		X	X		X	X			X
Arkansas		X	X		X			X	X
California									
Colorado		X	X						
Connecticut			X						
Delaware		X	X		X	X			X
District of Columbia[2]		X	X						
Florida			X		X		X		
Georgia									
Hawaii		X	X						
Idaho		X	X		X			X	X
Illinois	X	X							
Indiana		X	X						
Iowa		X	X						
Kansas		X		X					
Kentucky			X		X				
Louisiana		X	X		X			X	X
Maine			X		X				
Maryland		X				X			X
Massachusetts			X				X		X
Michigan					X				
Minnesota		X	X						
Mississippi									
Missouri					X				
Montana		X		X					
Nebraska		X	X						
Nevada		X	X					X	X
New Hampshire					X				
New Jersey									
New Mexico		X		X					
New York		X	X	X		X			
North Carolina		X	X						
North Dakota			X		X				
Ohio		X							
Oklahoma		X		X					
Oregon		X	X						X
Pennsylvania		X	X						X
Rhode Island			X		X				
South Carolina			X						X
South Dakota		X	X				X		X
Tennessee			X				X		
Texas					X				
Utah		X							
Vermont									
Virginia		X	X						
Washington		X					X	X	
West Virginia			X		X				
Wisconsin		X	X						
Wyoming			X		X				
America Samoa		X	X		X			X	X
Guam		X		X					
Puerto Rico									
Virgin Islands			X		X				

[1]The thirteen jurisdictions included in the "Other" column are: Arizona and Delaware — "any privilege... provided for by professions such as nursing covered by law or a code of ethics regarding practitioner-client confidences...;" Arkansas, Idaho, Pennsylvania, and American Samoa — "any privilege... between any professional person... including... counselors, hospitals, clinics, day care centers, and schools and their clients;" Louisiana and South Carolina — "any privilege... between any professional person and his client...;" Maryland —"every health practitioner, educator of... law enforcement officer, who contacts, examines, attends, or treats a child and who believes... the child has been abused is required to make a report... notwithstanding any other section... relating to privileged communications...;" Massachusetts — "any privilege established... by court decision or by profession code relating to the exclusion of confidential communications and the competency of witnesses...;" Nevada — "shall not be excluded on the grounds that the matter would be privileged... under chapter 49 of Nevada Revised Statutes (which includes accountant-client, lawyer-client, school counselor and teacher-student)... and the news media privilege...;" Oregon — the privilege extended to staff members of schools and to nurses...;" and South Dakota — "school counselor and student."

[2]The District of Columbia excludes the physician-patient and husband-wife privileges... "provided that the Division determines such privilege should be waived in the interest of public justice."

National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention, (1976)*

Standard 13.7—Endangered Children, Standard of Proof

In the adjudicatory phase of Endangered Child proceedings, the burden should rest on the petitioner to prove by clear and convincing evidence that the child is endangered as defined in Standards 11.9 through 11.15.

COMMENTARY

This standard is consistent with the approach of all major standards-promulgating organizations that have considered this issue in the past. It calls for proof by "clear and convincing evidence" that the criteria for intervention are applicable to the child.

Endangered Child proceedings are not susceptible to a simple labeling as either civil or criminal. Rather, they involve two sets of competing interests: the interests of the parent and the child in being free from unwarranted intervention and the interests of the State and the child in insuring that children will be protected from serious harm. Thus, neither the civil preponderance of the evidence standard nor the criminal requirement of proof beyond a reasonable doubt seems appropriate. The standard requiring proof beyond a reasonable doubt does not provide the child with adequate protection. This is especially true in physical abuse cases, because it is often impossible to get conclusive evidence that an injury was inflicted nonaccidentally. On the other hand, given the substantial parental rights being challenged, and the possible harms to the child from intervention, it is appropriate to require clear and convincing evidence that the child is, in fact, endangered before authorizing coercice intervention.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* **(New York: Ballinger Publishing Co., 1977), 5.1H, 5.3E. Reprinted with Permission.**

5.1H. Evidence at all proceedings.

In all proceedings regarding the petition, sworn testimony and other competent and relevant evidence may be admitted pursuant to the principles governing evidence in civil matters in the courts of general jurisdiction in the state. The court may admit testimony by the child who is the subject of the petition or by any other children whose testimony might be relevant regarding the petition if, upon motion of the party wishing to proffer the testimony of such child, the court determines that the child is sufficiently mature to provide competent evidence and that testifying will not be detrimental to the child. In making such determination regarding the child's proffered testimony, the court may direct psychological or other examinations and impose appropriate conditions for taking any testimony to safeguard the child from detriment.

COMMENTARY

This subsection provides that admissibility of testimentary and documentary evidence in these proceedings should be governed by the ordinary rules for civil proceedings in the jurisdiction. The subsection further provides that the court may admit testimony by the child subject of the petition, or other children with knowledge likely to be relevant to the petition (such as siblings of the subject child) upon two specific determinations: that the child is sufficiently mature to provide competent evidence and that such testimony will not be detrimental to the child.

5.3E. Proceedings to determine contested petition.

In any proceeding to determine whether the petition should be granted, the following should apply:

1. Upon request of the child or the parent(s), the sole trier of fact should be a jury whose verdict must be unanimous, and which may consist of as few as six persons. In the absence of such request from either such party, the trier of fact should be the court.

2. The burden should rest on the prosecutor of the petition to prove by clear and convincing evidence allegations sufficient to support the petition.

3. Proof that access has been refused to sources of or means for obtaining information, as indicated in Standard 5.2, or that the parents have refused to attend or to testify without adequate excuse pursuant to Standard 5.2, or regarding conduct of the parents toward another child should be admissible, if the court determines such proof relevant to the allegations in the petition; except that proof of either such matter, standing alone, should not be sufficient to sustain the granting of the petition.

COMMENTARY

Subsection 1. of this section provides a right to jury trial at the option of the child or parent named in the petition. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), indicates that this right is not constitutionally mandated in wardship proceedings since the constitutionally based arguments for such mandate are, if anything, stronger in the delinquency proceeding context of that case. A right to trial by jury is currently provided in eight jurisdictions and granted specifically to parents in another four. Statutes in twenty-four jurisdictions, however, contain language precluding trial by jury. Katz et al., "Child Neglect Laws in America," 9 *Fam. L. Q.* 1, 32-33 (1975). As a matter of policy, we believe that the right to a jury trial is important to ensure that state intervention into family childrearing practices reflects widely shared community norms that any randomly selected jury would adhere to. Under subsection 1. this right is withheld from the prosecution to ensure that the jury will be invoked only by a party—the parent or child—with the most direct personal interests at stake, and typically as a tactic to increase the burden on the proponent of the petition. This burden of persuasion appropriately reflects the general principle enunciated in these standards presuming against state interventions. Specifying that the jury may consist of as few as six persons reflects the greater flexibility

regarding jury size now permitted even in criminal cases in light of *Williams v. Florida,* 399 U.S. 78(1970), and *Colgrove v. Battin,* 413 U.S. 149 (1973).

Subsection 2. makes explicit that the burden of proof is on the prosecutor of the petition. The standard of proof specified is, however, not the criminal standard of "beyond reasonable doubt" but rather the civil law standard of "clear and convincing evidence." For the same reasons indicated in the commentary to Standard 5.2 D., criminal law norms are not fully applicable to these proceedings. Rather these proceedings are more hybrid versions of criminal and civil proceedings, reflecting the competing policies of guaranteeing families and children against inappropriate state intervention but giving adequate assurance that children will be protected against parentally inflicted harms. Because direct proof of parental conduct is frequently difficult to adduce, particularly regarding preschool children, the criminal law standard of "beyond reasonable doubt" would be unduly restrictive of the possiblity that state intervention might adequately protect children in need. See Dembitz, "Child Abuse and the Law—Fact and Fiction," 24 *Record of N.Y.C.B.A.* 613 (1969).

Subsection 3. mandates the evidentiary weight that may be given to two items: proof that parents have refused to provide information in the investigation report or testify at the postinvestigation proceeding, and proof regarding parents' conduct toward another child. The subsection provides that either such matter may be relevant to ultimate adjudication of the merits of the petition and proof of such matters is thus admissible. But both such matters can produce an unjustifiably heavy pejorative impact on the factfinder and lead the factfinder wrongly to wish to "penalize" a parent who refused to "cooperate with investigators" or to conclusively (and wrongly) presume that a parent who behaves harmfully toward one child necessarily is unfit in dealing with all other children. To guard against the inevitably prejudicial impact of such proof, this subsection specifies that proof of either such matter, standing alone, would not be sufficient to sustain the granting of the petition, and that either such matter may only be cumulatively supportive of the petition. This subsection thus rejects the rule that the parents' uncooperativeness alone is sufficient to sustain a petition, compare *In re Vulon Children,* 56 Misc. 2d 19, 288 N.YS. 2d 203 (Fam. Ct. 1968) similarly rejecting such rule, or that parental abuse or neglect of one child is alone sufficient to sustain a finding of endangerment for other children in the absence of any evidence whatsoever regarding those other children, compare *In re Milton Edwards,* 76 Misc. 2d 781, 351 N.Y.S.2d 601 (Fam. Ct. 1972) adopting such rule.

Section V.

Legal Rights of Involved Parents

This section will examine several rights of parents that present special problems in abuse and neglect proceedings: the right to appointed counsel for indigent parents, the right to notice of the proceedings, the right to information about the dispute, and the privilege against self-incrimination. The extent to which these rights are honored differs considerably from jurisdiction to jurisdiction. Underlying these differences are many policy and practical consideratons. Further topics in this section are the court procedures and practices that can best provide these rights to parents and the methods used to inform parents of their rights.

A. Parents' Right to Counsel

1. A parent's right to be represented by his/her own counsel is clear.

2. In some states, the right of indigent parents to appointed counsel is less clear.

The general trend is toward providing counsel to indigent parents, and probably most states now do so.

There are several reasons for providing counsel:

A parent can be greatly affected by the outcome of abuse and neglect proceedings; he or she may lose custody of the child and may be labeled as a child abuser,

The child and the child protective agency are probably represented by counsel; a parent without counsel may be at a great disadvantage in court proceedings, and

A parent's statements in an abuse and neglect proceeding may be used in a criminal prosecution, unless immunity is granted.

B. Right to Notice

1. In general, parents have a right to notice of the proceedings, although the proceedings can go forward in their absence.

A common problem in abuse and neglect cases is the difficulty of locating parents who have a right to notice, particularly absent fathers. (See *Stanley* v. *Illinois,* 405 U.S. 745 (1972). Thus, the right to notice may require unusually thorough attempts to notify the parents.

Judges may become involved to a greater extent than in most litigation in ensuring that sufficient attempts have been made to locate the parents.

2. The parents' right to notice and right to attend the proceedings may be protected if the court is willing to reopen the case at the request of parents who were absent from the hearing.

Courts can automatically grant a rehearing, absent a showing that the parents willfully refused to attend the original proceeding.

Preliminary findings may be made in the absence of the parents, to become final only if the parents do not later appear.

3. Emergency custody hearings (see Section II. A) may be permitted without prior notice to parents. However, a follow-up hearing on continued custody should be held, with adequate prior notice to parents, within a few days of the *ex parte* custody order.

C. Right to Specific Allegations and Other Information

1. Requirements as to the specificity of facts in the petition vary between jurisdictions.

Detailed statements of the alleged acts relating to abuse and neglect provide information needed to prepare a defense.

Parents, however, may not wish damaging accusations explicated.

2. The parents sometimes have the right to demand particulars from the petitioner.

This may adequately provide parents with information where the petition does not state specific facts.

3. Parents may also have access to child protective agency reports related to the case. (See Section VI. C.)

D. Privilege Against Self-Incrimination

1. In most states parents do not have a general privilege against self-incrimination in abuse and neglect proceedings heard in juvenile or family court.

The proceedings are technically civil proceedings.

Often, only the parents can supply information required to demonstrate the need for protection of the child.

2. The privilege against self-incrimination, however, may apply when criminal prosecution is threatened. (See Section VII. B.)

In such a situation, parents should be informed of their rights by the court.

The privilege may be overcome if the court grants "use immunity" to the parent.

E. Informing Parents of Rights

1. Parents are usually informed of their rights at the commencement of proceedings.

Judges should use a written list of rights (written in the primary language of the parents) to insure that parents are thoroughly informed of their rights at the beginning of each hearing.

Additionally, parents should be informed of rights of further review after disposition.

2. Parents may also be notified of their rights before hearings commence.

Early notice of the right to counsel is important so that counsel can be obtained in time to investigate the facts and explain the proceedings to the parents.

Notice of rights can be given in the summons or in a separate document mailed to the parents.

Courts can encourage child protective agencies to inform parents of their rights whenever court proceedings appear likely.

Support Readings

A. Parents Right to Counsel

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect —Tentative Draft* (New York: Ballinger Publishing Co., 1977), 5.1D. Reprinted with Permission.

D. Notification of filing. Upon filing of the petition, the court should promptly interview the parents of the child identified pursuant to Standard 5.1 C., in order to:

. . . 3. inform the parents that they are parties to the proceedings and that they have a right to representation by counsel at all stages of the proceedings regarding such petition; and,

4. inform the parents that if they are unable to afford counsel, the court will appoint counsel at public expense, provided that, if a conflict of interest appears likely between parents named in the petition, the court may in its discretion appoint separate counsel for each parent.

COMMENTARY

. . . Recent decisions in some jurisdictions have held that parents are entitled to representation by counsel, see *State v. Jamison,* 444 P.2d 15 (Ore. 1968), or appointed counsel, *Shapp v. Knight,* 475 S.W.2d 704 (Ark. 1972); *In re B.,* 30 N.Y.2d 352, 285 N.E.2d 288 (1972). Nevertheless parents' rights to counsel in such proceedings is still very much a subject of controversy, see Sussman, *supra* 108-110. At present thirty-six jurisdictions give both parents and children a right to counsel in neglect hearings, and twenty-five jurisdictions provide a similarly broad right to appointed counsel. Parents are only granted a right to counsel in four jurisdictions, and to appointed counsel in six. Katz et al., "Child Neglect Laws in America," 9 *Fam. L.Q.* 1, 32-33 (1975).

We believe, both as a matter of policy and as a matter of constitutional law, that parents should be guaranteed the assistance of counsel in these proceedings. The potential deprivation and stigmatization imposed on parents in these proceedings, which may result from the loss of custody of their child, mirror the kinds of impositions which have led the Supreme Court in other apparently noncriminal proceedings to require constitutionally-derived criminal law guarantees such as the right to counsel. See *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963). Further, numerous decisions of the Supreme Court indicate that parental authority to rear children without state intervention while not an absolute right, nonetheless ranks among the fundamental values of our society. See., *e.g., Meyer v. Nebraska* 262 U.S. 390 (1923); *Stanley v. Illinois,* 405 U.S. 645 (1972). From these two propositions—the "closeness of the criminal analogue to the operations of [neglect and abuse] laws and the hallowed status of the parent-child relation in our society"—the parental right to counsel in these proceedings follows as a matter of constitutional law. See Burt, "Forcing Protection on Children and their Parents: The Impact of *Wyman v. James,*" 69 *Mich. L. Rev.* 1259, 1277-78, 1281-82 (1971). See also Burt, "Developing Constitutional Rights in, of and for Children," 39 *Law & Contemp. Probs.* (1976)...In some circumstances a conflict of interests may appear between the child's parents—if, for example, the parents have been divorced, the custodial parent's conduct toward the child is the subject of the petition and the noncustodial parent wishes to establish the other's unfitness for continued custody. Subsection 4. gives discretion to the court, where a conflict appears likely, to appoint separate counsel for each parent.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Counsel for Private Parties* (New York: Ballinger Publishing Co., 1976), 2.3(b). Reprinted with Permission.

2.3(b) Child protective, custody and adoption proceedings.

Counsel should be available to the respondent parents, including the father of an illegitmate child, or other guardian or legal custodian in a neglect or dependency proceeding. Independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody. Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters, except where temporary emergency action is involved and immediate participation of counsel is not practicable.

COMMENTARY

Although "neglect" and "dependency" cases have traditionally been and still are classified as "civil" in character, the rights involved in and potential consequences of such proceedings justify extension of counsel to the respondent—parent. In *Stanley v. Illinois,* 405 U.S. 645 (1972), the Supreme Court held that a hearing was required before an unwed father's rights to custody could be terminated by dependency proceedings. With respect to the importance of the parent-child relationship, the Court observed:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection . . .
>
> The rights to conceive and to raise one's children have been deemed 'essential' . . ., 'basic civil rights of man' . . . and [r]ights far more precious than property rights.
>
> . . . . 'It is cardinal with us that the custody, care and

> nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

Id. at 651. Other courts have concluded that interference with custodial rights by the state invokes a responsibility to make counsel available. In *Cleaver v. Wilcox,* 40 U.S.L.W. 2658, General Law Section (March 22, 1972), a federal district court held unconstitutional failure to provide counsel to indigent parents charged with neglect. The traditional distinction between "civil" and "criminal" matters was not thought dispositive of the issue:

> [W]hether the proceedings be labelled "civil" or "criminal," it is fundamentally unfair, and a denial of due process of law for the State to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel . . . Since the State is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and control, has long been recognized as a fundamental interest . . . Such an interest may not be curtailed . . . [without the parent being] heard, which in these circumstances includes the assistance of counsel.

Id. at 2659. *Accord, In re B,* 30 N.Y.2d 352, 356, 334 N.Y.S.2d 133, 136 (1972). See *State v. Jamison,* 251 Ore. 114, 444 P.2d 1005 (1968) (proceeding to terminate parental rights); Note, "Representation in Child Neglect Cases: Are Parents Neglected?" 4 *Colum. J. of Law and Social Problems* 230 (1968); Note, "Child Neglect: Due Process for the Parent," 70 *Column. L. Rev.* 465 (1970). State legislatures as well have increasingly recognized the parent's need for legal representation.*

These analyses better reflect the import and significance of neglect and dependency proceedings than the traditional view, particularly in view of the fact that, as a California commentator has observed, "once dependency is adjudged over 50 percent of the cases are not terminated for over two years. Twenty-eight percent of the cases are not terminated even after four years." R. Boches & J. Goldfarb, *California Juvenile Court Practice* 165 (1968) . . .

FOOTNOTE

**E.g.,* Ariz. Rev. Stat. Ann. §8-225; Calif. Welf. & Inst. Code §634 ("may"); Con. Gen. Stat. Ann. §17-66(b); Idaho Code §16-1631; Ill. Rev. Stat. ch. 37, §701-20; Iowa Code §232.28; Neb. Rev. Stat. §43-204; N.M. S.A. §13-14-25(F); N.D.C.C. §27-20-26; Ohio Rev. Code Ann. §2151.352, Rules of Juvenile Procedure, Rule 4; Ore. Rev. Stat. §419.498; Pa. Stat. Ann. tit. 11, §50-317; Utah Code Ann. §55-10-96.

Paul Piersma, et al., *Law and Tactics in Juvenile Cases* (Philadelphia, Pa.: American Law Institute-American Bar Association Committee on Continuing Professional Education), 498-500. Reprinted with Permission.

20.3 Right to Counsel for Parents

Unlike delinquency hearings in which appointed counsel is clearly mandated by *Gault,* the right to appointed counsel in neglect proceedings varies from state to state and is often affected by statute. Some enactments provide for the appointment of counsel as a matter of right, while others permit the judge to appoint counsel when necessary at his discretion. Although some states make no statutory mention of counsel, each of the model statutes includes provision for the appointment of counsel: Children's Bureau, U.S. Department of Health, Education, and Welfare, Legislative Guide for Drafting Family and Juvenile Court Acts §25 (1960); National Conference of Commissioners on Uniform State Law, Uniform Juvenile Court Act §26 (1968); National Council on Crime and Deliquency, Standard Juvenile Court Act §19 (1959); National Council on Crime and Delinquency, Model Rules for Juvenile Courts Rules 3, 13, 39 (1969). Fortunately, the clear trend among states recently revising their codes is toward providing counsel as a matter of right.

Previously when courts denied procedural protections in dependency and neglect hearings, the rationale given was that since juvenile proceedings are technically neither civil nor criminal, the court "partakes of the nature of a civil forum." *In re Carstairs,* 115 N.Y.S.2d 314, 315 (Dom. Rel. Ct. 1952). In the wake of *Gault,* the viability of the civil-criminal distinction has been progressively eroded. Increasingly, courts have looked to pragmatic rather than formalistic tests and have been unwilling to sanction uncounselled deprivations of liberty based on the civil "label of convenience." In *Heryford v. Parker,* 396 F.2d 393 (10th Cir. 1968), the court held that the right to counsel was required in the commitment of a feebleminded epileptic youth to the Wyoming State Training School, noting that:

> It matters not whether the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency . . . Where . . . the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes . . . the guiding hand of legal counsel. *Id.* at 396.

In the criminal law area, the Supreme Court has considered the viability of the felony-misdemeanor dichotomy for the purposes of appointment of counsel, finding the distinction unsatisfactory. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). The Court held that whenever there is a possibility of imprisonment for any length of time, due process requires the appointment of counsel. Implicit in the decision is the premise that any criminal conviction involving incarceration constitutes sufficient deprivation of liberty to require representation.

Approaching neglect, abuse, and termination hearings in terms of the seriousness of the potential result, it is apparent that the consequences may be far more severe than a mere ninety days in jail, both for the parent, who may lose custody of his child for years and suffer community stigma as well as possible criminal prosecution, and for the child, whose psychological development may be devastated and who may be subjected to what is, for all practical purposes, incarceration. . . Artificial distinctions, such as the civil-criminal and felony-misdemeanor labels, are not useful for the purpose of determining when due process requires the appointment of counsel. Rather, the importance of the interest affected and the seriousness of the consequences should provide the standard.

As is discussed at length in Section 16.2, the Supreme Court has frequently held that parental rights are "fun-

damental." The potential consequences of an adjudication of neglect are severe. A parent not only stands to lose custody and control of his child, but may also be stigmatized and subjected to possible criminal sanctions. The proceedings are focused not on any acts of the child, but rather on the conduct of the *parents*. Whatever relevance the *parens patriae* concept may have to the condition of the child, it is clearly inapplicable when applied to a parent charged with neglect, abuse, or termination. Moreover, when the formidable resources of the state are arrayed against an indigent and intimidated parent, who is without the requisite knowledge and skill to employ discovery procedures, analyze statutes, present evidence, or even protect his privilege against self-incrimination, the court takes on the appearance of a Star Chamber. Minimal procedural justice requires that the parent be given a meaningful opportunity to defend himself. Because of the fundamental nature of the interest involved and the severity of the consequences, the state should bear a heavy burden in demonstrating that it has some compelling interest in denying the benefit of counsel to a parent in these circumstances.

Two equal protection arguments may be advanced in support of appointed counsel for indigent parents in neglect, abuse, or termination proceedings. The first distinguishes between parents of neglected children on the basis of their wealth, and the second distinguishes between children on the basis of the charge, neglect or delinquency, brought against them.

The premise of the first argument is that distinctions based on wealth or poverty are inherently invidious, and hence violative of equal protection...

The second argument suggest that the state's discretion in electing to proceed by way of delinquency or neglect proceedings may be so arbitrary and irrational as to preclude the state from exercising it. The only meaningful difference in the consequences of the two types of proceedings is that an additional dispositional alternative is usually available in delinquency cases.

The parent in each case stands equally deprived of custody, and the child bears the same risk of loss of liberty. Moreover, the state may elect, when it has weak evidence of delinquency, to proceed on the basis of neglect, precisely for the purpose of avoiding the requirement of appointed counsel. Since the child risks the same degree of confinement in either case, the state cannot rationally base the right to counsel, as it apparently does, on the *kind* of institution in which the child may be confined.

Recently, many courts have required the appointment of counsel for indigent parents faced with a loss of custody of their children on both due process and equal protection grounds. The right has been recognized in neglect and dependency hearings. See, *e.g., Danforth v. State Dep't of Health & Welfare,* 303 A.2d 794 (1973); *Crist v. Division of Youth & Family Serv.,* 128 N.J. Super. 403, 320 A.2d 203 (1974), *modified,* 135 N.J. Super. 573, 343 A.2d 815 (1975); *In re Welfare of Myricks,* 85 Wash. 252, 533 P.2d 841 (1975); *State ex rel. Lemaster v. Oakley,* 203 S.E.2d 140 (W. Va. 1974). The right has also been recognized in proceedings to terminate parental rights. See, *e.g., In re Friesz,* 190 Neb. 347, 208 N.W.2d 259 (1973); *State v. Jamison,* 251 Or. 114, 444 P.2d 15 (1968); *In re Adoption of R.I.,* 455 Pa. 29, 312 A.2d 601 (1973); *In re Luscier,* 84 Wash. 135, 524 P.2d 906 (1974). Additional cases have granted the right to counsel to indigents who wish to appeal findings of neglect and termination. *Chambers v. District Court,* 261 Iowa 31, 152 N.W.2d 818 (1967); *Reist v. Bay County Circuit Judge,* 396 Mich. 326, 241 N.W.2d 55 (1976).

National Center on Child Abuse and Neglect, *Model Child Protection Act with Commentary,* (1977), Section 25(b) *DRAFT.*

(b) Any parent or other person responsible for a child's welfare alleged to have abused or neglected a child in a civil or criminal proceeding shall be entitled to legal representation in such proceeding. If he is unable to afford such representation, the appropriate court shall appoint counsel to represent him at public expense.

COMMENT

This subsection guarantees a parent or other person responsible for the child's welfare an attorney in civil and criminal proceedings. The need for counsel in criminal proceedings is well established. In civil proceedings, the respondent parent or guardian, in effect, also stands "accused." A finding of abuse or neglect may render him liable for criminal prosecution, may result in the removal of a child from his custody and, ultimately, may result in the termination of parental rights.

Just as the child's unique position entitles him to independent legal representation, the individual interests and due process rights of parents entitle them to counsel in child protective proceedings. Those individuals unable to afford private legal representation are to be appointed counsel by the court at public expense.

California Juvenile Court Rules, Chapter 4 Detention Hearings, Part II, Cases Petitioned Under Section 300 (dependency cases), Rule 1334.

Rule 1334. Commencement of hearing—explanation of proceedings

(a) [Explanation of petition and proceedings (§ 316)] At the beginning of the detention hearing, the court shall inform the minor and the parent or guardian, if present, of each of the following:

(1) The contents and meaning of the petition.

(2) The reasons why the minor was taken into custody.

(3) The nature of, and possible consequences of juvenile court proceedings.

(4) The purpose and scope of the detention hearing.

(b) [Right to counsel explained (§ 317)] If either is unrepresented by counsel, the court shall advise the minor and the parent or guardian of the right of the minor and those persons to be represented by counsel at the detention hearing and at every other stage of the proceedings and, where applicable, of the right to

appointed counsel, subject to a claim by the counsel for reimbursement as provided by law.

(c) [Appointment of counsel—general rule (§ 317)] If the minor, parent or guardian appears at the detention hearing without counsel, the court may appoint counsel if it appears that the minor, parent or guardian desires counsel but is unable to afford counsel. Counsel shall be appointed for any parent or guardian unable to afford counsel whenever it appears that person is unable to adequately present the case and faces a substantial possibility ofloss of custody or of prolonged separation from the minor.

(d) [—In § 300 (d) cases (§2§ 318, 351, 681)] If the case has been petitioned under section 300(d) and the minor appears at the detention hearing without counsel, the court shall appoint counsel for the minor. Whenever the parent or guardian, or any other person having care or custody of the minor or who resides in the home of the minor, is charged in a pending criminal prosecution based upon unlawful acts committed against the minor, the court may appoint the prosecuting attorney to represent the minor in the interest of the state. The terms and conditions of the representation shall be with the consent or approval of the court.

(e) [—Conflict of interest] In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the minor that one attorney could not properly represent both, the court shall take appropriate action to eliminate the conflict of interest.

Sources: Welf & Inst. Code§2§ 316-318, 351, 681

References: CEB §2§ 48, 74, 179; Deskbook §2§ 7.12, 7.13, 7.18, 7.23; see also §2§ 7.2, 7.3, 7.4, 7.8; Witkin §2§ 288, 301, 312, 313.

ADVISORY COMMITTEE COMMENT

Subdivision (a), relating to the explanation of the proceedings, is based upon section 316. But in addition to requiring that those present at the detention hearing be informed of the reasons why the minor was taken into custody and the nature of juvenile court proceedings, the rule would also require that the contents and meaning of the petition, the possible consequences of the juvenile court proceedings and the purpose and scope of the detention hearing be specifically explained.

Subdivision (b), requiring an explanation of the right to counsel, is based upon the last clause in section 316 and further requires that the minor and parent or guardian be advised of the right to appointed counsel, "where applicable." In a section 300 proceeding, the parent or guardian, as well as the minor, has a right to counsel at every stage of the proceedings. (Welf. & Inst Code Wit 317.) Absent a conflict of interest, the petitioner and the minor are usually represented by a single attorney. (See comment to rule 1311(d).)

Subdivision (c), relating to appointment of counsel, is based upon the first sentence in section 318 and *Cleaver, v. Wilcox* (9th Cir., 1974) 499 F. 2d 940, 945. In *Cleaver,* it was held that an indigent parent in a dependency case has a due process right to court-appointed counsel whenever the parent is unable to adequately present the case and faces a substantial possibility of the loss of custody or of prolonged separation form a child. Factors suggested for a juvenile court to consider when deciding whether to appoint counsel for the parent in these cases include the complexity of the case, the likelihood of removal of the child, the probability of prolonged removal and whether the parent intends to contest the matter. (*Cleaver v. Wilcox, supra,* at 945; see CEB Supp. at Wit175A.)

Subdivision (d), relating to the appointment of counsel for the minor in section 300 (d) proceedings, generally restates sections 318, 351 and 681.

Subdivision (e), relating to the appointment of counsel when there exists a conflict of interest sets forth a flexible rule directing the court to take appropriate action to eliminate the conflict of interest. (See Welf. & Inst. Code § 317.)

California Juvenile Court Rules, Chapter 7, Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Rule 1363.

Rule 1363. Commencement of hearing—explanation of petition; right to counsel

(a) [Petition read and explained (cf. § 353)] At the beginning of the jurisdiction hearing, the petition shall be read to those present. Upon request of the minor, or the parent, guardian, or adult relative, the court shall then explain the meaning and contents of the petition and the nature of the hearing, its procedures, and possible consequences.

(b) [Right to counsel explained (cf. § 353)] The court shall next ascertain whether the minor and the parent, guardian, or adult relative, as the case may be, are represented by counsel; if not, the court shall advise the minor, parent, or guardian of their right to have counsel present and, where applicable, of their right to appointed counsel, subject to a claim of reimbursement as provided by law.

(c) [Appointment of counsel—general rule (§ 317; *Cleaver v. Wilcox* (9th Cir. 1974) 499 F.2d 940, 945)] If the minor, parent or guardian appears at the jurisdiction hearing without counsel, the court may appoint counsel if it appears that the minor, parent or guardian desires counsel but is unable to afford counsel whenever it appears that person is unable to adequately present the case and faces a substantial possibility of loss of custody or of prolonged separation form the minor...

(e) [—Conflict of interest (§ 317)] In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the minor that one attorney could not properly represent both, the court shall take appropriate action to eliminate the conflict of interest.

(f) [—Continuance (§ 317)] If necessary, the court shall continue the hearing pursuant to rule 1362(c) or (d), whichever is applicable.

Sources: Welf. & Inst. Code §§ 316, 317, 318, 351, 353; see also § 681; *Cleaver v. Wilcox* (9th Cir. 1974) 499 F.2d 940.

References: CEB §§ 74-76; CEB Supp. §§ 175A, 175B, 187; Deskbook §§ 8.32, 8.33, 8.35, 8.45; see also §§ 7.3, 7.13, 8.10, 8.11; Witkin §§ 288, 301, 312, 313; Governor's Commission, pp. 26-27.

ADVISORY COMMITTEE COMMENT

Subdivision (a), relating to the reading of the petition and explanation of the proceedings, is based upon the first sentence in section 353. In contrast to rule 1353(a) but in accord with the statute, the explanations are required only upon request of the minor, parent, guardian, or adult relative. In appropriate cases, some courts advise the parents that the possible consequences of the proceedings may include eventual termination of parental rights under Civil Code section 232.

Subdivision (b), relating to the explanation of the right to counsel, is based upon the second sentence in section 353. Advice regarding the right to be represented by counsel must be given in any case where the minor, parent or guardian is not in fact represented by counsel. Further, subdivision (b) provides that advice be given of the right to appointed counsel "where applicable." (See subdivisions (c) and (d), *infra.*) Finally, it is provided that the appointment of counsel may be subject to a claim of reimbursement as provided by law. (See Welf. & Inst. Code § 903.1.)

Subdivision (c), relating to the appointment of counsel, is based upon section 317, as qualified by section 318 and *Cleaver v. Wilcox* (9th Cir. 1974) 499 F.2d 940, 945. The right of a minor or indigent parent to appointed counsel in section 300 dependency cases has been an uncertain area of procedural law. (Compare *In re Robinson* (1970) 8 Cal.App. 783 (no right to counsel at trial for parent or child) and *In re Joseph T.* (1972) 25 Cal.App.3d 120 (no right to counsel for parent on appeal) with *Cleaver v. Wilcox, supra* (flexible due process right to counsel for parent at trial) and *In re Simeth* (1974) 40 Cal.App.3d 982 (right to counsel for parent on appeal); see also *In re J. G. L.* (1974) 43 Cal. App.3d 447 (whether a parent or child is entitled to appointed counsel in a dependency case presents "an interesting question . . . *Simeth* obviously casts doubt on the continued validity of *Robinson and Joseph T." Supra,* at 449, n. 1.) Subdivision (c) incorporates the approach taken in the *Cleaver* case, wherein it was held that an indigent parent in a dependency case has a due process right to court-appointed counsel whenever the parent is unable to adequately present the case and faces a substantial possibility of the loss of custody or of prolonged separation from a child. Factors suggested for the juvenile court to consider when deciding whether to appoint counsel for the parent in these cases include the complexity of the case, the likelihood of removal of the child, the probability of prolonged removal, and whether the parent intends to contest the matter. (*Cleaver v. Wilcox, supra, at* 945; see CEB Supp. at § 175A.)

Subdivision (d), relating to the appointment of counsel for the minor in section 300(d) proceedings, generally restates sections 318 and 351.

Subdivision (e), relating to the appointment of counsel when there exists a conflict of interest, sets forth a flexible rule directing the court to take appropriate action to eliminate the conflict of interest.

Subdivision (f), which makes a cross-reference to subdivisions (c) and (d) of rule 1362 relating to continuances necessary for the appointment of counsel and to permit counsel to prepare the case, is based on section 317.

B. Right to Notice

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* —Tentative Draft (New York: Ballinger Publising Co., 1977), 5.1D, 5.1G. Reprinted with Permission.

D. Notification of filing.

Upon filing of the petition, the court should promptly interview the parents of the child identified pursuant to Standard 5.1 C., in order to:

1. notify the parents that such petition has been filed;
2. provide the parents with a copy of such petition, including identification by name of the person submitting such petition; . . .

COMMENTARY

This subsection, and the immediately succeeding subsections E. and F., provide the initial procedural steps following agency authorization of the filing of the petition. In this subsection, the parental right to counsel is guaranteed, and appointment of counsel for indigent parents is provided. The court should directly inform the parents of their rights to impress on them the seriousness of the proceedings and to guard against casual or ill-considered waiver of their rights. . . .

Subsection D. 2. of this standard provides that the parent named in the petition must be notified of the name of the person submitting the petition. This provision is consistent with the general posture of extensive discovery rights to parents and child mandated by Standard 5.3 C. This requirement would not, however, eliminate the possibility that petitions might be submitted with sources of information kept confidential from parents and child at this initial portion of the proceeding, since child protective agencies in many cases will themselves submit petitions. Accordingly, persons who wish to keep their identities secret from those named in the petition can contact child protective agencies with their information. These agencies may be expected, however, to screen out inappropriate petitions before submitting them. At later stages of the proceedings, in the agency investigation report under Standard 5.2 *et seq.* and in the court proceedings on contested petitions under Standard 5.3 *et. seq.*, the possibility of secrecy is sharply and necessarily curtailed for informants who provide critical data allegedly to substantiate a petition.

G. Attendance at all proceedings.

In all proceedings regarding the petition, the parents of the child should be entitled to attend, except that the

proceeding may go forward without such presence if the parents fail to appear after reasonable notification (including without limitation efforts by court-designated persons to contact the parents by telephone and by visitation to the parents' last known address of residence within the jurisdiction of the court). The child identified in such petition should attend such proceedings unless the court finds, on motion of any party, that such attendance would be detrimental to the child.

COMMENTARY

Elemental notions of due process require that all affected parties be given adequate opportunity to be present in judicial proceedings affecting important interests such as those at stake here. See *Stanley v. Illinois,* 405 U.S. 645 (1972). It is equally clear, as a matter of general law, that parties' failure to attend proceedings after adequate attempts at notification cannot itself stymie the public purposes to be served by the proceedings. In these proceedings, the need to protect children provides a clear interest mandating that proceedings should go forward if parents fail to attend, after reasonable attempts at notification. The question of proceeding without the presence of the child raises different issues. Even in criminal matters, where the accused's presence at trial is explicitly guaranteed by the Constitution, it is now clear that countervailing interests in the conduct of an orderly trial can justify proceeding without the presence of the accused. *Illinois v. Allen,* 397 U.S. 337 (1970). The child has important personal interests at stake in these proceedings, and those interests might ordinarily justify his/her presence at trial. Nonetheless, some children might be seriously psychologically harmed if they witnessed the testimony regarding their parents' conduct toward them or other stressful aspects of the proceeding. Thus there can be justification for excluding a child from presence at some part, or all, of the proceedings. The laws of twenty-two states currently provide that the child's attendance may be waived at such proceedings. Katz et al., "Child Neglect Laws in America," 9 *Fam. L.Q.* 1, 32-33 (1975). This subsection ensures, however, that such exclusion will not be automatic, and that before any such exclusion is ordered specific proof must be adduced and the court must specifically find that the particular child would be harmed by attending the proceedings. Such proof could consist, for example, of psychological or psychiatric evaluations of the child, *in camera,* on-the-record interviews with the child by the court or other sources calculated to provide specific data regarding the impact of attendance on the child. Further, the subsection provides that exclusion of the child from the proceedings must be initiated on motion of one of the parties, rather than *sua sponte* by the court, so that the moving party will bear the responsibility of placing evidence before the court regarding the need for the child's exclusion.

Paul Piersma, et al., *Law and Tactics in Juvenile Cases,* (Philadelphia: American Law Institute, 1977), 495-498. Reprinted with Permission.

20.2 Notice and Service of Process

Although the Court in *In re Gault,* 387 U.S. 1 (1967), dealt specifically with the notice requirements for a delinquency proceeding, the same requirements should apply in proceedings that affect the parent-child relationship. In fact, the Court stated that due process would "not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issue that they must meet." *Id.* at 34. This very nearly approximates the situation that is presented when parental rights are to be litigated, as when a parent's right to the custody of his child is at stake.

Notice of dependency, neglect, or termination proceedings must be timely and specific. As in delinquency proceedings, inadequate notice may be the basis for the reversal of an adjudication.

The Iowa Supreme Court reversed a juvenile court finding that a child was neglected because the petition violated the due process clause. In *In re Meyer,* 204 N.W. 2d 625 (Iowa 1973), the petition alleged neglect within the meaning of one section of the juvenile code, but the adjudication was based on another section of the code not referred to in the petition. The court found the notice given inadequate to apprise respondents of the charge with sufficient specificity to allow them to prepare a defense. The court stated:

> The legislature has provided four different grounds for adjudication that a child is neglected under subsection 232.2(15). The Code. Although these grounds may to some extent be similar there can be different defenses to the different grounds. It was a denial of due process to respondents to charge neglect under one ground then find neglect under another. *Id.* at 626-27.

A California court reversed a finding of dependency and neglect because the juvenile court considered facts not alleged in the petition. In *In re Neal D.,* 23 Cal. App. 3d 1045, 100 Cal. Rptr. 706 (1972), the child's natural mother attempted to readjudicate an initial finding of dependency and neglect. A social report was used at the new hearing that contained facts not alleged in the initial petition. Citing *Gault,* the court found a clear violation of due process notice requirements. The court stated:

> Fundamental to due process is the right to notice of the allegations upon which the deprivation of custody is predicated, and to notice of the time and place of the hearing. In other words, a parent is entitled to be apprised of the charges he must meet in order to prepare his case, and he must be given an opportunity to be heard and to cross examine his accusers . . . A social study is not a substitute for nor commensurate with a petition alleging jurisdictional facts. *Id.* at 1048, 100 Cal. Rptr. at 708-9.

The West Virginia Supreme Court agreed that the "petition to the juvenile court in cases involving neglected children should set forth the facts constituting the neglect and not merely state conclusions." In *State ex rel. Moore v. Munchmeyer,* 197 S.E.2d 648 (W. Va. 1973), the court held, however, that the petition in the case was sufficient because it was specific enough to inform the child's custodian of the basis upon which the petition rested and so afforded him reasonable opportunity to prepare a defense.

A gross abuse of the right to notice occurred in Nebraska when the parental rights of a couple appearing in court to obtain a divorce were terminated. Quite properly, the Nebraska Supreme Court concluded that even though the unfitness was substantiated by evidence, a

finding to that effect was erroneous because not responsive to any issue raised by the pleadings. *Perkins v. Perkins,* 194 Neb. 201, 231 N.W.2d 133 (1975).

Although notice requirements are similar to those in delinquency proceedings, service requirements differ markedly. The difference stems from a basic difference in the nature of the proceedings. Delinquency proceedings cannot go forward unless the real party in interest (the child) is physically within the jurisdiction and before the juvenile court. The child must necessarily be available within the state in which the proceeding is pending and be susceptible to personal service. On the other hand, dependency and neglect proceedings, which can terminate parental rights permanently or temporarily, can go forward in the absence of parents, even though parents have a constitutionally recognized interest in their children. *Armstrong v. Manzo,* 380 U.S. 545 (1965), and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), mandate only that parents be given adequate notice of the impending proceeding appropriate to the particular case. This right has even been extended to the natural parents of illegitimate children when existing rights will be affected. See, *e.g., Stanley v. Illinois,* 405 U.S. 645 (1972).

Notice in dependency and neglect proceedings may clearly be served upon nonresident parents through means other than personal service. The due process clause requires only that the form of notice used be "reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. at 314. The mere fact that parents are outside the state does not exempt the juvenile court from serving notice upon them, but it does affect the method of service. In *Stubbs v. Hammond,* 257 Iowa 1071, 135 N.W.2d 540 (1965), the Iowa Supreme Court held that failure to serve notice by regular mail upon nonresident parents whose addresses were known voided child custody proceedings in their entirety:

> Notice of the hearing and an opportunity to be heard appropriate to the nature of the case is the most rudimentary demand of due process of law... This is not changed because the father here did not have a known residence in this state. *Id.* at 1075, 135 N.W. 2d at 543.

The Texas Court of Civil Appeals reached an unusual result in *Evans v. Moore,* 472 S.W.2d 540 (Tex. Ct. App. 1971). The court held that in a case in which the mother endorsed upon a dependency and neglect petition a request that her child be declared dependent and neglected, service of citation upon either of the parents was unnecessary. The court also found that service of citation upon the parents was unnecessary, since neither parent resided within the county in which the proceeding was pending at the time the suit was filed. The court held, however, that when a decree is rendered without notice to a parent, "he is entitled to a full hearing later on the issue of whether or not his children were in fact dependent and neglected at the time such decree was rendered." *Id.* at 543. Although the court's language is at odds with *Armstrong,* the holding is not. Despite the assertion that a nonresident parent need not be served with a citation in a dependency and neglect proceeding, constitutional prerequisties are fulfilled when the parent, without notice, is later accorded a full hearing on the issue of dependency. Significantly, the Supreme Court declared in *Armstrong* that "[t]he trial court could have fully accorded this right to the petitioner only by granting his motion to set aside and consider the case anew. Only that would have wiped the slate clean." *Armstrong v. Manzo, supra,* 380 U.S. at 552. It should be noted that *Evans v. Moore, supra,* does not address itself to the question of the child's right to notice and does not imply that a parent or guardian can waive the child's right to notice.

New York Family Court Act, Sections 1036, 1037, 1041 and 1042 with Commentary.

§ 1036. Service of summons

(a) In cases involving abuse, the petition and summons shall be served within two court days after their issuance. If they cannot be served within that time, such fact shall be reported to the court with the reasons thereof within three court days after their issuance and the court shall thereafter issue a warrant in accordance with the provisions of section one thousand thirty-seven. The court shall also, unless dispensed with for good cause shown, direct that the child be brought before the court.

(b) Service of a summons and petition shall be made by delivery of a true copy thereof to the person summoned at least twenty-four hours before the time stated therein for appearance.

(c) If after reasonable effort, personal service is not made, the court may at any stage in the proceedings make an order providing for substituted service in the manner provided for substituted service in civil process in courts of record.

Practice Commentary

by Douglas J. Besharov

Subsection (a) is another example of the special rules and requirements for child abuse cases. If a child abuse summons and petition is not served within the required "two court days," that fact must be reported to the court with the reasons thereof within three court days" after which the court must issue a warrant. This extraordinary provision was largely the consequence of several studies criticizing the New York City Family Court and the New York City Police Department Warrant Squad for delays in serving process and executing warrants in child abuse cases. [*See, e.g.,* Judiciary Relations Committee of the First Judicial Department, *The Report of the Judiciary Relations Committee on the Handling of the Roxanne Felumero Case,* June 19, 1969, pp. 13-16, 31-32.] In practice, in many areas of the state, the court is rarely notified of the lack of service within three court days. And yet, this rather heavy-handed attempt at alleviating court and police inadequacies does seem to have generally expedited the service of process in abuse cases.

Although subsection (b) requires at least twenty-four hours notice before a hearing can be held, the practitioner should remember that § 1023, *supra,* authorizes the issuance of a temporary order prior to the filing of a petiton, and that § 1027, *supra,* authorizes an *ex parte* preliminary hearing after a petition is filed. Thus, this subsection is well intentioned but probably largely meaningless.

Subsection (c) also may seem superfluous since resort to "substituted service" would occur only in situations where the parents' location can not be determined. However, there are numerous situations in which a child is in the custody of the authorities but the parents' whereabouts are unknown. For example, a hospital may have retained custody of a

child whose parents subsequently abandoned the child or disappeared. This section provides an orderly procedure with which to establish jurisdiction over such children. Although the court may choose any one of the several methods of substituted service provided for in the civil practice law and rules [*See,* N.Y. CPLR 308 (1975).], judges almost invariably chose service by mail, to the parents' last known address. Because this section authorizes substituted service only "after reasonable effort" to accomplish personal service, substituted service made before reasonable attempts to make personal service would probably not withstand legal challenge. [*Cf.,* Zivkovic v. Zivkovic, 36 N.Y.2d 216, 366 N.Y.S.2d 627, 326 N.E.2d 299 (1975); N.Y.Fam.Ct.Act § 427(c) (1975).]

§ 1037. Issuance of warrant and reports to court

(a) The court may issue a warrant directing the parent, or other person legally responsible for the child's care or with whom he is residing to be brought before the court, when a petition is filed with the court under this article and it appears that (i) the summons cannot be served; or

(ii) the summoned person has refused to obey the summons; or

(iii) the parent or other person legally responsible for the child's care is likely to leave the jurisdiction; or

(iv) a summons, in the court's opinion, would be ineffectual; or

(v) the safety of the child is endangered.

(b) When issuing a warrant under this section, the court may also direct that the child be brought before the court.

(c) In any case involving abuse, the warrant shall be clearly marked on the face thereof "Child Abuse Case". If a warrant is not executed within two court days of its issuance, such fact shall be reported to the court within three court days of its issuance. Rules of court shall provide that reports of unexecuted warrants issued under this article shall be periodically made to the court.

Practice Commentary

by Douglas J. Besharov

Under subsection (a), the issuance of a warrant is discretionary. The court "may" issue a warrant under the enumerated circumstances. This subsection places no time limit on the warrant's execution, nor does it mandate a report to the court concerning an unexecuted warrant. However, this subsection should be read in conjunction with subsection 1036(a), *supra,* and subsection 1037(c), *infra.* In an abuse case, if a petition and summons can not be served within two court days, the court must issue a warrant. [N.Y.Fam.Ct.Act § 1036(a) (1975).] Of course, in an abuse case, the court may also issue a warrant for the other reasons enumerated in subsection (a), although it is not required to do so.

Subsection (b) indirectly grants the court authority to issue a warrant for the child's production in court.

Subsection (c) continues the priorities accorded process in child abuse cases by requiring a report to the court if a child abuse warrant is not executed within two days. This provision applies whether the court is mandated to issurrants issued pursuant to Article 10 of the Act shall be kept by the clerk of the court each county, who shall make periodic reports to the court of all unexecuted warrants."[22 NYCRR § 2502.5].

§ 1041. Required findings concerning notice

No factfinding hearing may commence under this article unless the court enters a finding:

(a) that the parent or other person legally responsible for the child's care is present at the hearing and has been served with a copy of the petition; or

(b) if the parent or other person legally responsible for the care of the child is not present, that every reasonable effort has been made to effect service under section ten hundred thirty-six or ten hundred thirty-seven.

Practice Commentary

by Douglas J. Besharov

To ensure that a preliminary hearing under section 1027, *supra,* can be held without the parent's presence, this section was amended in 1972 to insert the word "fact-finding" before the word "hearing" in the introductory phrase. Previously, some judges had felt that this section prohibited a preliminary hearing without the parent's presence or at least without reasonable notice to them, refusing to read into the subsection (b) phrase "every reasonable effort" an exception when immediate protective action was necessary. The 1972 amendment clarifies whatever question there was and allows the court to move expeditiously in providing emergency protection to endangered children.

Unfortunately, the resolution of the orginal problem created other problems. There is now no requirement of even "reasonable effort" to notify the parents of the pendency of an application for temporary removal under section 1027, *supra.* [But See N.Y.Fam.Ct.Act § 1022(a) (1975), prohibiting emergency removal before a petition is filed unless the parents are "informed of an intent to apply for an order."] There is now also no requirement of notice of a dispositional hearing, although it should be noted that parents ordinarily do not receive formal notice of a dispositional hearing and instead are notified of its scheduled date by being present at the conclusion of the fact-finding hearing, at which time a date for the dispositional hearing is normally selected.

The effect of the absence of a parent from the hearing and the parent's ability to vacate the resulting disposition is dealt with in section 1042, *infra.*

§ 1042. Effect of absence of parent or other person responsible for care

If the parent or other person legally responsible for the child's care is not present, the court may proceed to hear a petition under this article only if the child is represented by counsel, a law guardian, or a guardian ad litem. If the parent or other person legally responsible for the child's care thereafter moves the court that a resulting disposition be vacated and asks for a rehearing, the court shall grant the motion on an affidavit showing such relationship or responsiblitity, unless the court finds that the parent or other person willfully refused to appear at the hearing, in which case the court may deny the motion.

Practice Commentary

by Douglas J. Besharov

This section should be read in conjunction with section 1041, *supra,* mandating the presence of the parents or at least "every reasonable effort" to notify them prior to the commencement of a fact-finding hearing. Although section 1042 does not specifically say so, the phrase "proceed to hear a petition under this Article" refers to fact-finding hearings and probably to dispositional hearings, but not to preliminary hearings.

The purpose of the first sentence in the section is to ensure that there is a full and orderly exploration of the evidence and facts surrounding the alleged abuse and neglect even if the parents are absent. This is accomplished by having the child represented by counsel, a law guardian, or a guardian ad litem who is expected to pursue and protect the best interests of the child.

The second sentence of this section grants the absent parent the right to request a rehearing. Although parents are frequently absent from fact-finding hearings, demands for rehearings are exceedingly rare. If a rehearing is requested, however, the court is required to grant one *unless* it finds "that the parent or other person willfully refused to appear at the hearing."[*See also* N.Y.Fam.Ct.Act § 1028 (1975).] Since, under standard rules of evidence, it would be presumed that the parent did not willfully refuse to appear, a petitioner would have some difficulty establishing such willful refusal, especially absent personal service of a summons. In any event, even if willful refusal is established, the court may nevertheless grant the motion. "Absent unusual, justifiable

circumstances, one's rights should not be terminated without his presence at the hearing. (In re Cecilia R., 36 N.Y.2d 317, 367 N.Y.S.2d 770, 327 N.E.2d 812." [In re Ana Maria 382 N.Y.S. 2d 107 (App. Div., 2d Dept. 1976).]

Supplementary Practice Commentary

by Douglas J. Besharov

1978

The court must grant a motion to vacate a disposition resulting from a hearing at which the parent or other person legally responsible for the child's care is not present, "unless the court finds that the parent or other person willfully refused to appear at the hearing . . . " Therefore, before refusing to vacate a disposition, the court must "ascertain whether [the] non-appearance was inadvertent or willful . . . " Failure to do so is error and will result in the reversal of orders denying an application to set aside the default. [*In re* Yem, 54 A.D.2d 673, 388 N.Y.S.2d 7, 8 (1st Dept., 1976).] Moreover, the *Yem* case demonstrates the danger of proceeding without the respondent being present to insist on procedural regularity, since the court apparently made its order even though the psychiatic examination and report which it requested were not provided.

District of Columbia Superior Court Neglect Proceeding Rules 13, 14, 16(a).

Rule 13. Summons or Order for Custody Upon Petiton

(a) Issuance. When a petition is filed, the Clerk shall issue summonses as directed by the Division pursuant to D.C.Code § 16-2306. If it should appear to the satisfaction of the Division, by testimony or written request of the Corporation Counsel or by other means, that there are grounds to take the child into custody pursuant to D.C.Code §16-2306(c), then the Division may endorse upon the summons an order that the officer serving the summons shall at once take the child into custody (hereafter "order for custody").

(b) Form.

(1) *Summons.* The summons shall be signed by the Clerk and shall specify a return date. It shall state that the child is alleged to be neglected and shall command the parties named therein to appear before the Division at a stated date, time and place.

(2) *Order for Custody.* The order for custody shall be in the same form as the summons except that it shall be signed by a judge of the Division and shall command that the child be taken into custody at once.

(c) Service or Execution and Return. (1) *By Whom.* A summons may be served by a United States Marshall or by any person empowered to serve a summons in a civil action, but an order for custody shall be executed only by a law enforcement officer.

(2) *Territorial Limits.* A summons or order for custody may be served or executed at any place in the District of Columbia, but not more than one year after the date of issuance.

(3) *Manner.* The order for custody shall be executed by the taking into custody of the child named therein. The officer need not have the order in his possession at the time of the taking into custody, but upon request he shall show the order to the parent, guardian or custodian as soon as possible. If the officer does not have the order in his possession at the time of the taking into custody, he shall then inform the parents, guardian or custodian of the child of the allegation of neglect and of the fact that an order for custody has been issued. The summons shall be served upon a child and his parents, guardian, or custodian by delivering a copy to them personally, or by such substitute for personal service as is provided for in this rule. Service of the summons shall be completed sufficiently in advance of the hearing (preferably at least 48 hours before) so that reasonable opportunity to prepare to plead is afforded. Jurisdiction is conferred if service is effected at any time before the date fixed in the summons for the return thereof.

(4) *Return.* On or before the return day, the person to whom a summons was delivered for service, or to whom an order for custody was delivered for execution, shall make a return thereof to the Division. At the request of the Corporation Counsel made at any time while the petition is pending, an order for custody returned unexecuted and not cancelled may be delivered by the Division to a law enforcement officer for execution, or a summons returned unserved or a duplicate thereof may be delivered to an authorized person for service. At the request of the Corporation Counsel any unexecuted order for custody or any unserved summons shall be returned and cancelled by the Division.

(d) Notice to Institution. If the child is in shelter care the clerk shall promptly notify the Social Services Administration to arrange to have the child brought to the scheduled hearing.

(e) Substitute Service. Where the person to whom a summons is delivered for service is unable to deliver a copy of the summons personally to the party named therein, he may make substitute service by delivering the summons to a person of suitable age and discretion then residing at the dwelling house or usual place of abode of the party commanded to appear.

ADVISORY COMMITTEE COMMENT

This rule is substantially similar to SCR-Juvenile 9(a)-(e).

Rule 14. Alternative Service

(a) Service by Mail.

(1) Where the person to whom a summons is delivered for service is unable to deliver a copy of the summons personally to any party named therein, and is unable to effect substitute service in accordance with SCR-Neglect 13(e) he shall return the summons to the clerk of the Division noting thereon the reasons why he was unable to serve it. Upon written authorization of a judge of the Division, the clerk of the Division may thereafter make service upon any such party by certified mail to said party's last known address or by such other notice as the judge may authorize.

(2) Service of summons upon a party by certified mail, or other authorized notice, shall be deemed to confer jurisdiction over the party if the notice states that:

(A) An initial judicial hearing on a petiton alleging that the child is neglected will be held at a specified time and place;

(B) The presence of the notified party is necessary at said initial judicial hearing;

(C) The notified party is entitled to receive a copy of the petition which sets forth the allegations that the child is neglected at or before said initial judicial hearing;

(D) The notified party is entitled to be represented by counsel at said initial judicial hearing and, if the party is unable to retain counsel, the Division will appoint counsel to represent the party; and

(E) The findings of fact and orders of the Division made at the initial judicial hearing and any subsequent judicial hearings will become final at the final disposition hearing on the petition unless the notified party appears at or before the final disposition hearing.

(3) If service of summons upon a party is made pursuant to section (a), the Division may conduct provisional judicial hearings upon the petition and enter interlocutory orders prior to the final disposition hearing. If the notified party fails to appear at the final disposition hearing, the findings of fact and the interlocutory orders previously made shall become final without further evidence. If the notified party appears at or before the final disposition hearing, all previous findings and orders shall be vacated and disregarded and the Division shall proceed with an initial judicial hearing on the allegations of the petiton as otherwise provided for in D.C.Code § 16-2308 and these rules, unless the Corporation Counsel can show to the satisfaction of the judge that the party had actual notice of any previous hearing and willfully failed to appear.

(b) Notification in Lieu of Service. Oral notification by a judge of the Division during a judicial hearing or written notification given in person by an authorized representative of the Division to any person present shall constitute legal notice in lieu of service. A copy of any written notification given pursuant to this subsection shall be placed in the appropriate case record promptly.

ADVISORY COMMITTEE COMMENT

Section (a) is substantially similar to SCR-Juvenile 9(f). It is especially appropriate in neglect cases where a child's parents may have disappeared or permanently abandoned him, yet where custody decisions about the child must be made. The rule enables the Division to order the best possible alternative service, appropriate to the situation, thus protecting insofar as possible the parents' rights. If the parents fail to appear by the time of the disposition hearing despite notice by alternative service, the Division may nevertheless act in the child's best interest and enter dispositive orders. Section (b) is identical to SCR-Juvenile 9(g).

Rule 16. The Factfinding Hearing

(a) Necessary Parties. The judge shall begin the factfinding hearing by determining whether all parties are present and whether lawful notice of the hearing has been given, and shall have these facts recorded. If the parents, guardian or custodian are present but have not retained counsel, the judge shall adjourn the hearing to a date certain in order that counsel may be appointed. If the parents, guardian or custodian have been given lawful notice but have failed to appear, the judge may proceed in their absence if counsel for the parents, guardian or custodian is present at the factfinding hearing.

Washington State Juvenile Court Forms

SUPERIOR COURT OF WASHINGTON—COUNTY OF _____

JUVENILE

Dependency of { CASE NO. / NOTICE AND SUMMONS (DEPENDENCY)

State of Washington to:

Name:
Address:

I. NOTICE OF HEARING

1.1 You are given notice that a dependency petition was filed with this court, a copy of which is attached, in which it is alleged that the above-named child is dependent.

1.2 A hearing will be held:
On:
(Date) (Time)

At: Court, Room/Department:

Address:
(Street, City)

1.3 The purpose of the hearing is to hear and consider evidence on the petition.

1.4 The petition (does) (does not) begin a process which, if the child is found dependent, may result in permanent termination of the parent-child relationship.

II. SUMMONS TO APPEAR

YOU ARE SUMMONED to appear at the hearing at the time and place indicated.

[ ] The parent, guardian or custodian having custody or control of the child is directed to bring the child to the hearing.

IF YOU FAIL WITHOUT REASONABLE CAUSE TO SO APPEAR, YOU WILL BE SUBJECT TO PROCEEDINGS FOR CONTEMPT OF COURT.

III. ADVICE OF RIGHTS

3.1 You have the right to talk to a lawyer and will not have to pay for one if you cannot afford it.

3.2 A lawyer can look at the social and legal files in your case, talk to the case worker, tell you about the law, help you understand your rights and help you at trial.

Dated: _____ By direction of the Honorable:

_____
(Judge/Court Commissioner)

_____
(Clerk)

_____
By (Deputy Clerk)

SUPERIOR COURT OF WASHINGTON—COUNTY OF _____

JUVENILE

Dependency of

CASE NO.

AFFIDAVIT OF SERVICE OF NOTICE AND SUMMONS (DEPENDENCY)

State of Washington } ss
County of

The undersigned on oath states that:
1. I am: a person over 21 years of age and not a party to the proceedings.
2. I served: with the following documents:
3. Method of service:
[ ] Personally:
Date: Time:
Address:
[ ] By mail:
Date:
Address:

(Affiant)

(Title/Agency)

Sworn and subscribed on:

Date: _____.

(Clerk or Notary Public in and for Washington)

Residing at _____

SUPERIOR COURT OF WASHINGTON—COUNTY OF _____

JUVENILE

Dependency of

CASE NO.

MOTION FOR ORDER TO PUBLISH NOTICE AND SUMMONS

I. MOTION

The undersigned moves for an Order to Publish Notice and Summons in this case based on:
[ ] a dependency petition filed in this case
[ ] the below-verified statement of:

Dated: _____.

Signature

Title/Agency

II. VERIFIED STATEMENT

State of Washington
ss
County of
The undersigned on oath states that:
[ ] the natural or legal guardian of the child is a non-resident of this state;
[ ] the name or place of residence or whereabouts of the child's natural or legal guardian is unknown;
[ ] after due diligence, the serving officer has been unable to make service and a copy of the petition has been mailed to the child's natural or legal guardian's last known residence.

(Affiant)

(Title/Agency)

Sworn and subscribed on:

Date: _____.

(Notary Public in and for Washington)

Residing at _____

SUPERIOR COURT OF WASHINGTON—COUNTY OF _____

JUVENILE

Dependency of

CASE NO.

ORDER TO PUBLISH NOTICE AND SUMMONS

I. BASIS

Based on:
[ ] a dependency petition filed with this court.
[ ] the verified statement of:
it appears that:
[ ] the natural or legal guardian of the child is a non-resident of this state;
[ ] the name or place of residence or whereabouts of the child's natural or legal guardian is unknown;
[ ] after due diligence, the serving officer has been unable to make service and a copy of the petition has been mailed to the child's natural or legal guardian's last known residence.

II. ORDER

IT IS ORDERED that the Notice and Summons in this matter be published pursuant to RCW 13.34.080.

Dated: _____.

(Judge/Court Comissioner)

C. Right to Specific Allegations and Other Information

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect — Tenatative Draft* (New York: Ballinger Publishing Co., 1977), 5.2F. Reprinted with Permission.

5.2F. Report of investigation.

1. The investigating agency's report should include its recommendations and information specifically supporting such recommendations on the following matters:

a. a statement of the specific harm or harms, as defined by Part II and found in the given case intervention is designed to alleviate;

b. a description of the specific programs and/or placements, for both the parents and the child, which will be needed in order to prevent further harm to the child, the reasons why such programs and/or placements are likely to be useful, the availability of any proposed services, and the agency's plans for ensuring that the services will be delivered;

c. a statement of the indications (*e.g.*, specific changes in parental behavior) that will be used to determine that the family no longer needs supervision or that placement is no longer necessary;

d. an estimate of the time in which the goals of intervention should be achieved or in which it will be known they cannot be achieved.

e. In any case where removal from parental custody is recommended, the report should contain:

(1) a full description of the reasons why the child cannot be adequately protected in the home, including a description of any previous efforts to work with the parents with the child in the home, the "in-home treatment programs," *e.g.*, homemakers, which have been considered and rejected, and the parent's attitude toward placement of the child;

(2) a statement of the likely harms the child will suffer as a result of removal (this section should include an exploration of the nature of the parent-child attachment and the anticipated effect of separation and loss to both the parents and the child);

(3) a description of the steps that will be taken to minimize harm to the child that may result if separation occurs.

f. If no removal from parental custody is recommended, the report should indicate what services or custodial arrangements, if any, have been offered to and/or accepted by the parents of the child.

2. The investigating agency should be required to provide its report to the court and the court should provide copies of such report to all parties to the proceedings.

COMMENTARY

The investigative report will typically provide the most extensive critical behaviorial data on which any state intervention to protect the child will be based. It is therefore essential that these data are as complete and helpful as possible. This subsection accordingly requires detailed specificity in its data and findings well beyond the typical highly generalized "boilerplate" language about "less than optimal child-rearing environment" that currently afflicts too many agency-to-court reports in these matters. The subsections of this provision spell out precisely what data and what predictions are required for any rational judgment that state intervention might be required. The subsection further provides that, if no wardship is recommended, the report should nonetheless specify what services have been offered and accepted by the parents, in order to give some protection against unduly coerced acceptance of services by parents as a price of avoiding a court wardship recommendation. If, that is, the investigative report indicates that no wardship is recommended but that the parents have accepted extensive and onerous intrusions into their family life, counsel for both parents and child and the court should be alerted to the possibility that these services were not free from coercion and that some court inquiry is more properly called for.

(See STANDARDS RELATING TO ABUSE AND NEGLECT, 5.3C, in Section IV. A.)

District of Columbia Superior Court Neglect Proceeding Rule 12.

IV. Petition; Summons; Alternative Service

Rule 12. Petition

(a) Contents. In addition to a plain and concise statement of facts that would give the Division jurisdiction if established at a factfinding hearing, the petition shall state:

(1) the name, birth date and residence address of the child;

(2) the names and residence addresses of the child's parents, or his legal guardian, if there be one, or the person or persons having custody and control of the child, or the nearest known relative, if no parent, guardian or custodian can be found;

(3) whether the child is hospitalized or in shelter care, and, if so, the place of hospitalization or shelter care and the date he was placed there;

(4) whether the child or other members of the child's family have been or are the subject of division proceedings;

(5) when any of the facts herein are not known, the petition shall so state.

(b) Bill of Particulars. The Division may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before the initial hearing or within ten days after the initial hearing or at such later time as the Division may permit. When necessary to inform the moving party of the precise nature of the allegations of neglect, the Division may order the Director of Social Services to file the bill of particulars. A copy of the bill of particulars shall be served on all parties. A bill of particulars may be amended at any time subject to such conditions as justice requires.

New York Family Court Act, Section 1031(a) with Commentary

§1031. Originating proceeding to determine abuse or neglect

(a) A proceeding under this article is originated by the filing of a petition in which facts sufficient to establish that a child is an abused or neglected child under this article are alleged.

Practice Commentary

by Douglas J. Besharov

Under subsection (a), Article 10 proceedings are initiated by the "filing of a petition." Generally, a civil proceeding in New York State commences with a service of a summons on the defendant. [N.Y. CPLR 304 (1972).] Although the filing of a complaint is a necessary part of the preliminary proceedings, the court does not take jurisdiction over the defendant until service of process has been properly accomplished. On the other hand, a criminal action in New York State commences with the filing of "an accusatory instrument against the defendant in a criminal court." [N.Y.CPL § 1.20(17) (1971); § 100.05 (1975).] Thus, the commencement of an Article 10 proceeding, like an Article 7 proceeding, is more like the commencement of a criminal proceeding than a civil proceeding.

The most important element of subsection (a) is that specific facts sufficient to establish that a child is abused or neglected must be alleged in the petition. Thus, general or conclusory pleadings are prohibited. Requiring the allegation of "facts" was in part derived from the original language of N.Y.Fam.Ct.Act repealed § 331(b) (ii) (1963), which required that "acts of parental improper guardianship should be alleged, specifying the occasions on which this was observed."

The petition serves two primary and interrelated functions. As a court document, it recites the reasons why the court has jurisdiction and venue over the case and describes the allegations of abuse and neglect made against the parents. As a communication to the parents and to the law guardian, it apprises them of the specific acts alleged to have been committed [*Cf.*, In re Anonymous, 37 Misc.2d 827, 238 N.Y.S.2d 792 (Fam.Ct. Nassau Co.1962)] so that a defense can be prepared [*Cf.*, In re Gault, 387 U.S. 1 (1967).] and a reasoned exploration of facts accomplished.]*See* generally, Besharov, *Juvenile Justice Advocacy* 189 et seq. (1974).]

Hence, the person preparing the petition must have a thorough understanding of the facts underlying the court's asserted jurisdiction and must be able to write them in a form that is concise, understandable, and legally sufficient. In many places, the petition is prepared by a court clerk or a petitioner, such as a police officer, teacher, social worker, or a probation officer, neither of whom is ordinarily skilled in the niceties of legal draftmanship. As a result, in the past courts have tested the sufficiency of petitions leniently. [*Cf.*, In re David L., 64 Misc.2d 360, 314 N.Y.S.2d 708 (Fam.Ct. Schuyler Co. 1970).] A growing number of localities are now assigning attorneys, either from the office of the county attorney or corporation counsel or from a special legal staff in the court itself, to draft petitions.

Unlike the official petition forms for Article 7, which, in response to cases such as In re S., 73 Misc.2d 187, 341 N.Y.S.2d 11 (Fam.Ct. Richmond Co.1973), now have a standard paragraph reciting that any allegations made upon information and belief are supported by filed statements and depositions of witnesses, the official petition forms for Article 10 do not contain such a requirement. Indeed, they implicitly authorize the filing of information and belief petitions. [Family Court Act petition forms, forms 10-6, 10-7 (July, 1970).] The only provision of Article 10 which seems to require the verification of court papers is found in section 1062, *infra*. Moreover, this writer was unable to find any case decision requiring affidavits or depositions to support child protective petitions based on information and belief, although, in 1954, one Supreme Court justice questioned the use of protective custody based solely on the information and belief allegations in a petition. [Application of Jones, 206 Misc. 557, 134 N.Y.S.2d 90, 92 (Sup.Ct. Monroe Co.1954), stating, in relation to the decision to place the child in protective custody: "This court is disturbed by the informality of the proceeding in the Children's Court, at least to the extent of...the failure to have an affidavit of fact by some person possessed of direct knowledge concerning the charges to support the petition."] Although the filing of unsupported information and belief petitions is common, the better practice would be to attach relevant supporting documents. And the practitioner can assume that such a requirement may soon be applied on Article 10 procedures.

Extracted from Sample Petition filed by Support Center for Child Advocates, Inc., Philadelphia, Pa. *How to Handle a Child Abuse Case; A Manual for Attorneys Representing Children* **(1978).**

COMMONWEALTH OF PENNSYLVANIA
JCJC-1 1-80

IN THE COURT OF COMMON PLEAS _____ JUDICIAL DISTRICT

_____ COUNTY

JUVENILE PETITION

In the interest of _____ (A MINOR) Date of Birth _____ Juvenile No. _____

To the Honorable Judge of said Court

Petitioner _____ (NAME/TITLE), respectfully represent that, the said child, _____

resides at _____ and is alleged to be a delinquent/dependent child; if delinquency is alleged, the child is in need of treatment, supervision or rehabilitation. It is within the jurisdiction of the Court and in the best interest of the child and the public that this proceeding be brought before the Court for the following reason(s).

We are filing a petition requesting that be adjudicated dependent under the Juvenile Act and/or abused under the Child Protective Services Act. On November 24, 1977, the child's mother and her boyfriend, brought to the Emergency Room at St. Christophers Hospital Phila., Pa where he was found to have myoglobinuria, believed to be caused by a recent muscle trauma. Dr. , a staff member at St. Christophers Hospital filed a CY-47 with DPW on November 28, 1977 and the child was discharged on Nov. 30, 1977. The mother did not give an explanation for the trauma until a subsequent hospitalization at Childrens Hospital on December 13, 1977 for seizures, retinal hemorrhages and subdural hematoma, necessitating surgery for relief of hydrocophalus which Ms. explained as being the result of a fall down some end steps in October, 1977. This explanation has been unsubstantiated. On January 5, 1978, was released to his mother who agreed to meet with Presbyterian Hospital, Outreach Service for follow up treatment but never followed through. (Continued on next page.)

FATHER'S NAME AND ADDRESS ☐ UNKNOWN	MOTHER'S NAME AND ADDRESS ☐ UNKNOWN
SPOUSE'S NAME AND ADDRESS (IF APPLICABLE)	GUARDIAN'S NAME AND ADDRESS ☐ UNKNOWN
IF THE NAMES & ADDRESSES IN ABOVE ITEMS ARE UNKNOWN OR DO NOT RESIDE WITHIN THIS COMMONWEALTH, GIVE NAME OF A KNOWN ADULT RELATIVE RESIDING NEAREST TO THE LOCATION OF THIS COURT.	RELATIONSHIP ADDRESS
DATE/TIME TAKEN INTO CUSTODY BY POLICE AM PM	DATE/TIME ADMITTED TO DETENTION AM PM
IS CHILD PRESENTLY DETAINED? ☐ YES ☐ NO	IF YES, WHERE?

Wherefore, Petitioner prays your Honorable Court to inquire into the alleged delinquency/dependency of the above juvenile and of the matters alleged, and to make such order as deemed appropriate.

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF _____

_____ BEING DULY SWORN ACCORDING TO LAW DEPOSES AND SAYS THE FACTS SET FORTH ABOVE ARE TRUE AND CORRECT TO THE BEST OF THE PETITIONER'S INFORMATION KNOWLEDGE AND BELIEF.

_____
PETITIONER/TITLE

Continued from Juvenile Petition

[Name of mother] could not be reached by telephone by , Social Worker at Children's Hospital on January 9, January 10 or January 13, 1978 at the telephone number and address given by [name of mother] and [name of mother] was not available for a scheduled home visit by [name of social worker] and the Presbyterian Outreach worker on Friday, January 13, 1978. The residents at the address given stated that [name of mother] was staying at the home of a cousin in with no known address or telephone.

On January 16, 1978, [name of mother] brought [Name of child] for a scheduled clinic appointment for treatment of the head injury. A second degree burn was discovered on the left leg and a swelling of the forehead from a recent head trauma was observed by the attending physician. The explanation of the burn being caused from an electric heater was unsubstantiated. A CY-47 was filed by [name of doctor]. Mother had not sought medical care for the burn prior to the clinic appointment.

[Name of child] was in need of surgery on February 1, 1978 and [name of mother] could not be reached by either , DPW social worker or SCAN social worker for two days. When finally contacted, [name of mother] did not come into the hospital but gave verbal permission for surgery over the telephone.

During hospitalization, Mother did not follow medical instructions and allowed the child to walk on the severe burn. In addition, Mother failed to comply with her agreement with both Children's Hospital and Seashore House staff to regularly visit the child, care for medical needs and participate in scheduled parenting education services.

[Name of mother] has stated to , Children's Hospital social worker that she has hit with a belt in the past and he sometimes falls down when she hits him. Medical and social work staff have attempted to instruct [name of mother] about the extreme vulnerability of due to his head trauma and to offer parenting and medical instructions. [Name of mother] has not followed through and on February 23, rejected any services from SCAN. On February 13, 1978, was transferred to Children's Seashore House where he presently resides.

[Name of mother] living situation is unstable. She vacillated between an address at and a male friend's apartment at . The house at is occupied by at least seven other persons besides [name of mother] and her child and [name of mother] and her child are required to sleep together on a sofa.

[Name of mother] is uncertain as to whether she will be living in her brothers home at or with , her boyfriend's in

[Name of mother] failed to visit between January 30 and February 3, 1978 while he was hospitalized at CHOP contrary to her agreement with the hospital to regularly visit the child.

On February 28, 1978 [name of mother] stated to DPW social worker and social worker at Children's Seashore House that she planned to take to Georgia for a month as soon as he was released to her.

On March 3, on petition from Carol Schrier, Esquire and [name of child advocate], Esquire, Court appointed counsel for , [name of judge] issued a temporary restraining order. On March 6, 1978, a detention hearing was held and temporary commitment was given to DPW. A full hearing was set for 3/16/78.

Best that be committed to DPW with Mother required to follow the special instructions and keep clinic appointments scheduled by the attending physician. In addition Mother . . .

D. Privilege Against Self-Incrimination

Paul Piersma, et al., *Law and Tactics in Juvenile Cases,* (Philadelphia: American Law Institute, 1977), 504-506. Reprinted with Permission.

20.5 The Privilege Against Self-Incrimination

A juvenile's right to invoke the privilege against self-incrimination in any proceeding that could result in institutionalization has been assured by *In re Gault,* 387 U.S. 1 (1967). A more difficult problem is presented when a parent invokes the privilege in a child neglect, dependency, or termination proceeding. Admissions made in these hearings could conceivably be used against the parent in a subsequent criminal prosecution for child abuse, but the proceedings themselves are traditionally considered civil.

The Supreme Court has consistently held that the privilege against self-incrimination can be asserted in any proceeding—civil, criminal, administrative, judicial, investigatory, or adjudicatory. *Maness v. Meyers,* 419 U.S. 449 (1975); *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964). The basic rationale for the existence and use of the privilege is to protect against the compulsion to make admissions that could be used in a subsequent criminal prosecution. It is required, however, that the threat of prosecution be genuine. *United States v. Seewald,* 450 F.2d 1159 (2d Cir. 1971).

It can be argued that the severe consequences of neglect hearings warrant the provision of Fifth Amendment protection, notwithstanding the civil nature of the proceeding. The Supreme Court has recognized that substance cannot be disregarded "because of the feeble enticement of a civil label of convenience." Accord, *Breed v. Jones,* 421 U.S. 519, 529 (1975); *McKeiver v. Pennsylvania,* 403 U.S. 528, 541 (1971); *In re Winship,* 397 U.S. 358, 365 (1970); *In re Gault,* 387 U.S. 1, 50 (1967). In *Danforth v. State Dep't of Health and Welfare,* 303 A.2d 794 (Me. 1973), the court found little substance to the fact that Maine had determined neglect proceedings to be civil when it chose to accord parents the right to counsel, a right necessary in part to prevent a parent from making "self-incriminatory statements that could result in a criminal prosecution." *Id.* at 800.

Unfortunately, recent decisions in cases affecting the parent-child relationship have not accepted the argument as it applies to the privilege against self-incrimination and have instead compelled parents to testify. In *People v. Davis,* 11 Ill. App. 3d 775, 298 N.E.2d 350 (1975), a mother was forced to testify in a dependency hearing on the theory that her constitutional rights were not violated because she was not threatened with loss of liberty or other punishment. The court, however, stated that after the mother took the stand, an objection could have been made to any question that would have tended to incriminate her or subject her to possible prosecution for a criminal offense. The civil nature of the proceeding was cited to restrict the use of the privilege until after the witness was sworn and then to allow invocation only in response to potentially incriminating inquiries.

Another mother was required to testify at a hearing on a petition to permanently deprive her of custody in *In re Welfare of Green,* 14 Wash. App. 939, 546 P.2d 1230 (1976). The court held that forcing her to testify did not violate her privilege against self-incrimination, despite her argument that "permanent deprivation is such a 'grave' and 'fundamental' consequence that the hearing should be viewed as tantamount to criminal proceedings for the purposes of the Fifth Amendment right." *Id.* at 944, 546 P.2d at 1233. The ability to invoke the privilege was deemed to rest on the consequences of the response,

rather than on the nature of the proceeding; the civil nature of the hearing restricted the assertion of the privilege to a question-by-question basis.

In civil proceedings, a party must testify if called as a witness, unlike criminal proceedings in which defendants may invoke the privilege without taking the stand. Although the exercise of the privilege in a civil proceeding technically carries no inference of guilt, the failure to contradict adverse evidence as a result of invoking the privilege may allow the trier of fact to infer that this evidence is true. This possibility arises because of the obligation of a party to a civil action to refute evidence contrary to his position in order to obtain a judgment. See 2 Wigmore, Evidence § 285, 290 (3d ed. 1940).

Consequently, the practical effect of invoking the privilege may be to free a parent from making statements that would lead to a criminal prosecution, yet at the same time jeopardizing the parent's chances of retaining custody of his child. It would appear then that the only effective manner in which to protect the parent is to press for an acceptance of the general privilege against self-incrimination.

Use of the general privilege has been accepted in civil commitment hearings, even though they have traditionally been considered strictly civil in nature. See, e.g., *Millard v. Harris,* 406 F.2d 964, 973 (D.C. Cir. 1968); *Lynch v. Baxley,* 386 F. Supp. 378, 394 (N.D. Ala. 1974). In reaching its conclusion in *Lynch,* the court reasoned that "[t]he gravity of the consequences flowing from adjudication of the need for commitment, compels the application of procedural safeguards comparable in most instances to those required in criminal proceedings." *Id.* at 394. In *Gault,* the Supreme Court employed similar reasoning to extend the privilege to those charged with delinquency in the juvenile justice system.

The consequences of neglect, dependency, or termination cases are harsh: a parent risks termination of his fundamental right to raise his child and possible subsequent criminal prosecution. The child faces removal from his home and perhaps lengthy institutionalization. Because of the severity of the consequences of these proceedings, the "civil label" attached to these proceedings should not inhibit the extension of the privilege to this area of the juvenile justice system.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, ***Standards Relating to Abuse and Neglect—Tentative Draft*** **(New York: Ballinger Publishing Co., 1977), 5.2D, E. Reprinted with Permission.**

5.2D. *Sources and means for obtaining information.*

Pursuant to Standard 5.2C., the court may approve the following sources of and means for obtaining information:

1. interviews and/or psychological and physical examinations and tests of the child;
2. interviews and/or psychological and physical examinations and tests of the parents;
3. interviews with other members of the child's family and environment;
4. visitation and observation in the child's home;
5. interviews with school personnel and access to school records regarding the child;
6. interviews with medical and psychological professionals who have diagnosed or treated the child and relevant records regarding such diagnoses or treatment.

The child's attorney should be given reasonable notification and opportunity to attend interviews with the child or tests on the child. The parent's attorney should be given reasonable notification and opportunity to attend interviews with the parent or tests of the parent.

COMMENTARY

This subsection specifies the sources and means of information that the agency may pursue in its investigation. It is not envisioned that in every case, each of these sources and means of information will be necessary, but rather—to satisfy 5.2 C. *supra*—that the investigating agency must make a showing in each case of the necessity for consulting each source and means indicated. Accordingly, the agency in its plan must indicate why each proposed source is necessary to its investigative purposes, including what information is expected from the source and why that information is not adequately available from other sources which might be less intrusive or less likely to unsettle the child or his or her family. A similar indication is required for each proposed means of obtaining information. A proposed visit to the child's home, for example, must be justified by showing that relevant information would be obtained by this means that could not be obtained by less intrusive means, or that a home visit would be less unsettling to the particular child and family than examination conducted in a strange environment. Similarly, proposed access to records of any psychotherapeutic treatment of the child must be justified by showing that the breach of the child's confidences will not be detrimental to future therapy and that no alternative comparable source of information is available.

Subsection D. 2. of this standard specifically permits the agency to have investigative access to the child's parents. This provision thus rejects the proposition that the constitutional right against self-incrimination is available to parents named in an endangerment proceeding. This conclusion does not rest on a labeling exercise asserting that these proceedings are "civil" rather than "criminal." The reasoning of the Supreme Court's decision in *Gault* correctly identifies such a labeling argument as question-begging. Adjudicating the child endangered, even though such decision would not rest on parental fault, would impose both stigma and loss on parents not dissimilar to the consequences of criminal conviction. The specific state interests in child protection provide, however, countervailing considerations that are not applicable in criminal proceedings. Because parents may possess information about their child which uniquely would demonstrate that child's need for state protection (or may control such information, as with medical or

school records), the state's legitimate interest in child protection would be unduly obstructed by giving parents an unqualified right to refuse access to that information. This consideration does not lead to the conclusion that the constitutional norms have no applicability here, but only that these norms have less absolute force than in ordinary criminal proceedings. Because the specific state interest in child protection is the reason for the lessened force of the constitutional right against self incrimination for the parent, the necessity for access to parental information to vindicate that specific state interest must be shown with particularity in each case.

The basic rationale here, as elsewhere in these standards, for refusing to apply criminal law standards wholesale to child protective proceedings comes from the necessity to balance parental rights and the interests of providing state protection to specific, identifiable children. Although the parents' interests in avoiding state intrusions is directly parallel to the interests of criminal defendants in avoiding the loss of freedom and imposition of moral stigma, the countervailing state interest in child protective proceedings is more concrete and immediate than the generalized interests of protecting public safety at stake in criminal proceedings. Compare *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), and Burt, "Forcing Protection on Children and Their Parents: The Impact of *Wyman v. James,*" 69 *Mich. L. Rev.* 1259 (1971). This subsection specifies that the child's or parents' attorney may be present at interviews of their respective clients to safeguard the interests of their clients. Such presence would not inappropriately interfere with the information-gathering purpose of the interview and would protect against overreaching conduct by the investigative agency.

5.2E. *Sanctions for refusal to provide information.*

If any person refuses to provide the sources of or means for obtaining information specified in the plan approved by the court pursuant to Standards 5.2 C. and D., the investigating agency may report this refusal to the court. Upon receiving such report, the court should be required to notify the alleged refusing person and provide reasonable opportunity for such person to respond to such allegation. If the court finds that there was no adequate justification for such refusal, it may order any of the following:

1. where access to the child, as provided in Standard 5.2D. 1., has been refused, the court may authorize the investigating agency to take custody of the child for a time no longer than reasonably necessary for investigative purposes, but in no event should custody of the child be taken for a longer consecutive period than eight hours nor should custody be maintained between 8 p.m. and 8 a.m.;

2. where access to sources of or means for obtaining information as provided in Standard 5.2D. 2. and 5.2D. 3. has been refused, the court may direct that such refusal is admissible toward proving the allegations in the petition relevant to such sources of or means for obtaining information in subsequent proceedings on such petition;

3. where access to information as provided in Standard 5.2 D.4. and 5.2 D.5. has been refused, the court may subject the person having custody of such information to civil contempt penalties until such information is provided to the investigating agency.

COMMENTARY

This subsection provides sanctions for refusal to grant access to a source or means of information in a court-approved investigation plan. If the investigative agency reports such refusal, the court should first give the refusing person an opportunity to justify such refusal. This does not mean that the court in every case must reopen the question whether the particular source or means should have been approved initially in the investigative plan. But if the court finds for example, that problems were created by the investigative plan which were not adequately anticipated when the initial plan was approved, this might justify reexamination of the propriety of investigative access to the source or means of information. Alternatively, it may be that a parent claims the investigative agency unjustifiably scheduled visits in conflict with employment or other obligations.

If the court does, however, find that the refusal of access was not justified, the sanctions available to it are limited by this subsection. If access to the child has been refused, the court can authorize the agency to take custody of the child only for the limited time necessary to complete its investigation, and in any event only during regular waking hours and never overnight in order to minimize the emotional detriment to the child of being taken from his/her parents' custody. If the parents refuse themselves to give information, the court is not authorized to invoke contempt penalties. Rather, a tempered sanction is provided that the court may draw negative inferences from parental silence. This tempered sanction strikes a middle ground between giving the constitutional right against self-incrimination absolute effect and giving it no effect. As discussed in the Commentary to 5.2 D., *supra,* that right should not be fully applicable for parents in child protective proceedings, but neither is the right wholly inapt in this context; thus some tempered application of the right is appropriate. This tempering is not required, however, when access to information is refused by school personnel or medical personnel; for such refusal, the full weight of civil contempt sanctions is appropriate.

E. Informing Parents of Rights

(See CALIFORNIA JUVENILE COURT DESKBOOK, Sections 7.28, 8.27, and 9.28, in Section IV. B.)

California Juvenile Court Rules, Chapter 4, Detention Hearings, Part II, Cases Petitioned Under Section 300 (dependency cases), Rule 1335.

Rule 1335. Commencement of hearing—advice of hearing rights; admission of allegations

(a) [Advice of hearing right (§§ 311(b), 319)] After giving the advice required by rule 1334, the court shall next inform the parent or guardian of each of their following rights:

(1) The right to assert the privilege against self-incrimination.

(2) The right to confront and to cross-examine the persons who prepared any police reports, probation or social worker reports or other documents submitted by the petitioner, as well as any witness examined by the court during the detention proceedings.

(3) The right to confront, and to cross-examine at any subsequent hearings any witness that may be called to testify against the parent or guardian at those hearings.

(4) The right to use the process of the court to compel the attendance of witnesses on behalf of the parent or guardian.

(5) The right to present to the court whatever evidence the parent or guardian, or their counsel, desires to present.

(b) [Admission of allegations (§ 334)] If the parent or guardian indicates a desire to admit the allegations of the petition at the detention hearing, the court may accept the admission pursuant to rule 1361(g). When accepting an admission to the allegations of the petition by the parent or guardian, the court shall follow the procedures under rule 1364 and proceed thereafter according to the rules applicable in jurisdiction hearings.

Sources: Welf. & Inst. Code §§ 311(b), 319, 334, 341.
References: CEB §§ 48, 49, 51, 184; Deskbook §§ 7.13, 7.18, 7.23; see also §§5.15, 5.16, 7.3, 7.8, 8.1.

ADVISORY COMMITTEE COMMENT

Subdivision (a), relating to the rights of the parent or guardian at the detention hearing, is based on sections 311(b) and 319.

At the detention hearing, or at any time thereafter, a parent or guardian may admit in court the allegations of the petition and thereby waive the jurisdiction hearing (rule 1361(g); cf. Welf. & Inst. Code § 334). Subdivision (b) directs the court to follow the procedures prescribed in rule 1364, relating to advice of trial rights and admission of allegations of the petition at the detention hearing.

California Juvenile Court Rules, Chapter 7 Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Rule 1364.

Rule 1364. Commencement of hearing—advice of trial rights; admission of allegations

(a) [Trial rights explained (§ 341; cf. §§ 349, 702.5)] After giving the advice required by rule 1353, the court shall next advise the parent or guardian of each of their following rights:

(1) The right to a trial by the court on the issues raised by the petition;

(2) The right to assert the privilege against self-incrimination;

(3) The right to confront, and to cross-examine, all witnesses that may be called to testify against the parent or guardian;

(4) The right to use the process of the court to compel the attendance of the parent or guardian;

(5) The right to use the process of the court to compel the attendance of witnesses on behalf of the parent or guardian.

(b) [Admission of allegations; prerequisites to acceptance] The court shall then inquire whether the parent or guardian intends to admit or deny the truth of the allegations of the petition. If the parent or guardian neither admits nor denies the truth of the allegations, the court shall indicate for the record that the parent or guardian does not admit the truth of the allegations. Before accepting an admission that the allegations of the petition are true, the court should satisfy itself that the parent or gurardian understands the trial rights enumerated in subdivision (a), and that the parent or guardian is admitting the petition because that person did in fact commit the acts alleged.

(c) [Parent or guardian must admit] An admission by the parent or guardian shall be made personally by the parent or guardian.

(d) [Findings by court (§ 356)] If the court is satisfied that the admission should be received, the court shall then ask whether the parent or guardian admits or denies the truth of the allegations in the petition. Upon admission, the court shall make findings as to each of the following, noted in the minutes of the court:

(1) That notice has been given as required by law;

(2) The birthdate and county of residence of the minor;

(3) That the parent or guardian has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian's behalf;

(4) That the parent or guardian understands the nature of the conduct alleged in the petition and the possible consequences of an admission;

(5) That the admission by the parent or guardian is freely and voluntarily made;

(6) That there is a factual basis for the parent or guardian's admission;

(7) That those allegations of the petition as admitted are true as alleged; and

(8) That the minor is a person described by either subdivision (a), (b), (c), or (d) of section 300 of the Welfare and Institutions Code.

(e) [No contest] In lieu of admitting the allegations of the petition, the parent or guardian may enter no contest concerning the truth of the allegations, subject to the approval of the court. For purposes of these rules, the procedure for and legal effect of an entry of no contest shall be the same as that of an admission, but the entry of no contest may not be used against the parent or guardian as an admission in any other action or proceeding.

Source: Welf. & Inst. Code §§ 341, 356.

References: Deskbook §§ 8.32, 8.33, 8.35, 8.45; see also §§ 7.13, 8.10; Witkin §§ 305, 306.

ADVISORY COMMITTEE COMMENT

Subdivision (a), relating to the trial rights to be explained to the parent or guardian, is based on procedures suggested in the Deskbook section 8.45 and is analogous to the rights explained to the minor in section 601 and 602 proceedings. (See section 702.5.) The right to compel the testimony of witnesses, referred to in subdivision (a) (3), is based upon section 341.

Subdivision (b), relating to the prerequisites to accepting an admission by the parent or guardian, is based on procedures suggested in the Deskbook section 8.35. The *Boykin-Tahl* principles applicable in section 601 and 602 proceedings (*In re Michael M.* (1970) 11 Cal.App.3d 741) are not applicable to section 300 cases. It would seem that the court should nevertheless satisfy itself and make findings that the parent or guardian understands certain trial rights and that there exists a factual basis for an admission before the admission is accepted.

Subdivision (c), requiring that an admission be made personally by the parent or guardian, is based on a procedure suggested in the Deskbook section 8.35. (Cf. *In re Francis W.* (1974) 42 Cal.App.3d 898, 903; *In re M.G.S.* (1968) 267 Cal.App.2d 329, 339.)

Subdivision (d), relating to findings to be made when an admission to the allegations is accepted, is based on section 356 and procedures suggested in the Deskbook sections 8.35 and 8.45.

In some courts, parents or guardians have been permitted to enter no contest regarding the truth of the allegations of the petition. Subdivision (e) recognizes the existence of that practice.

California Juvenile Court Rules, Chapter 7 Disposition Hearings, Part II, Cases Petitioned Under Section 300, Rule 1376(c).

(c) [Explanation of proceedings] At the beginning of the disposition hearing the court shall inform the minor and parent or guardian, if present, of the purpose and scope of the disposition hearing. If the minor, parent or guardian is not represented by counsel, the court shall advise those persons of the right to be represented by counsel at the hearing and, where applicable, of the right to appointed counsel.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Sections 7.24, 8.57, and 9.53. Reprinted with Permission.

C. [§7.24] Oral Form: Conduct of Detention Hearing in §300 Cases

(All parties enter and sit down.)

(Probation officer introduces the parties to the court.)

(Court considers any motion to continue.)

COURT: Mr. Clerk, please read the petition and swear all persons who may wish to speak during the proceedings.

(Clerk reads the petition and swears all parties.)

COURT OR PROBATION OFFICER: Does each of you understand the petition just read, or do you have any question about it you would like to have answered by the court?

COURT: As you are aware, [name] has been placed in protective custody because of the circumstances which are alleged in the petition that was just read to you.

COURT: Juvenile court proceedings are divided into three separate hearings: (1) a detention hearing, (2) a jurisdiction hearing, and (3) a disposition hearing. You are in court today for a detention hearing. The purpose of this hearing is to decide whether [name] should remain in protective custody in the shelter from today until the date of the jurisdiction hearing, which has been set for [date]. When you appear in court on [date] for the jurisdiction hearing, the court will then decide whether or not the facts in the petition that has just been read are true. If they are found not true, the court will dismiss the case. If they are found true, the court will then conduct the third, or disposition, hearing. The purpose of a disposition hearing is to decide what action, if any, the court should take in view of what has been found to have happened.

COURT: (If parents unrepresented by counsel.) The court would like to explain to you that you have a right to be represented by an attorney during this detention hearing, and during all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so. If you want an attorney, but feel you cannot afford one, the court will refer you to the local legal aid office. If you qualify for such assistance, legal aid will provide you with an attorney at no expense to you. If you are unable adequately to present the case and face a substantial possibility of loss of custody or of prolonged separation from the minor, you have a right to be represented by an attorney, whether you can afford one or not. This is a serious and important matter. If the court should find that grounds for detention exist, this hearing could result in [name] being placed in the shelter from today until the jurisdiction hearing on [date]. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

COURT: (When applicable.) The court now finds that the parents have intelligently waived their right to counsel at this hearing.

COURT: You have certain additional rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing, (2) the right to cross-examine, that means ask questions of, any witness who may testify at this hearing, and (3) the right to present to the court any witnesses or other evidence you may desire.

COURT: Would the probation officer now explain to the court the facts and circumstances under which you placed [name] in protective custody.

(Court reads any written report or data prepared by the probation officer and permits the parties to review the same.)

(Court reads the police report and other written matter, and permits the parties to review the same.)

(Court states for the record all material read by the court.)

(Court should orally examine the minor, if present, and the parents or other persons with relevant knowledge bearing on the grounds for detention.)

(Court allows cross-examination of any witness who may testify.)

COURT: Now is the time for you to present any evidence or make any statement you may wish to make before the court decides whether [name] should remain in protective custody.

COURT: The court finds that [name] should (or should not) remain in protective custody in the shelter pending the jurisdiction hearing upon the following ground (or grounds) [insert ground or grounds].

(If released, the court should announce the conditions, if any, of such release.)

(If detained, the court should announce the conditions under which the court would permit a detention rehearing, if any.)

(If the decision is to detain, the court might explore the alternative of placing the child with relatives of friends pending the jurisdiction hearing, with the consent of the parents, instead of placing the child in the shelter.)

COURT: Do you have any questions about the court's order or what is going to take place in the future?

(Court signs the order specifying the ground of detention, orders reimbursement of the county for detention, if appropriate, and refers the parents to the finance section of the probation department to make arrangements regarding payment.)

C. [§8.57] Oral Form: Conduct of Jurisdiction Hearing in §300 Cases in Which Parents Are Unrepresented by Counsel and Admit the Petition

(All parties enter and sit down.)

(Probation officer introduces the parties to the court.)

(Court considers any motion to continue or other preliminary matter.)

COURT: Mr. Clerk, please read the petiton and swear all persons who may wish to speak during these proceedings. (Clerk reads the petition and swears all parties.)

COURT OR PROBATION OFFICER: Does each of you understand the petition just read, or do you have any questions about it that you would like the court to answer?

COURT: As you are aware, this is what we call a jurisdiction hearing. The purpose of the hearing is to decide whether the facts set forth in the petition just read to you are true. If the court finds they are not true, it will dismiss the case. If the court finds they are true, then it will hold a disposition hearing. The purpose of a disposition hearing is to decide what action the court should take in view of what has happened.

COURT: The court observes that you are not represented by an attorney. The court would like to explain to you that you have a right to be represented by an attorney during this jurisdiction hearing and all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so. If you want an attorney, but feel you cannot afford one, the court will refer you to the local legal aid office. If you qualify for such assistance, legal aid will provide you with an attorney at no expense to you. This is a serious and important matter. If the court should find that the facts set forth in the petition are true, the possible consequences could be the removal of your child from your custody, and placement in a relative's home, a foster home, or a private institution. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right, and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

COURT: The court now finds that the parents have intelligently waived their right to counsel at this hearing.

COURT: You have certain additional rights at this hearing. These are:

1. The right to a trial by the court to decide whether the facts set forth in the petition are true;

2. The right to see and hear all witnesses who may be called to testify against you;

3. The right to cross-examine (that means ask questions of) any witness who may testify at this hearing; and

4. The right to compel the attendance at this hearing of any witnesses you may want to testify on your behalf.

COURT: You have heard the petition read by the clerk. Are the facts set forth in the petition true?

COURT: Based on the admission by the parents that the facts set forth in the petition are true, the court now finds that the allegations of the petition filed on [date] are true as alleged, and that [name] is found to come within the provisions and description of §300 of the juvenile court law.

COURT: This completes the jurisdiction hearing.

(If the disposition hearing is to be continued to another date, the court should: (1) order the continuance; (2) advise the probation officer of any specific information sought; (3) order continued protective custody, other placement by agreement with the parents, or release of the minor; and (4) ask the parents whether they have any questions about the court's order or what they are expected to do.)

COURT: (If the court is going to proceed with a disposition hearing at this time) This brings us to the second portion of these proceedings, called a disposition hearing during which the court must decide what action, if any, to take in view of the fact that the court has found that the facts in the petition are true.

IV. [§9.53] Oral Form: Advice of Right to Appeal

The following oral form offers additional guidelines for advising parties of their right to appeal in contested cases:

COURT: [Name of minor or parents, guardian, or adult relative], it is my duty to advise you of your right to appeal to the appellate courts from the order or judgment of this court finding [you/name of minor] to be a person described by section (§300, 601, or 602) of the Juvenile Court Law.

COURT: If you want to file an appeal, there is a 60-day time limit within which you must file a written notice of appeal. The 60-day period begins today.

COURT: Your notice of appeal must be filed in this court and not in the court of appeal. It must state what it is you are appealing from, and it must be signed by you or your attorney.

COURT: (In §§601 or 602 cases only.) If you appeal and you cannot afford an attorney, the appellate court will appoint an attorney to represent you on appeal. It is your obligation to keep the appellate court informed of your current mailing address. After you have filed the notice of appeal, the court of appeal will contact you about whether you have a right to a court-appointed attorney.

COURT: (In§§601 or 602 cases only.) [Name], if you appeal and you cannot afford an attorney, you are entitled to a free transcript to use on appeal without regard to your parents' financial status.

COURT: Finally, you are advised that under the Juvenile Court Law, the order or judgment of this court is not necessarily held up while awaiting an appeal. In other words, the court's order that [nature of disposition] will be carried out, unless the court approves some other provision for your maintenance, care, and custody while awaiting the appeal.

COURT: Do you understand your rights to appeal as I have stated them to you?

COURT: Do you understand that it is your duty to file your own notice of appeal, and that it must be done within 60 days from today?

COURT: Do you have any questions you want to ask me about your right to appeal?

District of Columbia Superior Court Neglect Proceeding Rule 16, The Factfinding Hearing.

(b) Notification of Right to Appeal, and of Procedures for Sealing Records and Terminating or Extending Orders of Custody. After entering a dispositional order, the Division shall advise the parties of their right to appeal and of the procedure that the Division will follow for the sealing of the child's records upon fulfillment of the conditions specified in D.C.Code § 16-2334 and SCR-Neglect 26. In cases where the dispositional order vests custody of the child in a person, agency or institution, the parties shall be informed of the right of the child or his parents, guardian or custodian to move for modification or termination of the order pursuant to D.C.Code § 16-2323(b). The parties shall also be advised in such cases that if the Director of Social Services moves for extension of an order of custody beyond the time limits specified in D.C.Code § 16-2322, the Division will hold a hearing and will notify the parents, guardian or custodian of the date and time of the hearing and of their right to be present and to be represented by counsel.

North Dakota Juvenile Court Summons

Section 27-20-22, NDCC.

State of North Dakota, in Juvenile Court, County of _____, _____ Judicial District, in the interest of _____, a child.

PETITIONER,
vs. FILE NO.
RESPONDENTS. SUMMONS

THE STATE OF NORTH DAKOTA TO THE ABOVE-NAMED RESPONDENTS:

You, and each of you, are hereby summoned and required to appear personally and bring the above-named child before the Juvenile Court, at its Chambers in the Courthouse in the City of _____, in said County and State, on the _____ day of _____, 19__, at _____ o'clock __.M., or as soon thereafter as the parties can be heard, for the purpose of hearing the Petition made and filed with this Court, alleging said child to be subject to the provisions of the Uniform Juvenile Court Act, (Chapter 27-20, North Dakota Century Code) by reason of the following:

as more fully appears from the Petition, a copy of which is hereto annexed and served upon you.

If you fail to appear personally and to bring said child before the Court at said time and place, or to show good cause why you cannot do so, the Court will make such order as may be appropriate and you may be proceeded against for civil contempt.

RIGHT TO COUNSEL

While you are not required to have legal counsel in this proceeding, you are entitled to legal counsel if you so desire. If you desire legal counsel and are unable without undue financial hardship to employ counsel, the Court, upon your request, will appoint legal counsel for you. If you intend to have legal counsel, you are requested to make necessary arrangements in advance so as not to delay the hearing.

Dated this _____ day of _____, 19__.

_____
Juvenile Supervisor

Juvenile Court for the Parish of Jefferson, Louisiana, *General Rules of Court,* Rule IV.

Rule IV—Notice to Parents

Whenever a child is removed from the custody of his parents as a "Child in Need of Care" or an "Abused" or "Neglected" child, the OHD worker investigating the case shall immediately give the parent or parents a copy of the "Notice to Parents" promulgated by this Court and shall indicate on the notices the date and time of the initial hearing.

State of Louisiana Juvenile Court for the Parish of Jefferson

NOTICE TO PARENTS

This Court has granted the temporary custody of your child to the Louisiana Health and Human Resources Administration.

This order was granted because an investigation by that agency has indicated that there is good cause to believe that your child's safety can only be ensured outside of your home because of the possibility that your child is either abused, neglected, or a "Child in Need of Care."

A hearing will be held within 48 hours, exclusive of weekends and holidays, to determine if there is, in fact, probable cause for the removal of your child. This hearing will be on _____ at _____ o'clock __M, at the Jefferson Parish Juvenile Court, First Floor, Courthouse Annex, Derbigny Street at the River, Gretna, Louisiana.

There may also be a second hearing within forty-five (45) days to determine if your child is, in fact, abused, neglected, or a "Child in Need of Care."

You have the following rights:

1. To have an attorney present at all hearings. If you cannot afford an attorney, free legal assistance may be obtained through New Orleans

Legal Assistance Corporation (NOLAC), the Legal Aid Society, or the Loyola Law Clinic.

2. To contest the allegations made. You can subpoena witnesses, etc.

3. To be notified of the allegations, you will receive a petition specifying the allegations prior to the second hearing.

4. To reasonable visitation with your child.

While in the custody of the State, your child will be in either the home of a relative, a foster home, or a receiving home. If you know of any relatives or friends who may be willing to temporarily care for your child, please give that information to the social worker.

You may arrange to visit with your child through the social workers assigned to the case.

You will receive more information at the first hearing.

SOL GOTHARD, *Judge*

THOMAS P. MCGEE, Judge

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1 2157350210 MGM TDMT PHILADELPHIA PA 03-03 0311P EST

SUPPORT CENTER FOR CHILD ADVOCATES H COVE
1315 WALNUT ST
PHILADELPHIA PA 19107

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2157350210 MGM TDMT PHILADELPHIA PA 300 03-03 0311P EST
ZIP

PHILADELPHIA PA 19139
DEAR MS [redacted]

A REPORT OF SUSPECTED ABUSE HAS BEEN FILED ABOUT YOUR CHILD WITH THE DEPARTMENT OF PUBLIC WELFARE OF THE CITY OF PHILADELPHIA, CAROL J SCHRIER ESQUIRE (7350210) AND ALLAN TAGAS ESQUIRE (L043333) A MEMBER OF THE YOUNG LAWYERS CHILD ABUSE COMMITTEE OF THE PHILADELPHIA BAR ASSOCIATION HAVE BEEN APPOINTED BY THE FAMILY COURT TO PROVIDE SEPARATE LEGAL REPRESENTATION OF YOUR CHILD IN THIS MATTER.

AN ORDER FOR PROTECTIVE CUSTODY TO THE DEPARTMENT OF PUBLIC WELFARE WAS ISSUED ON MARCH 3 1978 BY JUDGE EDWARD ROSENBERG UPON PETITION OF CAROL J SCHRIER ESQUIRE AND ALLAN TABAS ESQUIRE.

THIS ORDER PROHIBITS ANYONE FROM REMOVING [redacted] FROM SEASHORE HOME AT CHILDRENS HOSPITAL WITHOUT PERMISSION OF THE WELFARE DEPARTMENT. A HEARING HAS BEEN SET FOR MONDAY MARCH 6 1978 AT 11:30AM 1801 VINE STREET PHILADELPHIA CONFERENCE ROOM "A" TO DETERMINE WHETHER CUSTODY TO THE DEPARTMENT OF PUBLIC WELFARE SHOULD CONTINUE.

A LAWYER MAY REPRESENT YOU AT THE HEARING AND ANY FURTHER PROCEEDINGS. IF YOU CANNOT AFFORD TO PAY A LAWYER YOU SHOULD CONTACT COMMUNITY LEGAL SERVICES LAW CENTER WEST 5219 CHESTNUT STREET PHILADELPHIA TELEPHONE 471-2200 OR TEMPLE LEGAL AID 1715 NORTH BROAD STREET BASEMENT REDER HALL PHILADELPHIA TELEPHONE CE6-4415. THE HOURS ARE 4 TO 8PM, MONDAY THROUGH FRIDAY SEPTEMBER TO MAY. IF YOU CAN AFFORD TO PAY A LAWYER BUT DO NOT KNOW A LAWYER YOU MAY CALL LAWYERS REFERENCE SERVICE 101 SOUTH 13 STREET PHILADELPHIA MU6-5698.

VERY TRULY YOURS

CAROL J SCHRIER, EXECUTIVE DIRECTOR
SUPPORT CENTER FOR CHILD ADVOCATES

Dear

As you know, legal action has been brought in a case involving your child(ren).

This action is very serious. The Department of Public Welfare may try to take your child(ren) out of your home.

You should be represented in court by a lawyer. YOU MAY GET A LAWYER BY GOING TO THE LAWYERS REFERENCE SERVICE IN ROOM 425 OF CITY HALL ANNEX, PHILADELPHIA, PENNSYLVANIA - TELEPHONE NUMBER MU 6-5698.

If you cannot afford a lawyer, you may be able to get free representation by going immediately to:

Temple Legal Aid: 1715 North Broad Street, Basement, Reder Hall

Philadelphia, Penna.
Ce 6-4415

or to the Community Legal Service office circled below.

Community Legal Services:
Law Center Northeast
3156 Kensington Avenue
Philadelphia, Penna. 19134
427-4850

Law Center Girard
704-06 West Girard Avenue
Philadelphia, Penna. 19134
427-4850

Law Center South
1226 South Broad Street
Philadelphia, Penna. 19146
755-5500

ANY DELAY CAN SERIOUSLY AFFECT YOUR RIGHTS.

Your next hearing is on _____, 19□, in Courtroom 1801 Vine Street, Philadelphia, Pennsylvania at □. M.

Section VI.

Privacy of Records

Records related to abuse and neglect cases, like other juvenile records, are generally confidential. This section explores the extent of access to juvenile court records and to central registers or other child protective records, emphasizing special problems relevant to court proceedings in abuse and neglect cases. A further topic is the procedures to protect parents' rights by amending, sealing, or expunging records.

A. Court Records

1. The general restrictions on access to juvenile court records apply to child abuse and neglect case records.

Typically access is limited to parties, attorneys for the parties, judges, selected court workers, and researchers.

2. There are special considerations in abuse and neglect cases.

Prosecutors are likely to have access if criminal prosecution is brought against the parents for the same acts subject to the civil proceeding.

Parents may not have full access to the records. (See Section C.)

Access by the child protective agency or by an agency having custody of the child may provide information useful for protection of the child or improvement of the family.

3. Records in abuse and neglect cases should be sealed or expunged when no longer needed by the court.

The time for sealing or expunging is typically later than that for delinquency records, because the records may be useful in subsequent proceedings concerning abuse or neglect of the child or his siblings.

B. Child Protective Agency Records

1. Access to case records and central register information is generally restricted by statute or regulation to limited categories of people. States may allow access to any child protective agency records by a court upon its finding that access "may be necessary for determination of an issue before such courts." 45 C.F.R. §1340.3(d) (5).

The information should be confidential because it can be harmful to subjects of the reports. On the other hand, the information should be available when needed for further child protective services.

Child protective professionals have access to central register files, especially when investigating new reports. State laws differ concerning access by doctors, police, researchers, and child treatment agencies.

2. An important issue is whether parents should have access to case records and reports concerning their conduct in order to properly prepare their defense. Several states permit access after the names of informants are deleted. Child protection agencies in some states must notify a parent whenever he or she is the subject of a report.

Notification and access allows parents to study their files and to request correction of mistakes.

However, a parent may retaliate against those bringing a report or providing information in the subsequent investigation. Deleting material that identifies these people may not be feasible, and the parent may be able to identify them in spite of deletions.

The courts may be the best agency to determine when parents should have access to child protective agency records and central register files through the use of the discovery process.

3. Many states have procedures for amending and expunging records in central registers. Typical provisions are that:

Unfounded reports must be deleted.

Records are closed or expunged a specified number of years following the report or when the child reaches a certain age.

Parents can request that reports be amended or expunged.

4. The guidelines that have been developed for central registers are generally not applicable to other child protective agency records.

C. Litigants' Rights of Access to Reports

1. Not all litigants have access to reports of child protective agencies, psychiatrists, hospitals, etc. Some courts restrict access even if the report is in the court record.

Arguments against providing litigants, especially parents, access to reports are that confidentiality may enhance the frankness of reports, future remedial attempts may be hindered if parents view reports, and parents may retaliate against informants.

Arguments for providing access are that litigants should have information that may help their cause and, if the report is in the record, due process requires that litigants be able to answer the report. (But even when reports are routinely provided, courts may require that informants' names be excised in accord with state policy.)

In general, litigants are more likely to have access to reports in adjudicative hearings than in dispositional hearings.

2. Often parents' counsel, but not the parents themselves, are permitted access to the reports (particularly

with psychological and psychiatric evaluations of the parents).

3. Many courts have discretion as to whether parents should be given reports.

Support Readings

A. Court Records

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Juvenile Records and Information Systems* **(New York: Ballinger Publishing Co., 1977), pp. 25-31, 130-131. Reprinted with Permission.**

Part XV: Access to Juvenile Records

15.1 General policy on access.

A. Juvenile records should not be public records.

B. Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information, the unnecessary denial of opportunities and benefits to juveniles, or an interference with the purposes of official intervention.

15.2 Access to case files.

A. Each juvenile court should provide access to a "case file" to the following persons:

1. the juvenile who is the subject of the file, his or her parents, and his or her attorney;
2. the prosecutor who has entered his or her appearance in the case;
3. a party, and if he or she has an attorney who has entered an appearance on his or her behalf, the attorney;
4. a judge, probation officer, or other professional person to whom the case has been assigned or before whom a proceeding with respect to the juvenile is pending or scheduled; and
5. a person who is granted access for research purposes in accordance with Standard 5.6.

B. A person who is a member of the clerical or administrative staff of a juvenile court, who has been previously designated in writing by the court, may be given direct access to a "case file" if such access is needed for authorized internal administrative purposes.

C. A juvenile court should not provide access to nor permit the disclosure of information from a "case file" except in accordance with this standard.

15.3 Access to summary records.

A. Each juvenile court should provide access to "summary records" to the following persons:

1. those persons enumerated in Standard 15.2A.;
2. the state juvenile correctional agency, if the juvenile is detained by or is otherwise subject to the custody or control of the agency;
3. the state department of motor vehicles, provided that the information given to the department is limited to information relating to traffic offenses that is specifically required by statute to be given to the department for the purpose of regulating automobile licensing;
4. a law enforcement agency for the purpose of executing an arrest warrant or other compulsory process or for the purpose of a current investigation.

B. A juvenile court should notify the law enforcement agency that arrested the juvenile or that initiated the filing of the complaint or petition of the final disposition of the case after such information is entered in the "summary record."

C. A juvenile court may provide direct access to a "summary record" to those persons enumerated in Standard 15.2 B.

D. A juvenile court should not provide access to nor permit the disclosure of information from a "summary record" except in accordance with subsections A. and B. of this standard.

E. A probation officer or other professional person may provide indirect access to a "summary record" with the written consent of the juvenile and his or her parents if the disclosure of summary information pertaining to the juvenile's record is necessary for the purpose of securing services or a benefit for the juvenile.

15.5 Access for research and evaluation.

Each juvenile court should accord access to its juvenile records for the purpose of research and monitoring in accordance with Standard 5.6.

15.6 Secondary disclosure limited.

A person, other than the juvenile, his or her parents, and his or her attorney, who is accorded access to information, pursuant to Section III of these standards, should not disclose that information to any other person unless that person is also authorized to receive that information pursuant to this Section.

15.7 Waiver prohibited.

The consent of a juvenile, his or her parents, or his or her attorney should not be sufficient to authorize the dissemination of a juvenile record to a person who is not specifically accorded the right to receive such information, pursuant to this Part, except as provided in Standard 15.4 E.2.

15.8 Nondisclosure agreement.

Any person, other than the juvenile who is the subject of a juvenile record, his or her parents, and his or her attorney, to whom a juvenile record or information from a juvenile record is to be disclosed, should be required to execute a nondisclosure agreement in which the person should certify that he or she is familiar with the applicable disclosure provisions and promise not to disclose any information to an unauthorized person.

Part XVI: Correction of Juvenile Records

16.1 Rules providing for the correction of juvenile records.

Rules and regulations should be promulgated which provide a procedure by which a juvenile, or his or her representative, may challenge the correctness of a record and which further provide for notice of the availability of such a procedure to be given to each juvenile who is the subject of a record.

Part XVII: Destruction of Juvenile Records

17.1 General policy.

It should be the policy of juvenile courts to destroy all unnecessary information contained in records that identify the juvenile who is the subject of a juvenile record so that a juvenile is protected from the possible adverse consequences that may result from disclosure of his or her record to third persons.

17.4 Cases involving a neglect petition.

In cases involving a neglect petition, all identifying records pertaining to the matter should be destroyed when:

A. no subsequent proceeding is pending as a result of the filing of a neglect petition or delinquency complaint against the juvenile;

B. the juvenile is no longer subject to a disposition order of the court; and

C. the youngest sibling is older than sixteen years of age.

COMMENTARY

In cases involving neglect, there are two reasons (other than research) for retaining records: 1. for use in a subsequent case involving the same juvenile; and 2. for use in a subsequent case involving a sibling. In both instances, the records gathered previously should contain relevant information with respect to present neglect, parental fitness, and the appropriateness of continuing parental custody. For these reasons, records in a neglect case should be preserved until the youngest sibling is sixteen years of age and there is neither a proceeding pending nor a disposition order that is in effect. Once the youngest sibling becomes sixteen years old, there is little likelihood of a subsequent neglect proceeding; and the reasons for destroying records, set forth in the commentary to Standards 5.8 and 17.1, then become applicable.

District of Columbia Code Sections 16-2331, 2332, and 2335.

§ 16-2331. Juvenile case records; confidentiality; inspection and disclosure

(a) As used in this section, the term "juvenile case records" refers to the following records of a case over which the Division has jurisidiction under section 11-1101(13):

(1) Notices filed with the court by an arresting officer pursuant to this subchapter.

(2) The docket of the court and entries therein.

(3) Complaints, petitions and other legal papers filed in the case.

(4) Transcripts of proceedings before the court.

(5) Findings, verdicts, judgments, orders, and decrees.

(6) Other writings filed in proceedings before the court, other than social records.

(b) Juvenile case records shall be kept confidential and shall not be open to inspection; but, subject to the limitations of subsection (c), the inspection of those records shall be permitted to—

(1) judges and professional staff of the Superior Court;

(2) the Corporation Counsel and his assistants assigned to the Division;

(3) the respondent, his parents or guardians, and their duly authorized attorneys;

(4) any court or its probation staff, for purposes of sentencing the respondent as a defendant in a criminal case and the counsel for the defendant in that case;

(5) public or private agencies or institutions providing supervision or treatment or having custody of the child, if supervision, treatment, or custody is under order of the Division;

(6) the United States Attorney for the District of Columbia, his assistants, and any other prosecuting attorneys involved in the investigation or trial of a criminal case arising out of the same transaction or occurrence as a case in which a child is alleged to be delinquent; and

(7) other persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family, or in the work of the Superior Court, if authorized by rule or special order of the court. Records inspected may not be divulged to unauthorized persons. The prosecuting attorney inspecting records pursuant to paragraph (6) of this subsection may divulge the contents to the extent required in the prosecution of a criminal case, and the United States Attorney for the District of Columbia and his assistants may inspect a transcript of the testimony of any witness and divulge the contents to the extent required by the prosecution of the witness for perjury, without, wherever possible, naming or otherwise revealing the identity of a child under the jurisdiction of the Division.

(c) Notwithstanding subsection (b), the Superior Court may by rule or special order provide that particular items or classes of items in juvenile case records shall not be open to inspection except pursuant to rule or special order; but, in dispositional proceedings after an adjudication, no item considered by the judge (other than identification of the sources of confidential information) shall be withheld from inspection (1) in delinquency or need of supervision cases, by the attorney for the child, or (2) in neglect cases, by the attorney for the child and an attorney for the parent, guardian, or other custodian of the child.

(d) The Superior Court may by rule or special order provide procedures for the inspection or copying of juvenile case records by persons entitled to inspect them. No

person receiving any record or information pursuant to this section may publish or use it for any purpose other than that for which it was received without a special order of the court.

(e) No person shall disclose, inspect, or use records in violation of this section.

§ 16-2332. Juvenile social records; confidentiality; inspection and disclosure

(a) As used in this section, the term "juvenile social records" refers to all social records made with respect to a child in any proceedings over which the Division has jurisdiction under section 11-1101(13), including preliminary inquiries, predisposition studies, and examination reports.

(b) Juvenile social records shall be kept confidential and shall not be open to inspection; but, subject to limitations of subsection (c), the inspection of those records shall be permitted to—

(1) judges and professional staff of the Superior Court and the Corporation Counsel and his assistants assigned to the Division;

(2) the attorney for the child at any stage of a proceeding in the Division, including intake;

(3) any court or its probation staff, for purposes of sentencing the child as a defendant in a criminal case, and, if and to the extent other presentence materials are disclosed to him, the counsel for the defendant in that case;

(4) public or private agencies or institutions providing supervision or treatment, or having custody of the child, if the supervision, treatment, or custody is under order of the Division; and

(5) other persons having a professional interest in protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family, or in the work of the Division, if authorized by rule or special order of the court.

(6) professional employees of the Social Rehabilitation Administration of the Department of Human Resources when necessary for the discharge of their official duties.

Records inspected may not be divulged to unauthorized persons.

(c) Notwithstanding subsection (b), the Superior Court may by rule or special order provide that particular items or classes of items in juvenile social records shall not be open to inspection except pursuant to rule or special order; but, in dispositional proceedings after an adjudication, no item considered by the judge (other than identification of the sources of confidential information) shall be withheld from inspection (1) in delinquency or need of supervision cases, by the attorney for the child, or (2) in neglect cases, by the attorney for the child and an attorney for the parent, guardian, or other custodian of the child.

(d) The Superior Court may by rule or special order provide procedures for the inspection or copying of juvenile social records by persons entitled to inspect them. No person receiving any record or information pursuant to this section may publish or use it for any purpose other than that for which it was received without a special order of the court.

(e) No person shall disclose, inspect, or use records in violation of this section.

§ 16-2335. Sealing of records

(a) On motion of a person who has been the subject of a petition filed pursuant to section 16-2305, or on the Division's own motion, the Division shall vacate its order and findings and shall order the sealing of the case and social records referred to in sections 16-2330 and 16-2331 and the law enforcement records and files referred to in section 16-2332, or those of any other agency active in the case if it finds that—

(1) (A) a neglected child has reached his majority; or

(B) two years have elapsed since the final discharge of the person from legal custody or supervision, or since the entry of any other Division order not involving custody or supervision; and

(2) he has not been subsequently convicted of a crime, or adjudicated delinquent or in need of supervision prior to the filing of the motion, and no proceeding is pending seeking such conviction or adjudication.

(b) Reasonable notice of a motion shall be given to—

(1) the person who is the subject of the petition;

(2) the Corporation Counsel;

(3) the authority granting the discharge, if the final discharge was from an institution, parole, or probation; and

(4) the law enforcement department having custody of the files and records specified in section 16-2332.

(c) Upon the entry of the order, the proceedings in the case shall be treated as if they never occurred. All facts relating to the action including arrest, the filing of a petition, and the adjudication, filing, and disposition of the Division shall no longer exist as a matter of law. The Division, the law enforcement department, or any other department or agency that received notice under subsection (b) and was named in the order shall reply, and the person who is the subject matter of the records may reply, to any inquiry that no record exists with respect to such person.

(d) Inspection of the files and records included in the order may thereafter be permitted by the Division only upon motion by the person who is the subject of such records, and may be made only by those persons named in the motion; but the Division in its discretion may, by special order in an individual case, permit inspection by a release of information in the records to persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the person who is the subject of the petition or other members of his family.

(e) Any adjudication of delinquency or need of supervision or conviction of a felony subsequent to sealing shall have the effect of nullifying the vacating and sealing order.

(f) A person who has been the subject of a petition filed under this subchapter shall be notified of his rights under subsection (a) at the time a dispositional order is

entered and again at the time of his final discharge from supervision, treatment, or custody.

(g) No person shall disclose, receive, or use records in violation of this section.

District of Columbia Superior Court Neglect Proceedings, Rule 25.

Rule 25. Inspection and Copying of Records

(a) Who can Inspect. In accordance with D.C.Code §§ 16-2330(b) (7) and 16-2331(b) (5), the following persons or agencies are also authorized to inspect the records of any child who was previously or is now within the jurisdiction of the Family Division, unless such records have been sealed pursuant to D.C.Code § 16-2334:

(1) Any person, hospital, institution or agency engaged in mental or physical evaluation or diagnosis pursuant to an order under D.C.Code § 16-2315;

(2) Any hospital, institution or agency to which the child could be committed under D.C.Code § 16-2320, provided the allegations of the petition have been adjudicated, and such hospital, institution or agency is being investigated as a dispositional possibility by the Director of Social Services or the attorney for the child.

(b) Application for Special Order. Any person or agency not named in section (a) of this rule may apply or the child's attorney may apply on their behalf, to the Division for a special order to inspect case records or social records pursuant to D.C.Code §§ 16-2330(b) (7) and §§ 16-2331 (b) (5). The application for a special order shall state in writing the name, address and telephone number of the person or agency desiring to inspect the child's records, the professional affiliation of the person or agency, and the reason for which the special order is sought. The application for special order shall be approved or denied by the Division in writing and filed by the clerk of the Division in the docket of the child's case.

(c) Procedure for Inspection and Copying. The clerk of the Division shall maintain a suitable room for the inspection of records and shall maintain a duplicating machine for copying records at reasonable cost for the use of any person or agency authorized or approved to inspect or copy records pursuant to D.C.Code § 16-2330 and § 16-2331 and section (a) or (b) of this rule. Any person or agency authorized to inspect or copy records under section (a) or (b) of this rule shall file with the clerk of the Division a form indicating name, address, record inspected or copies and date when inspected or copied. Such form shall be filed by the clerk of the Division in the docket of the child's case.

B. Child Protective Agency Records

Douglas Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services, 54* **Chicago-Kent L. Rev. 687, 733-749 (1979).**

IV. Protecting the Privacy of the Children and Families Listed in the Central Register

> As every man goes through life he fills in a number of forms for the record, each containing a number of questions. . . . There are thus hundreds of little threads radiating from every man, millions of threads in all. If these threads were suddenly to become visible, the whole sky would look like a spider's web, and if they materialized as rubber bands, buses, trams and even people would all lose the ability to move, and the wind would be unable to carry torn-up newspaper or autumn leaves along the streets of the city. They are not visible, they are not material, but every man is constantly aware of their existence. . . . Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads.[114]

Implicit in most recent child protective legislation is the legislative finding that the balance between children's rights and parents' rights must be weighted in favor of protecting children. Nevertheless, it is important to protect traditional American values of freedom and legality while trying to protect endangered children. For, the benign purposes and rehabilitative services of child protective agencies do not prevent them from being threatening and sometimes destructive—though well-meaning—coercive intrusions into family life.

The fact that many central registers contain the unverified suspicions of thousands of individual reporters, who are strangers to the agency operating the register and who are not subject to its administrative supervision, justifies the great concern over personal rights that such information systems arouse. Many of the reports received, stored, and made easily accessible by central registers prove to be unfounded.[115]

However, even when the material in the register is true, there is a need to protect the rights and sensibilities of those who are the subjects of the report. For, the register's records contain information about the most private aspects of personal and family life, which, if improperly disclosed, could stigmatize the future of all those mentioned in the report.[116] One worker voiced this concern:

> I would like to say that I have some real concern about confidentiality, that I find too often in my practice that names and case records travel between one agency within a city or within a state. There seems to be a careless concern over where we as workers are feeding information obtained by hearsay. When this feeds into a state registry which begins to feed into a federal register which feeds into AFDC welfare records and other records and then disseminates all this into five known national filing systems, I think there has to be a great deal of concern.
>
> I have some real concerns about what I have been hearing at this conference of the idea of having some central register that anyone could call into for information. Maybe I am speaking from a position of being a paranoid parent, but I feel very uncomfortable knowing that my house insurance or my car insurance is dependent on a report of suspected child abuse. And by the way, automobile companies are doing exactly this; they are identifying high risk groups as a way of picking up potentially poor insurance risks and one of the things they are looking at is family stress.
>
> So I feel that we are no longer talking about when Big Brother is going to come; we are now trying to fight off Big Brother.[117]

Yet, in most states, the subjects of reports are not informed that their names have been entered in the cen-

tral register; they are not permitted to see the file containing derogatory allegations; they cannot get untrue or unfounded charges removed from the register; and they have no right to appeal to a higher administrative authority.

> Who will have access to information contained in the registry? The mere fact that an individual's name is listed in the central registry carries with it a stigma of wrong doing and guilt and can be potentially damaging if this information is made public. Obviously, this information should only be available to those persons with a bona fide legal interest and with the proper safeguards. However, a number of states which have legislatively created a central registry have no provision stating who shall have access to the recorded reports, how one does gain access and makes no provision for protecting the suspect party's interest...they simply legislate that there shall be a central registry.[118]

Only as the result of the eligibility requirement of the Federal Child Abuse Prevention and Treatment Act[119] is there now provision in most states to ensure the confidentiality of records.

The capability of electronic retrieval of information magnifies both the capabilities and the dangers of a central register system. As more states seek to make the information in their registers more accessible and more usable, greater consideration will have to be given to the uses to which, and the conditions under which, the material should be put. In the words of former HEW Secretary Caspar Weinberger:

> [I]t is important to be aware, as we embrace this new technology, that the computer, like the automobile, the skyscraper, and the jet airplane may have some consequences for American society that we would prefer not to have thrust upon us without warning. Not the least of these is the danger that some record-keeping applications of computers will appear in retrospect to have been oversimplified solutions to complex problems, and that their victims will be some of our most disadvantaged citizens.
>
> One of the most crucial challenges facing government in the years immediately ahead is to improve its capacity to administer tax dollars invested in human services. To that end, we are attempting . . .to move away from the fragmented social service structures of the past, which have dealt with individuals and with families as if their problems could be neatly compartmentalized; that is, as if they were not people. Many of these measures could result in more intensive and more centralized record keeping on individuals than has been customary in our society. Potentially, at least, this is a double-edged sword . . . On the one hand, it can help to assure that decisions about individual citizens are made on the basis of accurate, up-to-date information. On the other, it demands a hard look at the adequacy of our mechanisms for guaranteeing citizens all the protection of due process in relation to the records we maintain about them.[120]

The usual response to these civil liberties concerns is that protecting innocent young children is more important than safeguarding the rights of abusing parents.[121] Indeed, there are legitimate and pressing needs to maintain information in central registers, and the only way to eradicate all danger of inappropriate disclosure of reports would be to abandon their use. But the necessity of storing this information should not forestall efforts to prevent its misuse. If society is to intrude into family life without the free consent of parents, it must do so with due regard to parental rights, as well as to the needs of children. Thus, even though the experience of all states shows that only a handful of reports are made maliciously, as states seek to improve and upgrade their child protective systems generally, they should also improve the methods they use to protect the rights of parents. Legal safeguards can be provided to protect parental rights without unreasonably endangering children. State law should accord to both the child and the parent the full safeguards of fundamental fairness, confidentiality, and due process of law. While meant to protect helpless and endangered children, the law and the register also can be designed to protect children's and families' legitimate rights to privacy. All of the civil libertarian criticisms of central registers, except for the one based on a general fear of all data banks, can be met by intelligent planning.

After studying the competing needs of administrative efficiency and the rights of citizens, the U.S. Department of Health, Education and Welfare's Secretary's Advisory Committee on Automated Personal Data Systems made a series of recommendations concerning the maintenance of social data records. The following six recommendations of the Advisory Committee are directly applicable to central register information systems:

> There must be no personal data record-keeping systems whose very existence is secret.
>
> There must be a way for an individual to find out what information about him is in a record and how it is used.
>
> There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
>
> There must be a way for an individual to correct or amend a record of identifiable information about him.
>
> Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.
>
> There should be civil and criminal penalties for unauthorized use of information.[122]

It is worth noting that such protections are parallel to those being established for credit and other financial records.

A recent United States District Court case, *Sims v. State Department of Public Welfare,*[123] although an apparent departure from recent federal abstention doctrines, seems to be a harbinger of more careful judicial scrutiny of the operations of state register systems. Although the basis and full reach of the court's decision are unclear, the court held that the method which Texas used to implement the statutory provision for a central register was unconstitutional. While the court was careful to state that the state may maintain investigative files, it found that the specific mode of operation of the Texas register was "an unconstitutional infringement on the rights of the parents."[124] The court's decision seems rooted in the court's concern (1) that persons listed in the register were not given notice of their being in the data system, were not given access to the data, and had no opportunity to have material in the register amended, expunged, or updated; and (2) that cases were labelled as "proven" based merely on social work investigations, without judicial review. While the *Sims* case is somewhat ambiguous, it is a clear sign that courts can now be expected to accept challenges to the operations of state

register systems and, when necessary, order changes in their operations when they do not comport with fundamental due process requirements.

There are two broad needs to meet in protecting the rights of those listed in central registers;

(1) The need to keep the information confidential and to limit access strictly to authorized persons for purposes consistent with its relatively narrow functions; and

(2) The need to insure the accuracy and currency of the information in the record through the sealing, expunging, removing, and updating of register data.

A. Confidentiality of Records

Reports made pursuant to the reporting law—as well as any other information in the central register—should be confidential. As a result of the eligibility requirements of the Federal Child Abuse Act, over forty-two states make unauthorized disclosure of information at least a misdemeanor.[125]

The applicable provision of the draft Model Act states:

> In order to protect the rights of the child, his parents, or guardians, all records concerning reports of noninstitutional child abuse and neglect, including reports made to the state department, state center, state central register, local child protective services, and all records generated as a result of such reports, shall be confidential and shall not be disclosed except as specifically authorized by this Act or other applicable law. It shall be a misdemeanor to permit, assist, or encourage the unauthorized release of any information contained in such reports or records.[126]

Such provisions are usually limited to child protective or social service records; they do not extend to juvenile court records, which have their own legislatively established confidentiality. Also, they do not extend to criminal justice system records, which ordinarily are considered public documents. For example, the draft Model Act provides: "Nothing in this Act is intended to affect existing policies or procedures concerning the status of court and criminal justice system records."[127]

Nevertheless, the information in child abuse and neglect records must be available to those who need it in order to make critical, often emergency, child protective decisions. The question is: Who should have access to these records? Limiting access necessarily limits use, while broadening access increases the possibility of misuse.

In general, states take three approaches to access to records. Some statutes prohibit access to anyone outside the child protective agency;[128] others make the records confidential, but authorize the responsible state agency to issue regulations allowing some persons access;[129] and others enumerate who has access in the statute itself.[130]

As a general rule, states that allow exceptions follow the long-standing aproach taken in the HEW Regulations implementing Title IV of the Social Security Act. These permit access for "purposes directly connected with" the administration of the program.[131] The HEW regulations implementing the Federal Child Abuse Prevention and Treatment Act enumerate the specific persons, officials, and agencies and the specific situations under which the access is deemed "directly connected with the administration" of the child protective program.[132]

Twenty-eight of the thirty-nine states and three jurisdictions which establish their register by statute have included provisions making exceptions to the confidentiality of records. Eight states give the department which runs the register the power to regulate access.[133] Six states only authorize exceptions if a court or the department has ordered the data to be released.[134] Only one state specifies that there shall be no access to information in the register.[135]

Twenty-three jurisdictions allow agencies investigating reports to obtain data;[136] seventeen specifically allow access for physicians.[137] Eight statutes provide access for persons contemplating placing a child in protective custody.[138] Fourteen jurisdictions allow access for researchers, although they impose certain limitations, the most common of which is that no identifying information should be released or that a responsible state official should approve the release. Subjects of reports can obtain information in fourteen jurisdictions, usually with certain limitations imposed, the most common of which is that identifying information about the person who made the report will not be disclosed.[139] Four jurisdictions allow access by other jurisdictions;[140] and two provide for the use of registered information by a national or regional registration system.[141]

B. Access by Child Protective, Treatment and Judicial Agencies

As described above,[142] data in the register should be made available only to certain specified persons under certain specified conditions. The draft Model Act is careful to describe the professionals who should have access to register information within the context of the need to make immediate child protective decisions:

> (i) A local child protective service in the furtherance of its responsibilities;
>
> (ii) A police or law enforcement agency investigating a report of known or suspected child abuse or neglect;
>
> (iii) A physician who has before him a child whom he reasonably suspects may be abused or neglected;
>
> (iv) A person legally authorized to place a child in protective custody when such person requires the information in the report or record to determine whether to place the child in protective custody;
>
> (v) An agency having the legal responsibility or authorization to care for, treat, or supervise a child or a parent, guardian, or other person responsible for the child's welfare who is the subject of a report;
>
> (vi) A court, upon its finding that access to such records may be necessary for the determination of an issue before such court; however, such access shall be limited to *in camera* inspection, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it; [and]
>
> (vii) A grand jury, upon its determination that access to such records is necessary in the conduct of its official business.[143]

Furthermore, even when such data is properly made available, there should be a prohibition against its further release. The draft Model Act, for example, provides:

> A person given access to the names or other information identifying the subjects of the report, except the subject of the

report, shall not make public such identifying information unless he is a district attorney or other law enforcement official and the purpose is to initiate court action. Violation of this subsection shall be a misdemeanor.[144]

C. Access by Administrators, Legislators, and Researchers

Perhaps the greatest controversy concerning access to records arises when child abuse and neglect records are opened to program administrators, legislators, and researchers who are pursuing their official or professional responsibilities to plan, monitor, audit, and evaluate services or to conduct other research.

Some have suggested that if those outside of designated investigatory and service agencies are given access to records, the identifying information in the records should be expunged.[145] But numerous types of important research, including longitudinal studies and cross-agency studies, require charting the movement of cases as they travel through time or among agencies. Such studies are crucial in gauging the effectiveness of different treatment techniques, and they cannot be performed without information that identifies the case and the individuals in it.

If child abuse and neglect records are to be used to improve service through monitoring and research, it is imperative that the data collected so painstakingly and at such great expense be available to outsiders, including academic policy-planners, legislators, and researchers. To do otherwise would deprive these policy-makers of information on how the system actually works, and would prevent higher level administrators and legislators from acting as informal "ombudsmen" in specific cases. Moreover, child protective agencies need the expert advice, assistance and research skills of universities and other institutions and groups. Those outside the system generally have a greater freedom to question long accepted assumptions, to explore new modes of action, and to conduct long-range research that might lead to basic changes in the structure and functioning of institutions.

Confidentiality can be exploited to shield the malfunctioning of an agency, as well as used to protect the privacy of individuals. Various advocate organizations have been denied access to their clients' records on the false grounds of confidentiality—even when they needed the records to protect their clients' rights by showing a pattern of bias or discrimination.[146]

Legitimate concerns for privacy can be met with adequate provisions to ensure that (1) disclosure of information to outsiders is strictly limited to situations in which the need for personal identifiers is essential to the research purpose, and (2) the information will not be improperly shared with others.[147] Data should be released only if the responsible state official approves the research plan, in writing.

The relevant sections of the draft Model Act grant access to:

> Any appropriate state or local official responsible for administration, supervision, or legislation in relation to the prevention or treatment of child abuse or neglect when carrying out his official functions; [and]
>
> Any person engaged in bona fide research or audit purposes; provided, however, that no information identifying the subjects of the report shall be made available to the researchers unless it is absolutely essential to the research purpose, suitable provision is made to maintain the confidentiality of the data, and the head of the state department or local agency gives prior written approval. The head of the state department shall establish, by regulation, criteria for the application of this subdivision.[148]

The requirement that "suitable provision [be] made to maintain the confidentiality of the data" is meant to ensure that the researcher not reveal personally identifiable data and that, at the conclusion of the research study, such identifying data be returned to the state department.

D. Feedback to the Person Making the Report

The fragmentation and impersonalization of services, which weakens the delivery of protective services, also tends to discourage reporting.

A person who makes a report of suspected abuse or neglect rarely is informed of the disposition of his report or even whether the investigation verified his suspicion. Sometimes his request for information is refused on the ground of confidentiality. As a result, he does not learn whether his diagnosis is valid; he does not know the consequences of his report, and he may feel isolated from his efforts to protect the child. How a potential reporter views the consequences of his act influences his decision whether to report. If he feels that the processing of his report will be haphazard or even destructive to the interests of the child, he may not report. Why should there be any surprise when, the next time he suspects that a child is abused or neglected, he decides not to make a report?

> It is axiomatic that in any kind of reporting system its completeness depends a great deal on the satisfaction of the reporter. In other words, the reporter likes to know that his report produces some tangible results.
>
> Public information using registry data and analysis is helpful in this respect. It cannot supplant effective response by the agency nor a cooperative relationship between reporter, worker and agency.[149]

"Feedback" reinforces the positive purpose of reporting in the mind of the reporter and will determine, to a great extent, his willingness to report in the future. Learning about the accuracy of the original suspicion also refines the reporter's diagnostic ability, thus improving the quality and accuracy of his future reports. Similarly, feedback to the reporter also will increase the accuracy of the data contained in the register by providing a "double check" on the accuracy of the information recorded.

If the law permits sharing the results of the investigation with the person who made the original report, the register can be the vehicle for that sharing. Of course, the amount of information provided would be limited by the child's and family's right of privacy and also would depend upon the source of the report. Only a minimal feedback report would be needed for nonprofessional sources.

The relevant section of the draft Model Act reads:

> Upon request, a physician or the person in charge of an institution, school, facility or agency making a legally man-

dated report shall receive a summary of the findings of and actions taken by the local child protective service in response to his report. The amount of detail such summary contains shall depend on the source of the report and shall be established by regulations of the state department. Any other person making a report shall be entitled to learn the general disposition of such report.[150]

E. Sealing, Expunging, Removing, and Updating Register Data

In an effort to prevent the misuse of register records, a growing number of states are developing procedures for the sealing, expunction, and removal of records. Almost invariably, these procedures apply only to central register records; they are not considered necessary for local agency case records which are perceived as having less potential for misuse than centralized data banks.[151] At present, eighteen of the thirty-nine states and three other jurisdictions which have set up their central registers by statute have made statutory provision for the destruction, sealing, expunction, or amendment of information.

Often, action is taken after the child reaches a certain age. With respect to children who have reached the age of eighteen, two jurisdictions destroy all records;[152] four allow access only if a sibling or offspring is reported;[153] one expunges all identifying information;[154] three expunge information with certain conditions attached;[155] and one gives the department the power to "purge reports."[156] Four jurisdictions seal records no later than when the child reaches the age of twenty-eight.[157]

Other jurisdictions, take action at a specified time after the last report is made. Three jurisdictions expunge identifying information seven years after the last report,[158] although two attach other conditions;[159] and two jurisdictions seal all records ten years after the last report.[160]

Investigations which determine that reports are unfounded are another basis for taking action. Four jurisdictions destroy all records if the report is discovered to be unfounded;[161] ten expunge identifying information.[162]

Although there is increasing recognition of the need to inform the subjects of a report that they have been entered in the register,[163] at this writing only five jurisdictions require that subjects of a report be given notice that they are listed in the register;[164] four require that persons listed be informed of their rights to challenge the contents of the file.[165] Eleven jurisdictions allow subjects to request that their files be amended, sealed, or expunged;[166] and nine jurisdictions give subjects the right to a hearing if their request is denied.[167]

Six jurisdictions give the head of the department which operates the register the power to amend, seal or expunge records "upon good cause shown," and with notice to the subject of the report.[168]

The absence of updated or follow-up reports indicating whether the initial report was valid is a grave shortcoming of most register systems, creating great potential for misuse. Storing such raw, unverified data is an unnecessary infringement on the civil rights of every individual and family listed in the register. Furthermore, unverified previous reports are an unsound basis for diagnosis or evaluation and severely compromise the data upon which planners must make decisions because they provide an incomplete and inaccurate picture of the child protective caseload. Without the follow-up reports, sound management is impossible and there can be no real monitoring of the child protective agency's performance. Thus, besides the "automatic" procedures described above, many states are developing procedures to either seal, expunge, or remove inappropriate reports, often called "unfounded," "unsubstantiated," or "invalid."[169] Some states do not enter a case into the register until it has been substantiated. An increasing number of states also require periodic progress reports on open cases in order to update register records.

Unfortunately, contemporary child protective practices are not easily accommodated to such procedures. In the past, caseworkers did not have to determine the validity of reports before offering help, and, indeed, they still often attempt to avoid such difficult decisions. But recent statutory and administrative changes force workers to make prompt formal decisions concerning the validity of reports. To protect family rights, the child protective service usually is required to report to the central register within a specified time (often sixty days) its determination of whether the report was "indicated" or "unfounded." For example, Kentucky reports: "Presently if a case of suspected child abuse is not confirmed, we would attempt to remove the information from our central registry and from the computer."[170] In another state:

> At the end of each year, each agency is sent a list of the alleged abuse situations that they reported as sustained. We then ask the agency to advise us whether we should destroy the record or if there is enough evidence to indicate that the record should be retained. This we recognize is a judgment decision that to a large degree depends upon circumstances. Currently our retention schedule for all other cases is to retain the record for ten years and the index cards for thirty years. This is subject to change and will probably be reviewed in the next several years.[171]

Such procedures require a reasonable and predictable method for determining whether reports should be removed from the register. This is fair to endangered children as well as to the accused parents. States differ as to the test to be applied in determining the validity of the report, from "probable cause"[172] to "some credible evidence."[173]

The draft Model Act follows the provisions common in many states:

> All cases in the central register shall be classified in one of four categories: "under investigation," "unfounded," "under care," or "closed," whichever the case may be. All information identifying the subjects of an unfounded report shall be expunged from the register forthwith. Identifying information on all other records shall be removed from the register no latter than five years after the case is closed. However, if another report is received involving the same child, his sibling or offspring, or a child in the care of the same adults, the identifying information may be maintained in the register until five years after the subsequent case or report is closed.[174]

Since the state department is the agency primarily responsible for the utility and integrity of the information contained in the register, it should take steps, upon learning that a report was made maliciously or is otherwise

inaccurate, to correct and, if appropriate, expunge the record. The draft Model Act therefore provides:

> The central register may contain such other information which the state department determines to be in furtherance of the purpose of this Act. At any time, the statewide center may amend, expunge, or remove from the central register any record upon good cause shown and upon notice to the subjects of the report and the local child protective service.[175]

F. The Rights of the Subjects of Reports

Only with the informed vigilance of persons who are the subjects of reports can the accuracy of the information in the register be fully assured. As a matter of fundamental fairness, if not constitutional right, persons alleged to have abused or neglected their children ought to know what information a government agency is keeping about them. Thus, a subject of a report should be able to obtain a copy of all the information about him contained in the register at any time. Subjects of a report should have access to the record, even though it is "confidential." They should have the statutory right to review the contents of the record which relate to them.[176]

Nevertheless, this right of access should not be absolute. The identity of any person who made the report or who cooperated with the subsequent investigation should be withheld if disclosure of such information would be "likely to endanger the life or safety of such person."

The withholding of information should not be automatic, but should be based on the individual facts of each case. For example, if a neighbor who made a report were in danger of retaliation by the parents, the state department should be authorized not to identify him. The same would be true for a babysitter, teacher, or other person in daily contact with a subject of the report. In some situations, the detriment to the person reporting or cooperating in the investigation might entail potential psychological or social rather than physical harm. For example, disclosure to a parent that a grandparent or spouse reported the case or cooperated in the investigation might so disrupt family life as to be detrimental to the interests of all concerned. However, utmost care must be exercised so that such authority is not used as an excuse to improperly withhold information concerning the report and its handling. No information should be withheld concerning a report or statement made in bad faith.

In addition, the state department should be authorized to seek a court order prohibiting the release of information which the court finds likely to be harmful to the subject of a report. Such information might involve statements of relatives, psychiatric reports, or other information which, if known by the subject of the report, might cause mental anguish or harm.

The relevant section of the draft Model Act reads:

> Upon request, a subject of a report shall be entitled to receive a copy of all information contained in the central register pertaining to his case. Provided, however, that the state department is authorized to prohibit the release of data that would identify or locate a person who, in good faith, made a report or cooperated in a subsequent investigation, when it reasonably finds that disclosure of such information would be likely to endanger the life or safety of such person. In addition, the state department may seek a court order from a court of competent jurisdiction prohibiting the release of any information which the court finds is likely to be harmful to the subject of the report.[177]

Subjects of a report should have the right to make appropriate application to amend or remove information from the register.[178] If their application is denied, they should have a right to an administrative hearing and, if their application is again denied, they should have a right to a court hearing.[179] Thus, the Connecticut Department of Social Services' Regulations provide that "the parents of a child reported [sic] suspected abused may request the Commissioner to remove their child's name from the registry. If the request is refused by the Commissioner on the basis of information learned, parents will be notified in writing of the refusal and the reasons for same."[180] New York's Child Protective Services Act of 1973 guarantees to children, parents, and other subjects of a report, a right to receive "a copy of all information contained in the central register,"[181] except that the State Commissioner is authorized "to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation which he reasonably finds will be detrimental to the safety or interests of such person."[182] In addition, the subject of a report "may request the commissioner to amend, seal or expunge the record of the report."[183] If the commissioner refuses to do so within thirty days, the subject has a "right to a fair hearing to determine whether the record of the report . . . should be amended or expunged on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with" the law.[184]

The relevant section of the draft Model Act provides:

> At any time subsequent to the completion of the local agency's investigation, a subject of a report may request the state department to amend, expunge identifying information from, or remove the record of the report from the register. If the state department refuses to do so or does not act within thirty days, the subject shall have the right to a fair hearing within the state department whether the record of the report should be amended, expunged, or removed on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this Act. Such fair hearing shall be held within a reasonable time after the subject's request and at a reasonable place and hour. The appropriate local child protective service shall be given notice of the fair hearing. In such hearings, the burden of proving the accuracy and consistency of the record shall be on the state department and the appropriate local child protective service. A juvenile court [family court or similar civil court] finding of child abuse or child neglect shall be presumptive evidence that the report was not unfounded. The hearing shall be be conducted by the head of the state department or his designated agent, who is hereby authorized and empowered to order the amendment, expunction, or removal of the record to make it accurate or consistent with the requirements of this Act. The decision shall be made, in writing, at the close of the hearing, or within thirty days thereof, and shall state the reasons upon which it is based. Decisions of the state department under this section shall be subject to judicial review in the form and manner prescribed by the state procedure law.[185]

At the fair hearing, similar to those held to determine whether a recipient's public assistance can be terminated, the burden of proof is on the state department and the appropriate local child protective service; however, the fact that there was a previous juvenile court finding of child abuse or child neglect is presumptive evidence that the report was not unfounded. On the other hand, the fact

that there was not a finding, including the fact that there was a dismissal, would have no effect on fair hearing determination, since the juvenile court quantum of proof is either a "preponderance of the evidence" or "beyond a reasonable doubt," both of which are greater than the "probable cause" test to determine whether or not a report is unfounded.

FOOTNOTES

114. A. SOLZHENITSYN, CANCER WARD (1968).

115. Sometimes, the reports are made by malicious neighbors or relatives; more often, the reporters, though well-intentioned, are mistaken in their suspicions.

116. *See Symposium, Computerized Criminal Justice Information Systems: A Recognition of the Competing Interests,* 22 VILL. L. REV. 1171 (1977).

117. AHA Proceedings, *supra* note 40.

118. Fraser, *supra* note 10, at 515-16.

119. 42 U.S.C. §5101 (Supp. V 1975), *as amended by* Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266. In order to qualify for funding under the Federal Act, a state must "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians." *Id.* at § 5103(b)(2)(E). Under the regulations that implement this section, a state must have a law "which makes such records confidential and which makes any person who permits or encourages the unauthorized dissemination of their contents guilty of a crime." 45 C.F.R. § 1340.3-3(d) (1976).

120. Weinberger, *supra* note 30, at v-vi.

121. *E.g.,* in Ohio official comments:

> Letter dated December 29, 1972, on file at the National Center on Child Abuse and Neglect, Department of Health, Education and Welfare, Washington, D.C.
>
> We both understand that the concept of due process of law involves a balancing test between the rights of the people as individuals and the rights of the people as a collective state. It is my opinion that the rights of people as a collective state to ensure that the children within the state are free from being abused and neglected outweighs any possible, though I believe highly improbable, stigmatization of the people who are the subject matter of this report.

122. Weinberger, *supra* note 30, at xx.

123. 438 F. Supp. 1179 (S.D. Tex. 1977).

124. *Id.* at 1192.

125. *E.g.,* ALA. CODE tit. 26 § 14.8 (1977);ARK. STAT. ANN. §42-818(10) (Supp. 1975); N.Y. SOC. SERV. LAW § 422(10) (McKinney 1976 & Supp. 1977-78); VT. STAT. ANN. tit. 13, § 1356(c) (Supp. 1977).

126. Draft Model Act, *supra* note 28, at § 24(a).

127. *Id.* at § 24(e).

128. *E.g.,* LA. REV. STAT. ANN. § 46-65(F)(1) (West Supp. 1977).

129. *E.g.,* ILL. REV. STAT. ch. 23, §§ 2061, 5035.1 (Supp. 1977).

130. *E.g.,* D.C. CODE § 16-2331(b) (1973); IOWA CODE ANN. § 235A.15 (West Supp. 1977-78); N.Y. SOC. SERV. LAW § 422(4) (McKinney 1976 & Supp. 1977-78); WASH. REV. CODE ANN § 26.44.070 (Supp. 1977).

131. 45 C.F.R. § 205.50 (a)(1)(i)(1976).

132. *Id.* at §1340.3-3(d)(5).

133. CONN. GEN. STAT. ANN. §§ 17-38(a),(g),-47(a) (Supp. 1977); DEL CODE tit. 16, §§ 905(b), 909 (Supp. 1977); ILL. REV. STAT. ch. 23, §§ 2061, 5035.1 (Supp. 1977); N.H. REV. STAT. ANN. § 169.44, .45 (1976); N.C. GEN. STAT. § 110-122 (1978); TENN. CODE ANN. § 37-1209 (Supp. 1977); TEX FAM. CODE ANN. tit. 2, § 34.08 (Vernon Supp. 1977); VA. CODE §§ 63.1-53,-248.8 (Cumm. Supp. 1977).

134. ARIZ. REV. STAT. §§ 8-541(B), -546.03(C) (1974); IDAHO CODE §§ 16-1621, - 1623(f) (Supp. 1977); MASS. GEN. LAWS ANN. ch. 119, § 51 E, F (West 1978-79); MISS CODE ANN. § 43-24-3, -5 (Supp. 1977); MONT. REV. CODES ANN. § 10-1308 (Cum. Supp. 1977); R.I. GEN. LAWS § 40-11-13 (Supp. 1976).

135. OHIO REV. CODE ANN. § 2151-421 (Page Supp. 1977).

136. *E.g.,* COLO REV. STAT. § 19-10-115 (Cum. Supp. 1976); MO. ANN. STAT. § 250.150(1), (2) (Vernon Supp. 1977).

137. *E.f.,* ALASKA STAT. § 47.17.040(b) (Supp. 1976); ARIZ. REV. STAT §§ 8-541, -542(B), -546.03(C) (1974).

138. ARK. STAT. ANN. § 42-818(4), (10) (Supp. 1975); IOWA CODE ANN. §§ 235a.15, .17 to .21 (West Supp. 1977-78); MICH. STAT. ANN. §§ 722.627, .633(2) (Supp. 1977); NEV. REV. STAT. §§ 200.5045, 432.120, .130 (1977); N.J. STAT. ANN. § 9:6-8:11 (West 1973); N.Y. SOC. SERV. LAW § 422(4), (10) McKinney 1976 & Supp. 1977-78); WYO. STAT. § 14-28.14 (Cum. Supp. 1977); A.S. CODE tit. 21, § 2912(d)-(k) (1977).

139. *E.g.,* FLA. STAT. ANN. § 421.07(7), (14)(c) (West 1976); IOWA CODE ANN. §§ 235A.15,. 17 to .21 (West Supp. 1977-78).

140. *E.g.,* Act 2-53, § 201, 24 D.C. REGISTER 748 (July 22, 1977).

141. OR. REV. STAT. §§ 418.770, 990(7) (1977); S.D. COMPILED LAWS ANN. § 26-10-12.3 (1976).

142. *See* text accompany notes 68-76 *supra.*

143. Draft Model Act, *supra* note 28, at § 24(b)(i)-(vii).

144. *Id.* at § 24(d).

145. *See, e.g.,* FLA. STAT. ANN. § 827.07(7) (Wet 1976); ME. REV. STAT. tit. 22, § 3860 (Supp. 1977); NEB. REV. STAT. § 28-1506 (1975); N.Y. Soc. Serv. Law § 422(4)(h) (McKinney 1976 & Supp. 1977-78).

146. Recently, lawyers in New York City were denied access to the records of their clients which, they claimed, would prove a pattern of religious and racial discrimination by foster care agencies. A court order was necessary to obtain the information sought. *See* Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974).

147. *See* Draft Model Act, *supra* note 28, at §§ 24(b) & (d).

148. *Id.* at §§ 24(b)(ix), (x).

149. Ireland (1975), *supra* note 16, at 115.

150. Draft Model Act, *supra* note 28, at § 24(c).

151. *Cf.* Draft Model Act, *supra* note 28, at § 21(j).

152. ARIZ. REV. STAT. § 8-546.03(A), (B) (1974); VT. STAT. ANN. tit. 13, § 1356 (Supp. 1977).

153. ARK. STAT. ANN. § 42-818 (Supp. 1975); COLO REV. STAT. § 19-10-114 (Cum. Supp. 1976); N.Y. SOC. SERV. LAW § 422(4) (McKinney 1976 & Supp. 1977-78); A.S. CODE tit. 21, § 2912(a)-(c) (1977).

154. 11 PA. CONS. STAT. ANN. § 2214 (Purdon Supp. 1977).

155. Act 2-53, § 201, 24 D.C. REGISTER 748 (July 22, 1977); MASS. GEN. LAWS ANN. ch. 119, § 51 B(5), F (West 1978-79); MICH. STAT. ANN. § 722.627(1) (Supp. 1977).

156. TENN. CODE ANN. § 37-1208 (Supp. 1977).

157. ARK. STAT. ANN § 42-818 (Supp. 1975); COLO. REV. STAT. § 19-10-114 (Cum. Supp 1976); NEV. REV. STAT. § 432.100 (1977); N.Y. SOC. SERV. LAW § 422 (McKinney 1976 & Supp. 1977-78).

158. *E.g.,* 1977 S.C. Acts, § 13(B).

159. *E.g.,* MD. ANN. CODE art. 27, § 35A(i) (1976).

160. *E.g.,* FLA. STAT. ANN. § 827.07(7) (West 1976).

161. IOWA CODE ANN. §235a.1 to .14, .22 to .24 (West Sup. 1977-78); N.H. REV. STAT. ANN. § 169.44 (1976); VT. STAT. ANN. tit. 13, § 1356 (Supp. 1977); WYO. STAT § 14-28.13(a), (b), (c) (Cum. Supp. 1977).

162. *E.g.,* ARK. STAT. ANN. §42-818 (Supp. 1975); MICH STAT. ANN. § 722.27(1) (Supp. 1977); 11 PA. CONS. STAT. ANN. § 2214 (Purdon Supp. 1977).

163. *See* Sims. V. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977) and text accompanying note 123 *supra.*

164. Act 2-53, § 201, 24 D.C. REGISTER 748 (July 22, 1977); M.D. CODE art. 27, §35 A(i) (1976); N.Y. SOC. SERV. LAW § 422 (McKinney 1976 & Supp. 1977-78); 11 PA. CONS. STAT. ANN § 2214 (Purdon Supp. 1976); 1977 S.C. Act 187, § 13(B).

165. Act 2-53, § 201, 24 D.C. REGISTER 748 (July 22, 1977); N.Y. SOC. SERV. LAW § 422 (McKinney 1976 & Supp. 1977-78); 11 P.A. CONS. STAT ANN. § 2214 (Purdon Supp. 1977); 1977 S.C. Act 187, § 13(B).

166. *E.g.,* ARK STAT. ANN. § 42-818 (Supp. 1975); MICH STAT. ANN. § 722.627(1) (Supp. 1970); VT. STAT. ANN. tit. 13, § 1356 (Supp. 1977).

167. *E.g.,* IOWA CODE § 235a.12 to .14, .22 to .24 (West Supp. 1977-78); MICH STAT. ANN. § 722.627(1) (Supp. 1977); N.Y. SOC. SERV. LAW § 422 (McKinney 1976 & Supp. 1977-78).

168. *E.g.,* ARK. STAT. ANN. § 42-818 (Supp. 1975); 11 PA. CONS STAT. ANN. §2214 (Purdon Supp. 1976); A.S. Code tit. 21, § 2912(a)-(c) (1977).

169. *See, e.g.,* N.Y. SOC. SERV. LAW § 422(5) (McKinney 1976 & Supp. 1977-78). *See generally* Fraser, *supra* note 10, at 516 n.43; Wis. Manual, *supra* note 54, at §1661.40(2)B(5) (removing reports from the register when the allegations have been "refuted").

170. Letter dated November 14, 1973, on file at the National Center on Child Abuse and Neglect, Department of Health, Education and Welfare, Washington, D.C.

171. Letter dated November 16, 1973, from a Wisconsin administrator, on file at the National Center on Child Abuse and Neglect, Department of Health, Education and Welfare, Washington, D.C.

172. *Compare* N.C. GEN. STAT §§ 110-119(2) (1978) (removal justified where investigation reveals abuse of neglect) *and* 11 PA. STAT. ANN. § 2214(h) (Purdon Supp. 1977) (same) *with* TENN. CODE ANN. § 37-1205 (Supp. 1977) ("reasonable grounds to believe").

173. *E.g.*, ARK STAT. ANN. § 42-818(A)(5) (Supp. 1975) ("some credible evidence"); MICH. COMP. LAWS ANN. § 722.627(2) (Supp. 1977) ("credible evidence"); N.Y. SOC. SERV. LAW § 422(5) McKinney 1976 & Supp. 1977-78) ("some credible evidence").

174. Draft Model Act, *Supra note* 28, at Ital. §21 (h).

175. *Id.* at § 21(g).

176. *Id.* at § 21; *See, e.g.*, N.Y. SOC. SERV. LAW § 422(7) (McKinney 1976 & Supp. 1977-78).

177. Draft Model Act, *supra* note 28, at § 21(h).

178. *See, e.g.*, N.Y. SOC. SERV. LAW § 422(8) (McKinney 1976 & Supp. 1977-78).

179. *Id.*

180. CONN. STATE WELFARE DEPT, INFORMATION PACKET PREPARED FOR INSTRUCTING MANDATED REPORTERS TO THE CENTRAL REGISTER (unpublished and undated).

181. N.Y. SOC. SERV. LAW § 422(7) (McKinney 1976 & Supp. 1977-78).

182. *Id.*

183. *Id.* at § 422(8).

184. *Id.*

185. Draft Model Act, *supra* note 28, at § 21(i).

Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect-Tentative Draft* (New York: Ballinger Publishing Co., 1977), 3.3D, 3.4. Reprinted with Permission.

3.3 D.

Identifying characteristics in all unsubstantiated reports (including names, addresses, and any other such identifying characteristics of persons named in a report) should be expunged from the files of the report recipient agency immediately following completion of the agency's listing review pursuant to Standard 3.2 C., within two years of the report's receipt. In any event, identifying characteristics in all reports should be expunged from the files of the report recipient agency within seven years of the report's receipt.

3.4 Central register of child abuse.

A. The state department of social services (or equivalent state agency) should be required to maintain a central register of child abuse. Upon receipt of a report made pursuant to Standard 3.1 A., the report recipient agency should immediately notify the central register by telephone and transmit a copy of any written report to the central register for recordation.

B. Within sixty days of its initial notification of a report for recordation, the report recipient agency should be required to indicate its action pursuant to Standard 3.3, and to indicate any subsequent action regarding such report at intervals no later than sixty days thereafter until the agency has terminated contact with the persons named in the report. If at any time the report recipient agency indicates that the report (including names, addresses, and any other such identifying characteristics of persons named in the report) should be expunged, the central register should immediately effect such expungement. In any event, all reports (including names, addresses, and any other such identifying characteristics of persons named in the report) should be expunged from the central register seven years from the date the report was initially received by the report recipient agency.

C. The central register, and any employee or agent thereof, should not make available recordation and any information regarding reports to any person or agency except to the following, upon their request:

1. a report recipient agency within this state, listed pursuant to Standard 3.2, or a child protective agency in another state deemed equivalent, under regulations promulgated by the state department of social services (or equivalent state agency), to such report recipient agency within this state;

2. any person (including both child and parent(s) and alleged abuser [if other than parent(s)]) who is named in a report (or another, such as an attorney, acting in that person's behalf), except that such person should not be informed of the name, address, occupation, or other identifying characteristics of the person who submitted the report to the report recipient agency;

3. a court authorized to conduct proceedings pursuant to Part V;

4. a person engaged in bona fide research, with written permission of the director of the state department (except that no information regarding the names, addresses or any other such identifying characteristics of persons named in the report should be made available to this person). Any person who violates the provisions of this standard by disseminating or knowingly permitting the dissemination of recordation and any information regarding reports in the central register to any other person or agency should be guilty of a misdemeanor (and/or should be liable for compensatory and/or punitive damages in civil litigation by or on behalf of person(s) named in a report).

C. Litigants' Rights of Access to Reports

Paul Piersma, et al., *Law and Tactics in Juvenile Cases,* (Philadelphia: American Law Institute, 1977), 506-507.

20.6 Access to Social Investigation Reports

Two different aspects to a claim for access to social investigation reports in child neglect, dependency, and termination proceedings exist. In delinquency hearings, the argument for access has been likened to the adult's right to view the presentence report. Although adult courts have not always afforded this right, the claim in juvenile hearings is even stronger, since the range of dispositional alternatives is far greater, and the court has the obligation to formulate a disposition in the "child's best interests" in an effort to provide measures of guidance and rehabilitation rather than mere punishment. Counsel's function is to aid the juvenile court in making a proper disposition, but this function can hardly be realized if counsel is ignorant of the factors to be considered

by the court. (For a complete discussion of the right in delinquency hearings, refer to Section 10.4.)

In proceedings that may result in an adjudication of neglect or termination, the evidence contained in a social report will be employed not only in the dispositional stage, but also in making the adjudication itself. Because this is true in custody disputes between parents as well, the analogy to these cases is especially applicable.

In a thorough discussion of the right of access to social investigation reports, the use of a confidential report, without permitting counsel for either party to examine it, was found to contravene due process of law in *Williams v Williams,* 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955), a child custody case. This was true even though the report was not shown to contain any harmful material. The use of social reports without disclosure to the parties and without entering them into the formal court record results in two problems. Without knowing what has been included in the report, the parties are powerless to test the credibility of the person who has made the report directly through cross-examination or by presenting other evidence to explain or minimize the adverse facts. See, *e.g., Mazur v. Lazarus,* 196 A.2d 477 (D.C. Cir. 1964); *Stanford v. Stanford,* 266 Minn. 250, 123 N.W.2d 187 (1968).

A second problem was noted in *Walter v. Walter,* 61 Ill. App. 476, 209 N.E.2d 691 (1965), in which the court observed: "[t]he principle vice of this practice is that there is no possible way the action of the trial judge can be reviewed if it is based upon confidential reports which are not part of the record." *Id.* at 479, 209 N.E.2d at 692. See also *McGuire v. McGuire,* 140 So. 2d 354 (Fla. Dist. Ct. App. 1962); *Oltmanns v. Oltmanns,* 265 Minn. 377, 121 N.W.2d 779 (1963).

There is now a recognition of these problems in cases in which the state attempts to interfere in the parent-child relationship, either through neglect or termination proceedings. In *In re S.M.W.,* 485 S.W.2d 158 (Mo. Ct. App. 1972), the court noted the practical problems caused by a lack of access to the reports and concluded:

> Denial of those opportunities violate[s] the fundamental principle of Anglo Saxon law that the decision of a court must be based on evidence produced in open court at a fair trial. *Id.* at 164.

See also *In re Chandler,* 230 Or. 452, 370 P.2d 626 (1962); *State v. Lance,* 23 Utah 2d 407, 464 P.2d 395 (1970).

If the constitutional considerations and practical necessities are weighed against the state's possible interest in encouraging complete reports through confidentiality, the scales must tip in favor of the parent's right to access.

New York Family Court Act, Sections 1047(b) and 1038 with Commentary.

§ 1047. Sequence of hearings

(b) Reports prepared by the probation service or a duly authorized association, agency, society or institution for use by the court at any time for the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing.

Practice Commentary

by Douglas J. Besharov

Subsection 1047(b) establishes the confidentiality of reports prepared "for the making of an order of disposition"; indeed, it makes them "confidential" to the extent of authorizing the court to withhold them "in whole or in part" from the law guardian or counsel for either of the parties. The original justification for authorizing such a high degree of secrecy was that "since most Family Courts and their official probation services are, in their functions as social agencies, members of social services exchanges, [among the drafters of the Family Court Act] there was universal disapproval of a mandatory disclosure to the parties, so the final provisions which appear in several places [N.Y. Fam.Ct.Act §§ 347, now 1047, 435, 625, 746, 835, and 915] permit the court in its discretion [to] withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person such confidential reports or information." [Oughterson, "Family Court Jurisdiction," 12 *Buffalo L.Rev.* 467, 471 (1963).] Other reasons frequently given for denying parties access to such reports are that if made known to the parties: (1) they could be emotionally damaging because they contain psychological or clinical judgments, or (2) they could create needless family antagonism because they contain candid statements from various family members.

Nevertheless, the realities of court practice affirm the need to review and, when necessary, to challenge the contents of probation and court clinic reports.

As a result, practice under subsection 1047(b) varies widely. Depending on the particular judge, all records may be disclosed to parties and their counsel, or selected reports or portions thereof may be disclosed or counsel alone may be permitted to read reports in chambers, or all reports may be withheld totally, permitting no disclosure. Mental health studies are the reports most frequently withheld, courts often citing *In re* J., 38 A.D.2d 711, 329 N.Y.S.2d 349 (2nd Dept., 1972). Although the Appellate Division's opinion did not distinguish between mental health records and other probation reports, and indeed seems to equate them, the case is often relied upon by judges who feel that revealing sensitive and easily misunderstood mental health reports to respondents might be more damaging than helpful.

When a mental health study is ordered, the respondent may have a right to object to it and may be able to condition his cooperation on later access to it. For example, in *In re* Mark J., 38 A.D.2d 711, 329 N.Y.S.2d 349, 350 (2nd Dept., 1972), the Appellate Division was careful to point out that "it is clear tha appellant Mark J. (anonymous) *never originally objected* to the examination and even sought to obtain favorable consideration by submitting his own psychiatrist's report to the court prior to the making of the dispositional order." [emphasis added] [*Compare* this with the fairly standard procedure to the same effect under Family Court Act § 435, *supra. See, e.g.,* Kessler v. Kessler, 10 N.Y.2d 1, 225 N.Y.S.2d 1 (1962); DiStefano v. DiStefano, 51 A.D.2d 885, 380 N.Y.S.2d 394, 395-396 (4th Dept., 1976).]

When faced with insistent requests from counsel for the report, some judges seek to mute these objections by letting counsel review the report in chambers; sometimes, the judges read the report, or part of it, to counsel, rather than giving him a copy. While this is not the most favorable way to gain access to the report, it may be the only way to do so; and it should not be ignored. By this method, the court may be seeking to protect the integrity of the social study while at the same time meeting the greater part of the attorney's needs. In an appropriate case, of course, counsel should reserve the right to appeal denial of direct access, while nevertheless utilizing the opportunity provided by the judge.

Obtaining the report is only the beginning. Frequently, practitioners and judges are too willing to accept such written reports at face value. But social studies often contain inaccurate, incomplete, or misleading information, though through no willful fault of those preparing them. Only through effective cross examination and the presentation of affirmative proof can counsel successfully review and, when necessary, challenge the contents of such reports. [*See generally,* Besharov, JUVENILE JUSTICE ADVOCACY 418 (1974).]

The last passage in subsection 1047(b) clarifies an issue of practice under the predecessor Children's Court Act by prohibiting the submission of probation reports "to the court prior to the completion of a fact-finding hearing . . . " [*Compare* with N.Y.Fam.Ct.Act §§ 435(b) and 746(b) (1975), both having similar provision.] In the only reported case on this issue, the First Department, applying conventional rules of evidence tinged with an explicit concern for the child, held that it was merely a "technical error" for the court to proceed with a fact-finding hearing after the judge had access to a probation report, even though there was a clear violation of this section's absolute prohibition. [*In re* Arroyo, 36 A.D.2d 531, 321, N.Y.S.2d 961, 962 (1st Dept., 1971); *appeal withdrawn*, 29 N.Y.2d 747, 326 N.Y.S. 2d 339, 276 N.E.2d 234 (1971).]

Finally, the growing obsolescence of subsection 1047(b) as a whole must be considered. At the time of the subsection's enactment in 1962, the court probation service was responsible for pre-dispositional investigations and reporting. Because probation was never involved in a case prior to fact-finding (except for intake screening), it needed to be specifically ordered, after a fact-finding, to prepare a report "for use by the court . . . for the making of an order of disposition." However, because of the Child Protective Services Act of 1973 (Title 6 of Article 6 of the Social Services Law), the child protective service of the local department of social services is now the petitioner in most Article 10 proceedings. As bureaucratic social service agencies, these agencies require their caseworkers to prepare a social study (for internal approval) before authorizing court action. If prepared properly, these studies ordinarily contain all the information the court should need in reaching a dispositional decision—subject only to the need to update the information and to receive contradicting evidence and argument from the respondent. As a result, these studies are increasingly used as a basis of the court's dispositional decision, and court probation departments are increasingly being relieved of the responsibility of preparing a pre-dispositional report, except in exceptional circumstances. (Specially commissioned psychiatric evaluations performed by the court's mental health clinic are another exception.)

In an effort to reach more timely dispositional decisions, a number of courts begin a dispositional hearing immediately upon a fact-finding in order to review this social study. After reviewing the study, the court determines (1) whether there is sufficient information to make a dispositional order (subject to the respondent's right to present contrary evidence and argument), or (2) whether further information is needed from the petitioner or other court related services, such as the mental health clinic.

This growing trend of using child protective agency social studies prepared during the course of the agency's pre-court investigation nullifies the prohibitions of section 1047(b) against access by the parties and against access by the court before a fact-finding is made.

Child protective service reports are available to the respondent for three reasons. N.Y.Social Services Law § 422(4) (d) specifically grants the subject of a report of suspected child abuse or neglect (this would include the child and the respondents) access to any reports made pursuant to the Social Services Law "as well as any other information obtained, reports written or photographs taken concerning such reports in the possession of the department of local departments . . . " More generally, such records seem to be available to all litigants in Article 10 proceedings, including respondents, pursuant to Family Court Act § 1038, *supra,* because a public child protective agency is an agency under the terms of that section. [*See* the Practice Commentary accompanying N.Y.Fam.Ct.Act § 1038, *supra.*] Furthermore, it is questionable whether subsection 1047(b) has the effect of making these child protective agency reports confidential since, although it talks about reports prepared "at any time," these reports are not made for the sole or even prime purpose of assisting the court in "making . . . an order of disposition." Since the report is not prepared "for the making of an order of disposition" and is in fact available to the parties at any time during the proceeding, this subsection probably does not reach such reports and it probably only relates to mental health and probation reports prepared specifically for the court at the dispositional stage.

The fact that child protective agency reports are available to the parties during all stages of Article 10 proceedings, including preliminary hearings and fact-finding hearings, has another implication for practice. The very nature of the proof in Article 10 Child Protective Proceedings requires that background and character information, as well as information about prior bad acts and perhaps even convictions, be part of the direct proof of the allegations. [In fact, Family Court Act § 1038, *supra,* by making such reports available to all parties without regard to the stage of the proceeding, suggests that the drafters of Article 10 assumed that they would be used during the adjudicatory as well as the dispositional stage.) Indeed, there is no apparent authority that would prevent the court from inquiring into the various psycho-social factors surrounding the family constellation, although information on the precise dispositional recommendation, and basis for it, would be properly excludable from an adjudicatory hearing. It may even be an abuse of discretion not to consider them in situations in which they become a crucial and even indispensable element in the proof, for example, if the petitioner is seeking to have the child adjudicated as a neglected child because he "is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care..." [N.Y.Fam.Ct.Act § 1012(f) (i) 1975).] In such a case, pursuant to the ordinary rules of evidence, the report as well as other records of the child protective agency would be admissible into evidence at a preliminary and fact-finding hearing, as well as at a dispositional hearing.

§ 1038. Records involving abuse and neglect

Each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, county attorney, district attorney, counsel for the child, or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article. The court shall establish procedures for the receipt and safeguarding of such records.

Practice Comentary

by Douglas J. Besharov

In effect, this is a pretrial discovery provision. It both expands and limits the provision for pretrial discovery in child protective proceedings. Counsel for any party in the proceeding is authorized to subpoena records of public and private agencies, including hospitals and local departments of social services and their child protective units. However, the material, once subpoenaed, does not go to the party subpoenaing it, but to the court for "safeguarding". This is a recognition that the antagonisms and hostilities child protective cases can raise suggest that the court is the best custodian of records and other evidence. Perhaps because of Legislative oversight, if evidence or records are obtained under some other legal authority, this section's requirement that they be sent to the court would not apply. Thus, for example, when the corporation counsel, county attorney, or district attorney, as legal representative of the public child protective agency, is given agency records, they can maintain custody of them. Similarly, if counsel for the child or one of the parties obtains the records through the discovery provisions of the CPLR, the records need not be sent to the court for safekeeping.

Although records or evidence relating to child abuse or neglect may be subpoenaed by counsel through an attorney's subpoena, a judicial subpoena probably expedites production of such records and should be sought, when appropriate.

Generally, the practitioner will begin his search for records by reviewing the records of the public child protective agency. From these records, the practitioner should be able to ascertain what agencies had contact with the family and, on that basis, seek out their records or interview their staff employees. As an added check, the practitioner can request a copy of the record concerning the family in the New York State Central Register of Child Abuse and Maltreatment. [*See* N.Y.Soc.Serv.L. § 424 (1976).] Although confidential by law, Central Register records would be available to counsel for one of the parties under the provisions of this section and the Social Services Law. [N.Y. Soc.Serv.L. §§ 422(4) (d), (e) (1975).] On the basis of these records, counsel can determine what other agencies, if any, had reported the child's condition to the authorities.

Florida Rules of Juvenile Procedure, Rule 8.070, Discovery.

(b) Required disclosure in dependency cases.

(1) At any time after the filing of a petition alleging a child to be a dependent child, on written demand of any party, the party to whom the demand is directed shall disclose to him and permit him to inspect, copy, test or photograph matters material to the cause.

(2) The following information shall be disclosed by any party upon demand:

(i) The names and addresses of all persons known to have information relevant to the proof or defense of the petition's allegations.

(ii) The statement as defined in this rule of any person furnished in compliance with the preceding paragraph.

(iii) Any written or recorded statement and the substance of any oral statement made by the demanding party or a person alleged to be involved in the same transaction.

(iv) Tangible papers or objects belonging to the demanding party which are to be used at the adjudicatory hearing.

(v) Reports or statements of experts, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(3) The petitioner shall not be entitled to initiate discovery under this rule, and the court may, for good cause shown, deny or partially restrict the disclosures provided by this rule.

(4) The disclosures required by this rule shall be made within five (5) days from the receipt of the demand therefor.

(c) Limitations on Disclosure.

(1) Upon application, the court may deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to the party requesting it.

(2) The following matters shall not be subject to disclosure:

(i) Work Products. Disclosure shall not be required of legal research or of records, correspondence, or memoranda, to the extent that they contain the opinion, theories, or conclusions of the prosecuting or defense attorney or members of his legal staff.

(ii) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or a failure to disclose his identity will infringe the constitutional rights of the child.

Section VII.

Criminal Prosecution of Abusing Parent

Although prosecution of parents takes place outside the juvenile courts, it can impinge seriously upon cases brought there. These effects, which comprise many of the arguments against prosecuting parents, will be examined. There is a need for correlation between criminal and juvenile courts and between the prosecutor and the child protective agency in cases where prosecution is, or may be, attempted.

A. Arguments For and Against Prosecution

1. Arguments for criminal prosecution include:

The goals of criminal prosecution in general apply to abuse and neglect cases. These goals are rehabilitation of the defendant, deterrence of both the defendant and other potential child abusers, removal of the defendant from society, and retribution. Retribution is exceptionally important in view of the public perception of child abuse as a heinous act.

Criminal sanctions against parents are available to coerce them into accepting services.

Police and district attorney investigations may be helpful in ferreting out all the facts in a particularly serious and complex case of abuse.

2. Reasons against prosecution include:

Criminal prosecutions in abuse and neglect cases are difficult because of evidentiary problems, the standard of proof required (beyond a reasonable doubt), and the prohibition against self-incrimination.

Criminal prosecution may make the parent less cooperative in remedial procedures.

Prosecution is less likely to deter child abuse than other criminal acts.

Criminal courts do not have power to order treatment for family members who are not defendants (particularly the spouse and child). They also often lack the necessary support services to implement effective supervision and treatment.

3. Most professionals in the child abuse and neglect field advise against prosecution except in unusual circumstances.

Prosecution is more likely in cases of sexual abuse, severe injury or death, and abuse by non-parents.

B. Effects of Prosecution on the Juvenile Court

1. Juvenile court proceedings are often suspended when there is criminal prosecution. The resulting delay can be considerable.

2. The possibility of prosecution may affect parents' testimony in the child protective hearing.

Parents may be less candid with the court.

If prosecution is actually threatened, the parents can remain silent under the self-incrimination privilege. Courts, however, can grant "use immunity" to the parents so that their testimony cannot be used against them in a criminal prosecution.

3. Fear of prosecution may lead parents to coerce their children not to testify about the parents' acts.

4. Prosecution and a resulting jail sentence can hinder attempts to improve the child's care and to provide better family life.

C. Steps Towards Coordination of Civil and Criminal Functions

1. Various means to coordinate activities of child protective agencies, police and prosecutors are:

Establishing guidelines for when child abuse and neglect reports should be referred for police investigation and possible prosecution.

Coordinating investigations by the police and child protective agencies.

Coordinating remedial efforts by the prosecutor and child protective agencies in cases where criminal prosecution is or may be initiated.

2. Suggestions for coordination between juvenile and criminal courts are:

Permitting prosecution only upon request of the juvenile court once a petition has been filed. (The juvenile court should request prosecution only if it believes prosecution will not harm the child or hinder remedial actions.)

Appointing a guardian *ad litem* to monitor and represent the child in criminal court actions.

Support Readings

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A. Arguments For and Against Prosection

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Projects, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 9.1. Reprinted with Permission.

Part IX: Criminal Liability for Parental Conduct

9.1 Limiting criminal prosecutions.

Criminal prosecution for conduct that is the subject of a petition for court jurisdiction filed pursuant to these standards should be authorized only if the court in which such petition has been filed certifies that such prosecution will not unduly harm the interests of the child named in the petition.

COMMENTARY

Under current law, two radically different kinds of sanctions can be invoked against a parent who harms his/her child: the parent can permanently lose custody of the child (or have some other response applied from the armamentarium of child protective laws); or the parent can be jailed (or have some other imposition from the penal laws). In these settings, the child protective and penal systems are both intended to serve two general goals—to protect children from harm by deterring or reforming misconduct, and to express community outrage at parental misconduct.

Child abuse is universally defined and punished as a crime under state laws. See Katz, "Child Neglect Laws in America," 9 *Fam. L. Q.* 1, 3, 4 (1975). Furthermore, the legislatures of four states (Arizona, Maryland, Mississippi, and Nevada) have created a new crime of "child abuse" or "cruelty to children," giving rise to criminal sanctions in addition to those already existing for assault, battery, and homicide. V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's,* 15, chart at 29 (1974). Sanctions for neglect, however, form a far less clear pattern among the several jurisdictions. Penalties for neglect are presently found in the criminal codes of thirteen jurisdictions, while civil penalties are included in the statutes of nineteen jurisdictions. Fines range from $50 to $1,000, and prison sentences from thirty days to five years for abandonment or resulting death. In most cases, both imposition of a fine and imprisonment are possible. See Katz, *supra* at 63.

Notwithstanding the almost universal existence of penal provisions suppplementing the various dispositions possible under the child protective system, only the purpose of protecting children from harm is straightforwardly expressed in the statutes. Katz, *supra* at 17-19.

It is difficult to document the general or specific deterrent impact of penal laws against parental misconduct—though perhaps no more difficult to establish than for the deterrent impact of most criminal law sanctions. There are, however, special circumstances that should lead toward greater skepticism of the worth of penal sanctions for child protective purposes. First of all, invocation of imprisonment against a parent clearly works against the child's psychological interest in many ways—by removing the parent's physical presence which, no matter how abusive the parent's conduct, always has some deleterious consequence for the child; by imposing an added burden of guilt on the child beyond the irrationally magnified burden already carried by most (particularly younger) children harmed by their parents; and by fanning the parent's already smoldering anger at the child.

The question posed by an imposition of jail for parental misconduct, in short, is whether that parent should continue to have custody of the harmed child following his/her imprisonment. And if this question is posed in necessary tandem with the question of imprisonment, a further issue is thus raised: why shouldn't continued custody be the sole question raised by parental misconduct toward children? Where the child has died as a result of parental misconduct, the question of continued custody would obviously be moot (though the special problems of surviving siblings will be discussed later). But where the harmed child is alive, the question must be considered whether all of the purposes served by penal sanctions would be satisfied (and more attentively to the long-range interests of the child) by permitting invocation of sanctions drawn from child protective laws.

The failure of existing laws to ask that question harms the best interest of needy children. The current, overlapping regime of child protective and penal laws itself has a particularly exacerbating quality: each system is controlled by different personnel with different perspectives, and each system too readily may be invoked, without attention to the consequences for the other. Students of child abuse, for example, have noted that criminal laws against parents are only rarely invoked by prosecutors and such invocation appears triggered mostly by the extent of the newspaper coverage, and consequent public turmoil, about individual cases. See Terr and Watson, "The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion," 124 *Am. J. Psychiatry* 1432 (1969). But though invocation of criminal sanctions is rare, the possibility of that invocation hangs heavy in every case in the minds of parents and of therapeutically oriented per-

sonnel attempting to work with, and build a trusting relationship with, parents in the future interests of their children. The problem of coordination could likely be solved by mandating case-by-case collaboration between prosecutors and child protective personnel. Mandating such collaboration obscures, however, the more fundamental question of the necessity and desirability for dual systems of sanctions for protecting children in any event.

While acknowledging that overlap between the criminal and child protective laws for the same parental conduct could have harmful consequences, the standard nonetheless looks to a case-by-case mediation of this conflict. It is considered important to maintain on the books, and in application to selected cases, criminal sanctions against outrageous abuses of parents against children. Harm to children, resulting from application of criminal sanctions to parents, could be adequately prevented if such sanctions were only possible when the court charged with the child protective function authorized such prosecution.

It can be argued to the contrary, however, that the pressures on the child protective court for invocation of criminal sanctions would be too strong—particularly in cases which fortuitously attract newspaper attention—and that all of the various legitimate purposes of the criminal sanction would be equally accomplished by sanctions available under child protective laws and the child would be better protected thereby. This position can be supported by the following arguments: that deterrence of future parental misconduct (generally or specifically) would be as much accomplished by invoking the possibility of permanent loss of child custody as by jail; that rehabilitative possibilities would be at least equally well served under the regime of child protective laws, and likely better served since persons with special therapeutic skills and sympathies would be more likely attracted to work in a child protective agency aegis; and that community outrage should, it seems, be equally satisfied, and the desires for the last measure of vengefulness through penal sanctions should be tempered by a realization that temporary separation of the child from his/her parent by jailing the parent will redound only to the greater harm of the child. It is true that, where a child dies as a result of parental misconduct and siblings remain living, those siblings will be injured by invocation of imprisonment against their parent (however much they also might need protection against that parent). But unfortunately, children are always harmed by separation from their parents when parents are jailed for harming the interests of other persons. Though principles of mercy might ask it, principles of equal treatment do not demand that surviving siblings have special claim on their murdering parent's company.

One further question must be addressed: that is, the definition of "parent." The social reality, of course, is that the "parenting function" is carried out by persons in widely divergent statuses; paramours may, for example, be more "psychological parents" than the absent biologic parent in a particular family unit. But for purposes of identifying parental misconduct which is properly subject only to child protective laws, it seems right to restrict this rubric only to "parents" who have a legally recognized right to custody of the child. The basic sanction under the child protective laws is the threat of loss of custody. Accordingly, other forms of adult-child relations must be subject to criminal law forums and sanctions, no matter how much out of step with the psychological reality of parent-child dynamic bonds in the individual case.

Urzi, *Cooperative Approaches to Child Protection, A Community Guide* (Minnesota Department of Public Welfare), 76-78.

Appropriateness of Criminal Prosecution for Child Abuse and Neglect

The use of the criminal courts in child abuse and neglect cases is controversial. Many professionals feel that child abuse and neglect is a psycho-social problem which should be handled by a social services approach. Others argue that an individual who abuses or neglects a child has committed a crime and should be treated as any other criminal, that is, prosecuted.

Some of the typical arguments given for and against criminal prosecution are provided below in the hope that this may more clearly delineate the dimensions of the issue.

Reasons Cited For Criminal Prosecution

Child abuse may constitute a criminal act and should be treated like all other alleged criminal acts.

Criminal prosecution and conviction of child abusers will deter the individual defendant and others from acts of abuse or neglect.

Criminal prosecution and conviction is necessary to bring about meaningful change in the behavior of the abuser, since the criminal court has the power to enforce its order by requiring the abuser to participate in social service programs.

Unless criminal prosecution is the result of police involvement in child abuse cases, the police will not be willing to act in such cases.

Criminal prosecution affords the defendant full due process rights and forces the state to prove abuse or neglect beyond a reasonable doubt. Because of this, the family's right of privacy is better protected than when the intervention into the family occurs through Juvenile Court or a social service agency.

Reasons Cited Against Criminal Prosecution

Child abuse and neglect are psycho-social problems which should be handled by a nonpunitive social service approach designed to preserve the family structure as well as to protect the child.

Child abusers often see themselves as victims, as people who are helpless and isolated from the social mainstream. Prosecution and conviction, especially if it leads to incarceration, may tend to reinforce these feelings and may lead to increased hostility and resentment. These feelings may in turn lead to further abusive acts.

Criminal prosecution and conviction is more likely to break up the family than are other approaches to the problem.

Because successful criminal prosecution of child abuse is very difficult (due to the high standard of proof required and the fact that there are often no witnesses other than the child victim who is too young to testify or too frightened to testify, especially in sexual abuse cases), many prosecutions result in dismissal or acquittal. Some professionals argue that in such instances, even though it may be clear that the child is receiving inadequate care, the exonerated defendant will be unwilling to participate in any social service programs.

In cases which involve both Juvenile and Criminal Court Proceedings it is possible that the decision of one court will undermine that of the other. To avoid this situation, the Juvenile Court may at times have a tendency to adopt a "wait and see" attitude, in which disposition of a child determined to be abused or neglected may be delayed until the criminal court case is concluded.

Criminal prosecution usually singles out one parent when abuse and neglect are family problems needing family treatment.

Criminal prosecution moves slowly extending the period of crisis and making treatment difficult.

Whatever the rationales, where criminal prosecution appears to be an issue, it is important to confront it, discuss it and negotiate an agreement among the concerned disciplines—usually welfare, law enforcement, and the county attorney. At the very least, a formal agreement should clearly delineate the criteria for referring and abuse or neglect case to the local law enforcement agency for criminal investigation and possible prosecution. Two sample agreements are included here as an illustration.

Suggested Criteria for Referring Child Abuse Cases to Law Enforcement for Investigation in St. Louis County (Minn.)

Suggestions for the criteria to be used are as follows:

1. Any sexual abuse matter.
2. Physical abuse which:

a. Results in death.

b. Results in fractures, concussions, burns, internal injuries, loss of use of organs, limbs or otherwise causes great bodily harm or places the child's life in serious jeopardy.

c. Represents a second or subsequent occurrence to the child or within the family or custodial unit.

d. Is believed to result from acts other than those of the natural parent (i.e.—boyfriend, girlfriend, foster parent, institutional or treatment center employee, etc.)

e. Being none of the above causes the social worker to believe that a more thorough investigation is required.

3. Physical neglect, which substantially endangers the child's life.

The appropriate law enforcement department should be orally contacted by the worker receiving the report of child abuse when the information tends to show that the abuse falls into the above category. The law enforcement department should be requested to maintain contact with the County Attorney's Office—Welfare/Juvenile Division —even though a criminal prosecutor might later become involved. The worker should also inform the County Attorney's Office—Welfare/Juvenile Division—that a referral has been made to the appropriate law enforcement department.

Child abuse occurring within the city of Duluth would be referred to the Duluth Police Department—Juvenile Division and to the County Attorney's Office located in the Welfare Department. Those cases occurring in the southern half of the county but outside the city would be referred to the Sheriff's Office in Duluth and to the same office of the County Attorney. Those occurring in the northern half of the county but outside the municipalities would be referred to the Sheriff's Office in Virginia or Hibbing, whichever is appropriate and to the County Attorney's Office in Virginia. Matters arising in the various municipalities on the Iron Range would be referred to the local police department and to the County Attorney's Office in Virginia.

Suggestions For Conditions Which Lead to Immediate Referral to Police for Investigation and Intervention in Hennepin County

When any of the below-described conditions exist, an immediate referral will be made to the local Police Department for their investigation and possible action.

1. To obtain immediate removal of the child from the parents' home as a protection from imminent danger. Removal under a Police Hold would be obtained.
2. When Police investigation and intervention (but non-removal) is necessary to protect a child from further abuse.
3. When the family makes itself inaccessible to the social worker and there is not sufficient basis to obtain a hold order—there is no other way to investigate (and we have sufficient reason to fear for the possible danger to the child).
4. When we determine the presence of the Chronic Child Abuse Syndrome, and whenever there is a criminal physical assault and/or a sexual assault.
5. When there appears to be probable physical danger to the social worker in conducting an investigation.

Definitions

1. Chronic Child Abuse Syndrome—A medical, social or psychological condition, primarily of infants and young children, in which there is evidence of repeated injuries to the nervous, skin, skeletal or other biological or psychological systems.
2. Severe Physical Assault—The intentional, non-accidental use of physical force with a resultant extreme consequence upon the child, such as bone fracture, severe, penetrating body burns, violent rupture of large skin area, significant head trauma, etc.
3. Sexual Assault—Sexual attack upon the child which would fall under the definition of the Criminal Sexual Conduct Act of 1975.

5.53 The Role of the County Attorney

The county attorney is the intermediary between the courts (juvenile or criminal), on the one hand, and the

welfare and law enforcement agencies, on the other. This is a critical role in the child protection system.

In essence, it is the county attorney's job to present the child abuse or neglect case to either the juvenile or criminal court. This means that the county attorney will represent:

The *petitioner* (almost always the county welfare agency) if formal neglect or dependency proceedings are to be brought in the Juvenile Court;

The *complainant* (almost always a law enforcement officer) if criminal charges are to be brought against the abuser.

In either case, the county attorney must decide whether the facts alleged are supported by sufficient admissible evidence to cause the court to make a determination that abuse or neglect does, in fact, exist. If, in the judgment of the county attorney, there is not sufficient evidence to prove the allegations, he can decide not to institute a proceeding.

Because of this role, the county attorney must focus on available, detailed, factual information to prove the case. This concern for detail and for specific admissible evidence often creates resentment and misunderstanding between the county attorney, and the welfare agency and/or witnesses called to testify.

This problem is perhaps best addressed in the context of a multidisciplinary approach to child abuse and neglect. To begin with, the county attorney should be readily available to protective service workers and law enforcement officers for legal consultation and advice. In those communities where a child protection team exists, legal consultation and advice would be readily available to *all* involved professionals (health, mental health, education, etc.). In addition, the county attorney should thoroughly understand the court's expectations and be able to tell protective service workers and others specifically what kinds of evidence and documentation are needed. This also means that the county attorney could well provide training to various professionals in the gathering of legally competent evidence and the giving of testimony. Finally, those county attorneys serving on case consultation committees should aid in assessing cases for their legal implications and in determining which cases should be referred to the court and which might more properly be handled outside the court system.

Child Abuse and Neglect Procedure Manual for Hennepin County (1978), p.262.

C. County Attorney Trial Division of the Criminal Division

1. Role and Responsibility in a Child Abuse Case

The Trial Division of the Criminal Division is responsible for issuing criminal complaints if the evidence presented by a police officer shows that a crime has been committed and a particular individual may have committed the crime. The Division by law has authority to issue complaints for crimes that have been designated as gross misdemeanors or felonies.

An incident of child abuse may give rise to a prosecution for Aggravated Assault, Homicide, Criminal Sexual Conduct, Incest, or Prostitution. If a child abuse or neglect case gives rise to criminal prosecution of the parent, guardian, custodian, or person responsible for the child's health and welfare, a proceeding generally is commenced in the Juvenile Division of District Court, as explained in the discussion of the Court Unit. Since the standard of proof in a criminal prosecution is "beyond a reasonable doubt" which is a more difficult standard of proof than that of Juvenile Court's "clear and convincing" standard, the Juvenile Court proceeding is generally continued until the criminal prosecution is complete. There are a number of reasons for such strategy:

a. Evidence adduced at the criminal proceeding would be admissible in the juvenile proceeding;

b. The District Court can tailor the sentence, whether the defendant pleaded guilty or was convicted at trial, so that the offender will be prompted to face his/her family and personal problems; and

c. The Juvenile Court has jurisdiction only over juveniles, so it must rely on a coordinated effort between the Assistant County Attorney of the Court Unit and the Assistant County Attorney of the Criminal Division to arrive at conditions of probation in the criminal prosecution and goals in the Juvenile Court proceedings that reflect the best interests of the child from both philosophies. Successful completion of treatment as part of probation or goals for behaviors such as chemical dependency, sexual deviancy, or violent personality may result in reuniting and strengthening the family which is part of the public policy of the Reporting of Maltreatment of Minors Act, Minn. Stat. § 626.556, Subd. 1. and the Juvenile Court Act.

Excerpts from *Sexual Abuse of Children-Effective Utilization of the Legal Systems* by Howard A. Davidson.

Use of Civil vs. Traditional Criminal System in Abuse and Neglect Cases

a. *Advantages of Civil System (Juvenile Court Child Protective Proceedings) over the Criminal Process:*

1. It can remove the child from home if necessary.

2. It can order agencies to provide treatment for the child. It is the court most likely to have access to support services necessary to implement effective supervision and treatment. It is also becoming more common for juvenile courts to provide long-term monitoring of the child's status and follow-up on the success of the "treatment plan."

3. A Guardian *Ad Litem* (or attorney) will be appointed for the child.

4. Parents may be more motivated to accept therapy and services (to keep from losing "their" child).

5. These cases can be sustained with a less rigorous (than criminal court) burden of proof (i.e., "preponderance of evidence" rather than "beyond a reasonable doubt").

6. The purpose of this system is generally considered to be progressive—to promote "family harmony" and "protect children". This system may also be the most flexible

and humane (e.g., a judge may be more willing to question the child in chambers and out of the presence of the parents. In a criminal proceeding this might deprive the abuser of his constitutional right to confront his accuser).

7. The juvenile court's ultimate concern is the "best interests of the child". It is treatment, not punitive-oriented. Its focus is to protect the child from further harm.

8. Involvement in this judicial forum may be less traumatic to the child than other systems. (The child may not have to testify and therefore there is less parental pressure on the child "not to testify". Parents often coerce their children against testifying when there is a fear of criminal prosecution.) Also, there are no long, drawn out jury trials in a child protective proceeding.

9. Where criminal processes often lead to the father's incarceration, splitting up the family may prevent truly long-term effective treatment and can lead to the child having "guilt feelings". Conversely, an "acquittal" after an emotional criminal case can be psychologically devastating to the child/accuser and subject him/her to fierce reprisals.

10. Parents are less likely to "contest" this type of case. Parents are also more likely to be candid with the judge (particularly where they are given "use immunity" so that their testimony can not be used against them in a criminal proceeding).

11. The lack of a criminal "conviction" may help keep the family together (i.e., it lessens the chance of a public stigma and loss of job).

b. *Advantages of Traditional Criminal Court System:*

1. It may be appropriate for the most serious cases of abuse or where the offender's behavior is compulsive, repeated, or "sociopathic".

2. It can assure the offender's prompt removal from the home (i.e., setting of high bail) and long-term removal if necessary (as a condition of probation or through use of incarceration).

3. It can be effective as a rehabilitative tool (a method for assuring that the "defendant" submits to treatment or accepts services).

4. Criminal prosecution is more visible to the community and coincides with a desire for "justice" to be done (in fact, "the people" are represented in such cases by a state's or district attorney).

5. Some experts believe that prosecution is a necessary expiatory factor in the treatment of the offender and his family.

6. Criminal cases are usually brought to a clear-cut end shortly after adjudication, whereas child protective cases may "drag on" for a prolonged period.

B. Effects of Prosecution on the Juvenile Courts

California Juvenile Court Rules, Chapter 5, Non-statutory Procedures, Rule 1342.

Rule 1342. Granting of immunity of witness

(a) [Privilege against self-incrimination] If a person is called as a witness in the juvenile court and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court shall advise the witness of his privilege against self-incrimination and of the possible consequences of testifying. The court shall also inform the witness of the right to representation by counsel and, if indigent, of the right to have counsel appointed.

(b) [Authority of judge to grant immunity] If in any juvenile court proceeding a witness refuses to answer a question or to produce evidence based upon a claim of the privilege against self-incrimination, a judge of the juvenile court may grant immunity to the witness under either subdivision (c) or (d), as appropriate, and order the question answered or the evidence produced.

(d) [Request for immunity—§ 300,601 proceedings] In proceedings under section 300 or 601, a request that the judge order a witness to answer a question or produce evidence may be made orally on the record or in writing by either the petitioner or prosecuting attorney, or by both acting jointly. If the request is made by either the petitioner or prosecuting attorney alone, the other shall be given the opportunity to show why immunity is not to be granted and the judge may then grant or deny the request as he deems appropriate. If jointly made, the request shall be granted unless the judge finds that to do so would be clearly contrary to the public interest. The terms of any grant of immunity shall be set forth in the record. After complying with the order and if, but for this rule, the witness would have been privileged to withhold the answer given or the evidence produced, any answer given, evidence produced, or any information derived therefrom shall not be used against the witness in any juvenile court or criminal proceeding.

ADVISORY COMMITTEE COMMENT

The juvenile court law is silent on the subject of granting immunity to witnesses in the context of juvenile court proceedings. Nevertheless, the issue is one which is raised with increasing frequency. In section 602 proceedings, for example, a coparticipant may refuse to testify through fear of prosecution. Similarly, in some section 300 proceedings, a parent called to testify may be subject to prosecution for criminal child abuse or child neglect. This rule recognizes the authority of juvenile court judges to grant immunity and to compel a witness to testify and sets forth the procedures to be followed.

Subdivision (a) provides that if a person is called as a witness in a juvenile court proceeding and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court is to advise the witness of the privilege against self-incrimination, the possible consequences of testifying, and of the right to representation by counsel while testifying. (See *People v. Seastone* (1969) 3 Cal.App.3d 60, 68; *People v. Barker* (1965) 232 Cal.App.2d 178, 182.)

Subdivision (b)recognizes the inherent power of a trial court judge to grant immunity and to order a witness to answer a question or to produce evidence. A judge has the authority to do this under appropriate circumstances even in the absence of a specific legislative grant of

immunity to a witness. *(People v. Superior Court) (Kaufmann)* (1974) 12 Cal.3d 421, 428.)

Subdivision (d) sets forth the procedures for granting immunity in section 300 or 601 proceedings. In these proceedings, the probation officer (or social worker) would be the petitioner and a prosecuting attorney may or may not be participating in the proceedings. (See Welf. & Inst. Code §§ 351,681.) The procedure set forth in subdivision (d) is therefore designed to insure that the prosecuting attorney be given an opportunity to show why immunity should not be granted in an individual case. Futhermore, it should be noted that the scope of immunity which may be granted in these proceedings is more limited than in section 602 proceedings. In the absence of a statutory basis for doing so, a court may only grant immunity from the "use" of the information or its fruits in connection with a juvenile proceeding or criminal prosecution against the witness. *People v. Superior Court (Kaufmann)* (1974) 12 Cal.3d 421, 428; *Byers v. Justice Court* (1969) 71 Cal.2d 1039, 1049 (vacated on other grounds in *California v. Byers* (1971) 402 U.S. 424.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) 75. Reprinted with Permission.

One reason that appointing counsel is necessary for minors in §300 cases involving physical child abuse, incest, or sexual molestation (especially if criminal action is pending against the parent or stepparent) is that the family will often exert tremendous pressure upon the child to change his statement in order to protect the parent or stepparent from prosecution. Rule 1334(d) provides that if "the case has been petitioned under Section 300(d) and the minor appears at the detention hearing without counsel, the court shall appoint counsel for the minor. Whenever the parent or guardian, or any other person having care or custody of the minor or who resides in the home of the minor, is charged in a pending criminal prosecution based upon unlawful acts committed against the minor, the court may appoint the prosecuting attorney to represent the minor in the interest of the state." Visitation of the child in the shelter, in such cases, should be strictly supervised.

Los Angeles Superior Court, *Guardian ad Litem-/Dependency Court Improvement Project, Grant Application* (1978), 24-27.

III. Objective—Coordination between the Dependency Court and the adult criminal departments and supporting agencies

Statement of the problem:

The need to minimize adverse impact on the minors of undue delay in the criminal proceedings and for coordination in program and treatment planning for the affected families.

ILLUSTRATION

Before the court lay a total disaster. The two girls, 16 and 14 years of age, would have been far better off if no intervention had been made on their behalf to protect them from the acts of sexual intercourse and sodomy that their stepfather had foisted upon them since each was the age of 10. The adult criminal proceedings had been delayed for nineteen months through clever maneuvering by the stepfather. Finally, he was convicted and sent to prison. However, as a result of the prolonged and constant pressure to change their testimony by the mother and the stepfather (who had bailed out pending trial) the girls were virtually destroyed. The 16 year old had to be placed in a mental institution and the 14 year old had deliberately become pregnant to be relieved from the intolerable situation.

The California law (Cal. Penal Code Sec. 10488) mandates that all criminal cases in which a victim is a minor must be given priority for trial over all other criminal cases. It mandates further that those cases must go to trial within 30 days from the date of filing the information unless, for good cause shown, the court extends the time. This provision has never been implemented in Los Angeles County. The above case taken from our files is one illustration of the tragic results from that failure. Moreover, delays in completing the adult criminal prosecution affects both the dependency court and DPSS in terms of completing the juvenile court proceedings, providing appropriate services to the victim children and their families, and developing a long-term case plan.

The following are additional problem areas created by the delay:

A. The parent-defendant may be advised by his attorney not to enter any type of plea to the allegations in juvenile court (i.e., admission, denial or no contest) because it might have some damaging effects upon his defense in criminal court.

B. Until the juvenile court makes a dispositional order, no treatment plan for the family can be fully developed. This includes activities related to reuniting the family, long-term placement plans for the child and referrals for adoption planning.

C. No treatment for the parent can be initiated because information provided by the parent to the therapist may also be admitted in criminal court. Lengthy delays in beginning treatment programs may diminish their effectiveness and conditions may worsen instead of improve.

D. Visitation between parents and children must be carefully monitored both for the child's protection as well as to protect the ability of the child to offer needed testimony in court. After the disposition of both the criminal and juvenile court cases, this type of caution is not as vital. This is extremely time consuming for the CSW and difficult for parents, children, and foster parents.

Moreover, there is no coordination today in Los Angeles County between the Dependency Court and the adult criminal court on an individual case level. In addition, the Los Angeles County Probation Department, a

separate administrative branch of the county, services the court with respect to recommendations for sentencing in the adult criminal court. As indicated previously, the DPSS, also a separate administrative branch of the county, services the Dependency Court as to disposition alternatives. There is minimal coordination between these two departments as to a family treatment plan or program where a minor who is supervised by the DPSS has a parent who is under the supervision of the probation department. In exploring the sentencing alternatives to recommend to the adult criminal court, the probation department does not explore with the DPSS their proposed plan for supervision of the minor who is before the court in the Dependency Court for disposition, and vise versa.

Project Impact

This problem must be resolved on two levels. The first level is administratively. Implementation of Penal Code Section 1048 is now being demanded by the Superior Court at the highest administrative level, both through the Inter-Agency Council for Child Abuse and Neglect (ICAN) and elsewhere.

However, once such implementation is achieved, an ongoing program must be maintained to insure that tragedies such as that of the case illustration do not re-occur. This can and should be done only through a viable and consistently maintained guardian ad litem program. It is proposed that such a program be a significant component of this demonstration project.

Guardian ad Litem Program Impact

Guardian ad litem appointed for the purpose of assisting the court in insuring implementation of Penal Code Section 1048 and in coordination of program planning for the children victims and their families should be attorneys who have also completed the same training component in the social sciences required of lay guardian ad litem under this program. (See Part V, infra.) They will be appointed from the volunteer panel at the arraignment hearing in the Dependency Court or at any other time when it is called to the court's attention that adult criminal proceedings are pending against the perpetrator of the crime against the minor. Their responsiblity will be to alert and keep advised both the adult criminal court and the Dependency Court, by working through prosecuting attorneys and defense counsel in the criminal proceedings and by reporting directly to the court and to DPSS in the dependency proceedings, of the status of each proceeding. They will be responsible also for recommendations to the Dependency Court in matters relating to coordination of the two proceedings and of treatment programs. They must be sensitive in so doing to problems of insuring confidentiality where required by law and of the rights of the defendants in the criminal proceedings to due process of law.

Case Load Estimate

During fiscal year 1976-77, DPSS processed 1,284 new dependency cases involving non-accidental injuries to children and 364 cases involving sexual molestation, or a total of 1,648 cases. It is estimated that 25% or approximately 412 of these cases involve felony prosecutions. These will be the target cases in which these guardian ad litem will be appointed to insure against undue delay and to assist in coordination of programming.

C. Steps Toward Coordination of Civil and Criminal Functions

National Center on Child Abuse and Neglect, *Model Child Protection Act with Commentary,* Section 16, The Local Child Protective Service (1977 draft).

(m) The child protective service shall give telephone notice and immediately forward a copy of reports which involve the death of a child to the appropriate district attorney [or other appropriate law enforcement agency] and medical examiner or coroner. In addition, upon the prior written request of the district attorney or if the local service otherwise deems it appropriate, a copy of any or all reports made pursuant to this Act which allege criminal conduct shall be forwarded immediately by the child protective service to the appropriate district attorney.

COMMENT

Although child abuse and neglect are crimes, the Model Act rejects a criminal law response to most cases. Instead, it adopts a non-criminal, treatment approach to these social problems. Nevertheless, the Act recognizes that non-criminal handling alone may not be sufficient for certain types of cases (particularly homicides and other severe cases). This subsection requires that district attorneys and medical examiners automatically receive immediate notification of cases which involve the death of a child so that they may perform their official duties and so that any other children in the same care may be protected. In addition, the district attorney is empowered to request copies of any other reports so that the suitability of criminal action can be determined and the child protective service is authorized to refer cases to the district attorney depending on the facts of individual cases and the prevailing mores of the community.

(n) If a law enforcement investigation is also contemplated or is in progress, the child protective service shall attempt to coordinate its efforts and concerns with those of the law enforcement agency.

COMMENT

This subsection is meant to ensure that, should a law enforcement investigation be contemplated or be in progress, evidentiary, protective and treatment concerns are coordinated.

Jeffrey E. Froelich, "Family Crisis Intervention," *Juvenile & Family Court Journal* (1978), 3-7.

Author's note: The author is quick to acknowledge the invaluable assistance of the following individuals in pre-

paring this article: Mr. James Stahler (SCAN Coordinator), Ms. Patricia Bradley (Victim/Witness Division director), Dr. Tom Rueth (Eastway Community Mental Health Center), Rita Hoog (Good Samaritan Community Mental Health Center), Ruth Summer and Bob Mullins (South Community Mental Health Center), Gail Johnson (Daymont West Community Mental Health Center, and James Burroughs (Assistant Montgomery County Prosecutor). In fact, it is these same people who have put the program which is described in the article as "proposed" into actual operation in Montgomery County today.

Statistics indicate that one girl out of every four in the United States will be sexually abused in some way before she reaches the age of eighteen;[1] further, that in a full seventy-five percent of the cases, the victim knows her assailant[2] and in thirty-four percent, the molestation takes place in her own home.[3] In fact, about one in twenty women have had an incestuous experience.[4]

These are figures that shock us all, as human beings and as attorneys. The obvious question is, What can be done within the juvenile and family court system to deal with these very real problems?

The Existing System

Information regarding sexual abuse of children comes to the attention of the abuse unit of the Childrens' Services Board (CSB) or of a law enforcement agency. According to the county plan, CSB and police exchange reports so that CSB investigates and decides upon any action concerning intrafamily child abuse and the police agencies do likewise for extrafamily assaults occurring within their agency's geographic jurisdiction.

Civil Remedy

CSB has two general and not mutually exclusive courses it may pursue—civil and criminal. If the child is in such circumstances or condition that his or her continuance at home or in the care and custody of the parents presents imminent danger to the child, they may apply for an immediate emergency order from Juvenile Court (Juv. R. 13). This order is granted, *ex parte,* upon CSB's petition.

The court then notifies the parents and holds a shelter care hearing generally within twenty-four hours of its previous order (Juv. R. 7). This is technicially an adversary hearing with CSB having to prove that there is sufficient evidence of abuse or neglect that they (CSB) should retain custody of the child until all the facts can be ascertained and dependency hearing can be held. The parent(s) may be represented by counsel and may present any evidence they have in opposition to CSB's petition. This is a completely civil proceeding and the formal rules of evidence need not be followed. It is filed in the Juvenile Division of the Common Please Court and is captioned, "In the matter of child _____ ". The court need only find whether a "state" or "status" of abuse or neglect exists since the petition does not accuse any specific persons(s) of any specific act(s).

Dependency hearings (Juv. R. 29) are currently scheduled approximately eight weeks after the shelter care order. During this time, a guardian ad litem is appointed by the court to represent the unique and separable interests of the child. This appointment is generally made from a group of attorneys who have agreed in advance to take such assignment and are paid a nominal sum by the court. The dependency hearing is also an adversary proceeding with CSB (which has the burden) on one side, parent(s) on the other, and the guardian able to question both sides. At its conclusion, the court issues an order either (1) restoring custody to the parents, (2) granting permanent custody to CSB, or (3) granting temporary custody to CSB subject to periodic review and possible petition of the parent(s).

If CSB determines there is no need for such immediate court action, their role is that of providing protective services to the family to prevent further sexual abuse as well as to provide or monitor those services necessary to insure the child's well being.

Criminal Remedy

If CSB or the police (again, depending on whether the allegations involve intra or extra family sexual abuse) believe the facts appropriate, they may request criminal charges. If the suspected abuser is a juvenile, these charges must begin in juvenile court. In very aggravated cases and depending on age and record, the defendant may later be transferred to adult felony court for trial. Otherwise, the charge is delinquency (O.R.C. § 2151.02) in the trial of which the defendant has basically all the rights of an adult with the notable exception of the right to a speedy and public trial by a jury. If adjudicated a delinquent, the penalties available to the court include probation or incarceration until age twenty-one.

If the suspected abuser is an adult, charges may be initiated in any geographically appropriate municipal court, the adult felony common pleas court, or the juvenile court. If filed in a municipal court, the charge would be a misdemeanor (e.g. assault, O.R.C. § 2903.13) carrying a maximum penalty of six months in the Human Rehabilitation Center or one year probation. A felony (e.g. sexual battery, O.R.C. §2907.03) could be filed in adult common pleas court or juvenile court (with required transfer to common pleas after preliminary hearing) and carries a penalty of up to ten years in prison or five years probation. A misdemeanor (e.g. child abuse O.R.C. §2151.41) could also be filed in and handled entirely by juvenile court.

Although civil and criminal remedies may be pursued simultaneously, only one of the criminal forums may be selected. For example, non-forced sexual conduct (e.g. intercourse) between an adult parent and a child at least thirteen years of age is a felony (which may be initially filed in either the adult or juvenile division of common pleas court) and a misdemeanor (which may be filed in a municipal court or juvenile court). On any given set of facts, the choice of what charge and what court is entirely up to the agency seeking the filing.

Because the allegations are against an adult, the defendant is entitled to all statutory and constitutional rights (even if filed in juvenile court; Juv. R.1). If the charge is a misdemeanor, the defendant is immediately

brought before a judge for a plea setting of bail, and appointment of an attorney. There is no preliminary hearing or grand jury and trial must be held within ninety days (thirty if the defendant is in jail).

If charged with a felony, the defendant must be brought before a judge without unnecessary delay for the setting of bond and, if needed, appointment of counsel. He is entitled to preliminary hearing within fifteen days (five if he is incarcerated). If probable cause is found at the preliminary hearing, the defendant's case is presented to the grand jury. This is a non-adversary, secret proceeding at which the defendant is not present. The prosecutor may also take a case directly to the grand jury, bypassing the preliminary hearing, and thus avoiding public exposure and cross examination of the complainant. If the defendant is indicted, he is brought before a common pleas judge for plea, bond, and appointment of counsel.

Generally, trial must be held within 270 days (ninety if incarcerated) of arrest or the initial filing of charges. If the defendant is convicted, he may be continued on bond or incarcerated. Prior to sentencing, the county adult probation department does a presentence investigation (PSI) and reports to the judge. In most instances, this report is confidential (Crim. R. 32.2) to the judge who then, within the discretion allowed by statute, imposes a sentence of incarceration, probation, or a combination.

Proposed System

All potential criminal allegations involving sexual misconduct with a juvenile as either the perpetrator or victim would go only to the assistant Montgomery County Prosecuting Attorney assigned to juvenile court. The prosecutor has four choices: (1) to charge as a felony, (2) to charge as a misdemeanor, (3) to initiate clinical intervention, or (4) not to proceed with any official action.

"Sexual misconduct" is defined as statutorily prohibited "sexual activity" [O.R.C.§2907.01 (C)]. "Intrafamily" is a more amorphous term meant to include, for the purposes of intervention, not only the parents (natural, adoptive, *de facto*) or other persons responsible for the child's conduct, but also any individuals encompassing the family paradigm, legally as well as psychosocially.

If the facts fall into the pre-defined category of "extrafamily", the prosecutor will decide whether to charge as a felony (sexual battery) or a misdemeanor (child abuse) solely on the basis of which offense he believes can be proved at trial. If the acts constitute an "intrafamily" offense, the prosecutor decides whether to charge or to initiate clinical intervention. This discretionary intervention is exercised by the prosecutor only after consultation with the police, CSB and, if needed, the mental health (liaison) professional and consideration of aggravation, criminal record, social history, effect of criminal prosecution, and so forth.

In most cases the prosecutor will not request an arrest warrant because any immediate need to alter the family living arrangement will be coordinated with CSB. The prosecutor will call the mental health (liaison) professional in the catchment (geographic) area in which the family resides and set up a diversion conference to be held at the prosecutor's office. The investigating police officer will personally deliver a written request to all members of the family to appear at the conference. (Appendix B)

Immediately prior to the conference, there is a brief meeting among the prosecutor, the mental health (liaison) professional (or actual therapist if available), and the CSB case-worker. At the beginning of the conference, the prosecutor reads to the suspected abuser and has him sign an agreement explaining the purpose of the conference. (Appendix C) After the agreement is signed, the prosecutor leaves and the mental health liaison and CSB worker meet with the family to assess the status of the family in terms of needs for emergency mental health and community services and to provide such services as indicated. The mental health representative will also advise the family of the option and availability of therapy from professionals not connected with the four community mental health centers. The prosecutor's decision whether to accept this alternative therapy will depend on his evaluation of its legitimacy and responsiveness to the procedures and goals of the family crisis intervention program. Following this assessment for possible crisis situations, an appointment will be made for the family to attend an initial counseling session at the appropriate community mental health center within seventy-two hours.

At the initial counseling session, the family will sign a release of information, giving the community mental health center permission to communicate to the courts, the Suspected Child Abuse & Neglect (SCAN) team, and Children Services Board the fact that the family is in treatment. In addition, the prosecutor and CSB will be given periodic reviews of the progress of the therapy (following the initial counseling session, thirty days after the initial counseling session, ninety days after the initial counseling sessions, and every ninety days thereafter).

As stated in the agreement, the information about the acts in question and any previous activities of a similar nature discovered in family therapy will not be communicated to the prosecutor. However, pursuant to statute (e.g. O.R.C. §2921.22) and agreement with the client, any new acts would be reported to law enforcement authorities. If in the process of therapy, the therapist feels a need to consult with agencies outside the community mental health center, for example Children Services Board or SCAN, additional releases of information will be obtained.

During this initial session, the guidelines for counseling will be spelled out. Much of the discussion will be focused on the clients' expectations and needs. An initial needs assessment of the family will be begun at this time.

Additional counseling sessions will proceed in the context of four main processes: family assessment, treatment planning, counseling, and evaluation. In family assessment, early counseling sessions will focus upon assessment of the family constellation in terms of the personal, situational and environmental factors contributing to its functioning. Assessment will also be made in terms of family interpersonal interaction patterns and the identification of those patterns leading to dysfunctioning in the family.

The success of the treatment will be evaluated in two ways:

1. For court purposes, a statement will be presented to the prosecutor relating to the family's efforts and work in counseling;
2. In terms of the specific family, movement towards goals they have identified in the treatment plan, the counselor, and the entire family will evaluate the progress of therapy at regular intervals.

The purpose of this evaluation is to gain valuable information which will direct the further course of treatment.

The community mental health center has the responsibility of reporting to the prosecutor whether the family is making progress towards achieving the treatment goals. The decision to terminate counseling, either because of success or breakdown, will be shared with the SCAN team prior to any recommendation to the prosecutor.

Problems with Current Approach and Rationale for Change

The current system promotes forum shopping and prevents consistency and objectivity in charging decisions. Moreover, there is no coordination between the civil and criminal courts or the criminal justice and child welfare systems. Adjudicatory distinctions (e.g. preponderance of evidence vs. beyond a reasonable doubt; guilt of specific individual for specific acts vs. determination of existing condition of victim) and, time and intermediary procedure differences (e.g. bail is only to insure defendant's appearance vs. orders to protect victim), among other potential conflicts, work against the best interests of the child and society.

The goals of the criminal justice system are rehabilitation, deterrence (of the defendant and of others), incapacitation and retribution. Acts requiring societal retribution and individuals requiring long-term removal and incapacitation should continue to be dealt with in the traditional manner.

Deterrence of incestual acts is not achieved by resort to the present system. Firstly, the act is either the product of sudden and extreme emotional distress, or, by definition, a thought process not answerable to or controlled by society's mores. Secondly, the percentages of reporting, apprehension, charging, conviction, and sentencing are so infinitesimal on this type of crime as to make deterrence of others meaningless.

It is axiomatic that both deterrence and rehabilitation work much better if closely associated in time to the acts in question. Certainly rehabilitation of a sexual child abuser cannot be achieved by placing the offender in the workhouse or similar institution. Even if probation (with appropriate social services) is granted, delaying treatment and forcing the entire family through a win-lose procrustean process cannot do anything but aggravate the situation within the family much to the detriment of all the parties and society and manifestly inapposite to the objectives of the criminal justice, mental health, and social service systems.

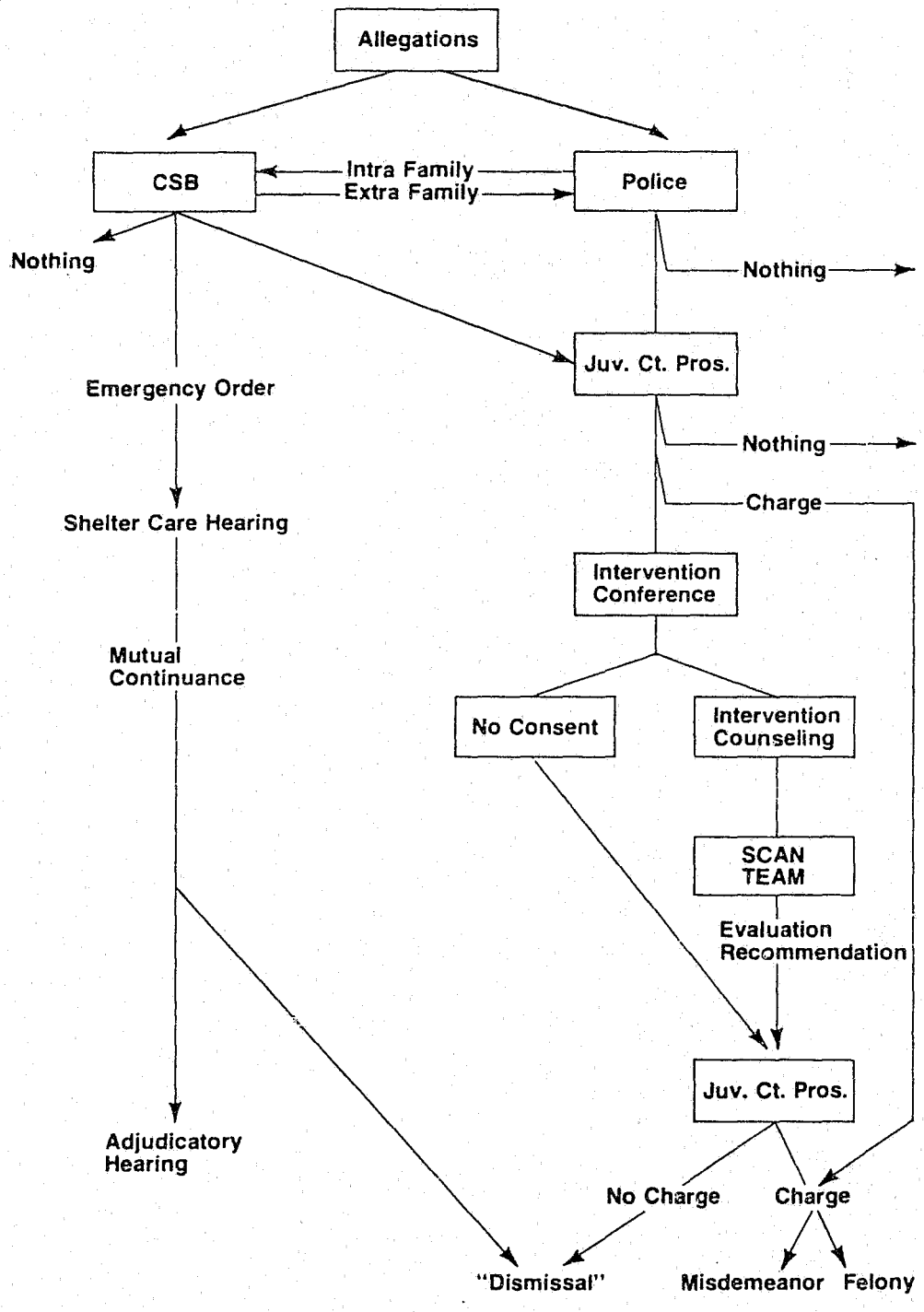
There are situations which would not be subject to intervention by this program, but concerning which a very strong argument can be made that early intervention is preferable from both a law enforcement and mental health perspective to traditional prosecution. For example, prosecution of a juvenile neighbor who occasionally babysits is contemplated by the present program despite the fact that, with the possible exception of retribution, no goals of either system would be best achieved. Intervention in "extrafamily" incidents involves, by definition, some different considerations which will be addressed after the *family* crisis intervention program.

Summary

Currently, for numerous reasons, very few incest incidents result in a criminal conviction. If there is a conviction, a court will, after a thorough evaluation of the defendant, most often order treatment for the offender and a rearrangement of the family's relationships.

The proposed clinical intervention, by evaluating and treating the situation immediately after the allegation is made (1) achieves more successful treatment (i.e. rehabilitation and deterrence) of the offender, (2) safeguards past and future victims, (3) maintains and possibly improves the family unit, and (4) saves court and prosecutor time to deal with those individuals and offenses where they (the courts) can be truly effective.

In short, the proposed restructuring of the present system of handling an incest allegation has the exact same goals as the present system, but is more likely to achieve them.



Straight Lines Indicate Possible Flow of Information and Decision-Making Process

LEE C. FALKE
Prosecuting Attorney,
Montgomery County, Ohio.

_____ ,

_____ ,

_____ :

You are hereby asked to attend a meeting in the Montgomery County Prosecutor's Office — Juvenile Division to discuss a complaint concerning your past conduct that has been brought to the Prosecutor's attention by _____ .

You are advised that this conduct may constitute a violation of the Ohio Criminal Code (_____ , O.R.C. Section _____).

This meeting will be held on the __ day of _____ , 1977, in the Juvenile Court Prosecutor's Office, 303 West Second Street, Room 129, Dayton, Ohio 45402, at _____ .

You have the right to have an attorney with you at this meeting. If you are unable to afford an attorney you may contact the Montgomery Public Defender's Office, 379 West First Street, Dayton, Ohio 45402.

LEE C. FALKE, *Montgomery County Prosecuting Attorney*

By _____ .

In the Matter of:

AGREEMENT

I, _____ , have been informed by an assistant prosecuting attorney that certain allegations have been made to him/her concerning my activity; further that past conduct may constitute a violation of the criminal law (_____ , O.R.C. Section _____); further that if proved this offense can be penalized by _____ in jail and a _____ fine.

I understand my right to an attorney and have freely and voluntarily executed the attached "Waiver of Attorney."

I agree to speak to _____ concerning the information known to the prosecutor with the possibility of my participating in a program of family counseling. I understand that any and all information obtained or opinions formed regarding this alleged activity and any prior similar activity as a result of such program shall not be used against me in this or any criminal, civil or administrative proceeding; furthermore, I understand that my signing this agreement or agreeing to participate in any program does not prevent the prosecutor from proceeding with any possible charges against me or anyone else at any time.

I acknowledge that this agreement is completely voluntary and that it is made without coercion or promise. I also acknowledge by my signing this agreement that I have received a copy of the Agreement and Notice of Rights and Waiver.

_____

_____ _____

(Attorney for:) (Assistant Prosecuting Attorney)

NOTICE OF RIGHTS

Before I talk to you it is necessary that you understand your constitutional rights.

(1) You have the right to remain silent.

(2) Anything you say to the Prosecutor can and will be used against you in a court of law.

(3) You have a right to ask an attorney for advice at any time.

(4) You have a right to have an attorney with you at all times.

(5) If you cannot retain an attorney you may seek legal advice without charge from the Montgomery County Public Defender's Office.

WAIVER

I have read this Notice of Rights—or it has been read to me—and I understand what my rights are. I am willing to discuss with _____ my possible participation in the Family Counseling Program. I do not want an attorney at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

_____ _____

(Date)

_____

(Witness)

Section VIII.

Collection of Evidence and Information

It is frequently difficult to obtain clear-cut information about whether a child has been abused or neglected, especially when the child is very young. Adequate information about the family situation necessary for a proper disposition order may also be hard to compile. This section includes four important topics related to these problems: how information about injuries can be obtained, the use of social reports prepared by child protective agencies, mental health examinations of parents, and reliance on circumstantial evidence.

A. Indications of Injury

1. Obtaining accurate information about injuries may be difficult because the injuries have healed before the fact-finding hearing.

2. Prompt action is necessary to document injuries.

Typical means of documentation are:

A. photographs,

B. X-Rays (for fractures), and

C. detailed medical reports or written descriptions by police and social workers.

Child abuse reporting laws may authorize, or mandate, documentation, especially by doctors.

Judges can improve the quality of documentation by educating social workers, police, and doctors concerning the need for documentation and the types of documentation most useful to the court.

3. A further problem is obtaining information about prior injuries to the child to determine whether there is a long history of abuse. Here, the most important information is X-Rays indicating bones broken in the past.

B. Social Reports

1. Social reports are a major source of information to the courts.

These may be reports routinely prepared by the child protective agency in each case going to court, or they may be reports made pursuant to judicial orders. The latter can provide more current information.

Court-ordered reports are usually prepared by the child protective agency. In some states, a separate agency may prepare the reports, thus providing the court with an independent assessment of the case.

2. Social reports are most commonly used in the disposition phase.

In some courts the report used in the disposition hearing was prepared prior to the adjudicatory hearing. Portions of such reports which contain disposition recommendations should not be considered by the judge or entered into the record until after the adjudicatory hearing is completed.

Some courts order a separate report for the disposition hearing. Such information is more current, but the time required to prepare the report may delay proceedings.

3. Some courts also receive social reports in the adjudicatory phase.

The report may be a major basis for the judge's decision. There is a danger that the court will place too much reliance on the report, especially if the child and parent do not have effective representation.

Counsel should be sent copies of the report before the hearings, in time to permit adequate study.

In adjudicatory hearings, unlike in disposition hearings, the report is subject to the rules of evidence. At the least, the social workers who prepared the report should be subject to examination and cross-examination when the report is placed in the record. Consideration should be given to striking out segments of the report which consist of impermissable hearsay. There may also be a *voir dire* to establish the worker's qualifications and ability to render an opinion.

C. Psychiatric Examinations of Parents

1. Psychiatric examinations of parents often supply important information.

Psychiatric reports are more common in disposition hearings, but they are also used in adjudicatory hearings if the law permits or the parents consent.

The psychiatric report is often included in the social report given the court, although it can be presented as a separate document.

The psychiatric examination may be conducted as part of the child protective agency's investigation, or it may be conducted pursuant to court order.

2. The examining psychiatrist should be familiar with child abuse problems, although such expertise often is not available.

Judges might persuade local mental health clinics to develop such expertise, especially by assigning abuse and neglect cases to a single psychiatrist.

A few juvenile courts receive psychiatric reports on parents from court-employed psychiatrists, who should be familiar with abuse and neglect situations.

3. Use of psychiatric reports as evidence, especially in the adjudicatory hearing, presents some important problems:

The parent may be less candid than he/she would be in a confidential psychiatric situation. This may hamper the psychiatrist's evaluation, and thus lessen its value to the court.

If the court orders the report, the parent is, in effect, required to testify against himself or herself. It is uncertain whether the absence of a self-incrimination privilege in civil proceedings justifies a court to order psychiatric examination.

D. Psychiatric and Psychological Examinations of the Child

1. At some stage of the proceedings, judges may consider evaluations of the child to be useful in the court's decision-making process.

Abused or neglected children frequently have emotional or physical handicaps, neurological damage, learning disabilities, or other medical problems which may go undetected and untreated unless the court assures that the child receives an adequate diagnostic evaluation and appropriate follow-up treatment.

Children are occasionally "singled-out" for parental maltreatment because of their physical, developmental or emotional problems; other children may have neurological impairments caused by parental abuse or neglect.

2. Some cases are brought to court because agencies have recognized a child's need for treatment, but the parents refuse to consent to and/or cooperate with the treatment process. Judges may be asked to place the child in the agency's legal (but not physical) custody for the purpose of assuring that the child obtains treatment.

3. Judges can utilize court clinics if available or make referrals to mental health clinics. Another source of free evaluation and treatment services is the local school system's special education program mandated by the Education for All Handicapped Children Children Act (P.L. 94-142).

E. Circumstantial Evidence

1. It is often difficult to show that harm to the child was caused by the parents. This proof is frequently necessary before a court can make a finding of abuse and neglect.

Medical evidence may not indicate whether an injury was accidental or purposely inflicted.

In many cases, only the parents have access to information about how the child was harmed, and parents may be reluctant to admit fault.

The child is often too young or reluctant to testify against his parent.

2. Courts, therefore, must often rely on circumstantial evidence that parents have harmed their child.

A res ipsa loquitur analogy has been adopted by statute or decision in several jurisdictions. Evidence of injury to the child and of parents' control over the child may create a presumption that the parents are responsible for the injury. Under this doctrine, the court may assume jurisdiction without any direct evidence that parents abused or neglected the child. (See *In re S.*, 46 Misc. 2d 161, 259 N.Y.S. 2d 164 (Fam. Ct. 1965); *State* v. *Loss*, 295 Minn. 171, 204 N.W. 2d 404 (1973).)

Support Readings

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A. Indications of Injury

Brian Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes,* **54 Chicago-Kent L. Rev. 641, 670-672 (1978).**

Medical Examination of the Child

Contrary to popular belief, child abuse is not an easy condition to diagnose.[184] This is particularly true in cases of neglect[185] and mental injury, but can also be true in cases of non-accidental physical injury.

In a case of non-accidental physical injury, the actual injury is quite easy to identify. The difficult issue is whether it was non-accidental. To determine if an injury was non-accidental often requires a careful analysis of the child's injuries in relation to the parents' explanation (is it reasonable) of how or when the injury occurred. This type of examination and analysis requires specific medical expertise. It is an expertise that the vast majority of caseworkers investigating a case of suspected child abuse do *not* have.

A good child abuse investigation includes a complete physical examination of the child by a qualified and licensed physician. Since children's injuries mend with remarkable speed, it is imperative that the examination be made quickly. Each injury should be examined individually and characterized according to its type, extent, severity and age.[186] The results of such a medical examination should be entered into the child's official medical record immediately.[187]

Five states have recognized the limitations of individual caseworkers and the value of medical expertise. These states provide in their reporting statute for the medical examination of a child suspected of being abused, regardless of whether the parents agree.[188]

Color Photographs and X-Rays

In order to facilitate the investigation and to preserve evidence, a number of states now make provisions for the taking of color photographs and X-rays in cases of child abuse. X-rays are used as a diagnostic tool and a means of preserving evidence. Color photographs, on the other hand, have little diagnostic value. They are used to preserve a pictorial explanation of the suspected trauma. In the vernacular, a picture is worth a thousand words.

X-rays are taken when they are ordered by a physician. They are always taken by a qualified and usually licensed technician. If proper medical procedures are followed, there is little problem in introducing them as evidence.[189] The same is *not* true, however, of color photographs. Color photographs are usually not taken by qualified technicians but are taken by social workers, nurses, teachers, physicians and police officers.[190] While these photographs can be submitted as evidence,[191] the shortcomings of the photographer often limit the picture's probative value. A color photograph is not always an accurate portrait of the suspected injuries. Issues such as the type of film used, the shutter speed, the type of lighting and perspective in relation to the picture can be troublesome.[192] A picture is worth a thousand words, but the picture must be accurate and the photographer must be prepared to tell why the picture is accurate.[193]

Today, fourteen states permit the taking of color photographs and X-rays in cases of suspected child abuse with or without the parents' consent.[194] Another four states mandate that such color photographs and X-rays be taken.[195]

FOOTNOTES

184. Reporters are asked to report their suspicions or their beliefs. They are *not* asked to make a final determination of abuse. There is a great difference between a suspicion and the diagnosis.

185. *See* Sgroi, *supra* note 9, at 18.

186. *See* Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem,* 13 Cal. W. L. Rev. 16, 37 (1977) [hereinafter cited as *Independent Representation*].

187. *See* Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome,* 50 CHI.-KENT L. REV. 45 (1973) [hereinafter cited as *Medical and Legal Aspects*].

188. MD. CODE ANN. § 35A(h)(2) (Cum. Supp. 1976); MICH. COMP. LAWS § 722.626(3) (Cum. Supp. 1977); N.J. STAT. § 9:6-8.31(E) (Cum. Supp. 1977); 11 PA. CONS. STAT. ANN. §2209(a) (Supp. 1977); R.I. GEN. LAWS § 40-11-6(3) (Supp. 1976).

189. *See Medical and Legal Aspects, supra* note 187, at 74.

190. Iowa, for example, permits physicians, dentists, nurses, social workers and psychologists (among others) to take color photographs. IOWA CODE ANN. § 235A.11 (Cum. Supp. 1977-78).

191. The usual rule of thumb for color photographs is that they will be admitted into evidence if they are relevant and material to issues of fact and are not so gruesome as to be inflammatory. *See* Albritton v. State, 221 So. 2d 192 (Fla. App. 1969).

However, even if a picture were gruesome or inflammatory, it might be admitted into evidence if it would throw light on a vital issue of the case and resolve a conflict in evidence. *See* 221 So.2d at 197.

The Illinois Court of Appeals ruled that color slides of a dead baby showing numerous bruises were admissable. *See* People v. Brown, 83 Ill. App. 2d 411, 228 N.E.2d 495 (1969).

192. *See* Ford, Smister & Glass, *Photography of Suspected Child Abuse and Maltreatment,* BIOMEDICAL COM. July 1975, at 12.

193. *Id.* at 14.

194. ARIZ. REV. STAT. § 13-842.01(c) (Supp. 1976); ARK. STAT. ANN. § 42-810 (Cum. Supp. 1976); COLO. REV. STAT. §19-10-106 (Cum. Supp. 1976); FLA. STAT. §827.07(4)(c) (Cum. Supp. 1978); ILL. REV. STAT. ch. 23, § 2056 (1977); IOWA CODE §235A.11 (Cum. Supp. 1976); MICH. COMP. LAWS § 722.626(2) (Cum. Supp. 1977); OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1976); OR. REV. STAT. § 418.764 (Supp. 1976) (photographs *only*) 11 PA. CONS. STAT. ANN. § 2207 (Supp. (1977); VA. CODE § 63.1-248.13 (Supp. 1977); WASH. REV. CODE § 26.44.050 (Supp.

1975); W. VA. CODE § 49-6A-4 (Cum. Supp. 1977); WYO. STAT. § 14-2-117(c) (Cum. Supp. 1976).

195. MO. REV. STAT. § 210.120 (Cum. Supp. 1976); N.J. STAT. §9:6-8.31(G) (Cum. Supp. 1977); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); S.C. CODE § 20-10-70 (Cum. Supp. 1977).

National Center of Child Abuse and Neglect, *Model Child Protection Act With Commentary,* Title II, Reporting Procedure and Initial Child Protective Action, Section 8 *DRAFT.*

Section 8. Photographs and X-Rays

Any person or official required to report under this Act may take, or cause to be taken, photographs of the areas of trauma visible on a child who is the subject of a report and, if indicated by medical consultation, cause to be performed a radiological examination of the child without the consent of the child's parents or guardians. Whenever such person is required to report in his capacity as a member of the staff of a medical or other public or private institution, school, facility, or agency, he shall immediately notify the person in charge, or his designated agent, who shall then take or cause to be taken color photographs of visible trauma and shall, if indicated by medical consultation, cause to be performed a radiological examination of the child. The reasonable cost of photographs or x-rays taken under this section shall be reimbursed by the appropriate local child protective service. All photographs and x-rays taken, or copies of them, shall be sent to the local child protective service at the time the written confirmation report is sent, or as soon thereafter as possible.

COMMENT

This section authorizes persons and officials required to report to take or arrange to be taken photographs and x-rays without the permission of parents, which would ordinarily be required in many situations. X-rays can be crucial to early and accurate diagnosis. Perhaps more importantly, photographs and x-rays graphically preserve the evidence of the alleged abuse or neglect. Long after memories have faded, they can provide extra assurance that subsequent child protective decision-making and possible court action reflect the severity of the child's initial condition, particularly when case records lack sufficient detail. A photograph or x-ray can be worth, as the cliche goes, a thousand words.

To insure that photographs and x-rays are taken, this section *requires* the person in charge of a medical institution or other facility to take or arrange to have taken color photographs of visible trauma and, if medically indiated, x-rays.

To encourage the taking of photographs and x-rays, this section provides that the cost of the photographs and x-rays shall be reimbursed by the appropriate local child protective service.

As soon as such photographs or x-rays are available, they, or copies of them, are to be sent to the child protective service. (The Act assumes that in most situations the hospital or other institution will wish to retain a copy of the original for its own use. The Act does not intend to relieve the physician or hospital of its obligation to maintain accurate and complete records.)

Under normal rules of evidence, such photographs and x-rays could be used in any later court proceedings that might occur.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Jurisdiction Hearing, Part II, Cases Filed Under Section 300, Section 8.48. Reprinted with Permission.

M. [§8.48] The Battered-Child Syndrome and Cases in Which Parents Refuse Medical Attention

Identification and labeling by medical science of the battered-child syndrome has occurred only within the last 15 years. For this reason, judges assigned to the juvenile court should thoroughly acquaint themselves with the literature in this area.

Radiologists trained and expert in the diagnosis of the battered-child syndrome are hard to find. However, those who are expert in this field are now able to offer the court a great deal of assistance. For instance, a battered child will normally not be taken to a medical facility on the day the injury occurs. Rather, the parents will wait a few days, and then bring the child in for medical treatment. When this occurs the parents will often give a false story as to the date and manner of the injury. A trained radiologist can normally tell from the healing of a fracture when the injury actually took place.

Bone injuries in battered-child cases are not the kind one might expect from the child falling from a bed or couch. The bone injuries in these cases will usually be caused only by a jerking or twisting motion of the extremity.

In every case of suspected child battering, a full set of skeletal X-rays should be obtained. These will frequently disclose bone injuries in various degrees of healing, indicating a pattern of injury over a period of time.

Doctors active and interested in this field tell us that the medical profession as a whole is still very deficient in diagnosing and reporting suspected cases of child abuse. Case after case will have a history of prior injury where child battering was not identified or, if suspected, not reported. An expert radiologist could go into any hospital in California, examine the X-rays of babies on file, and find scores of unreported cases. The removal of possible civil liability has not proven sufficient to encourage doctors to report suspected cases. Doctors are still overprotective of the parents of child patients.

Doctors are not the only persons required by law to report that a minor has injuries that appear to have been inflicted by other than accidental means. Penal Code §11161.5 lists all persons who bear such responsibility. To this rather lengthy list, the 1971 Session of the legislature added the following: (1) any supervisor of child welfare and attendance, (2) any certificated pupil personnel employee of any public or private school system, (3) any teacher of any public or private school, (4) any licensed day-care worker, or (5) any social workers. By

further amendment of the same section the legislature provided that no "person" shall incur any civil or criminal liability as a result of making an report authorized by that section.

Also, Pen C §11161.5 was amended to make reports and other information received from the State Bureau of Criminal Identification and Investigation available to supervisors of child welfare and attendance and to certificated pupil personnel employees; if the child is under welfare department supervision, such reports shall also be made to the department.

In 1974 Pen C. §11161.5 was amended to require reporting suspected cases of sexual molestation or of injury prohibited under Pen C §273a. The 1974 amendment also deleted the provision that defined a minor, for purposes of Pen C §11161.5, as a person 12 years of age or under. As now written, the provisions for reporting apply to all minors.

Many concerned doctors are devoting themselves to this problem within the medical profession. It is generally unrecognized by the public at large. There have been some educational television programs and some newspaper articles about it, but the public generally is unacquainted with the scope of the problem and finds the very thought of a parent injuring a child almost incomprehensible.

For these reasons, the juvenile court judge should insist that the probation department develop expertise in this area. He should seek out experts in the medical profession in his county and enlist their support, both within and without the medical profession. He should initiate programs of public education, especially among law-enforcement officers, nurses, teachers, welfare workers, and others who are in a position to observe and report possible cases of child abuse.

Sometimes a probation officer will garner all the evidence necessary but be frustrated by an inexperienced judge or referee who is overly cautious in finding jurisdiction. This is a civil case. Here we are dealing only with probabilities. Is it more or less probable that the child has no parent actually exercising proper care, when the child has received multiple injuries over a period of time for which the parents either have no reasonable explanation or have an explanation that is inconsistent with the type of injuries incurred? These are almost all cases of circumstantial evidence, but in most the circumstantial evidence is by far the more probable. The inference that may be drawn is analogous to that in res ipsa loquitur cases. It is not necessary to establish *who* did the battering or *how* the injuries were inflicted. The extremely cautious judge or referee will still have an opportunity at the disposition hearing to place the child with the parents, but then he may impose strict control, supervision, counseling, and frequent checks on the child's condition.

Support Center for Child Advocates, Inc. ***How to Handle a Child Abuse Case, a Manual for Attorneys Representing Children*** **(1978), Chapter XI.**

XI. Medical Evidence Suggesting Child Abuse or Neglect

(E. Peter Wilson, M.D., M.P.H.—Director, Supportive Child/Adult Network (SCAN), Children's Hospital of Philadelphia and University of Pennsylvania.)

Child Protective Service Law (Act 124). Regulations —March 26, 1976

"An abused child is a child who exhibits evidence of serious physical or mental injury not explained by the available medical history as being accidental, sexual abuse or serious physical neglect, if the injury, abuse or neglect has been caused by the acts or omissions of the child's parents or by a person responsible for the child's welfare. . . ." (2-23-7)

I. *Evidence of serious physical injury not explained by the available medical history as being accidental.* Most of the injuries sustained by children may be either accidental or non-accidental in origin. Multiple injuries may be due to accidents (tumbling down stairs, automobile collisions, hazardous play or sports). However, in these cases, there is usually at least one witness able and willing to provide a history consistent with the physical evidence. Hence, in most cases, on the physical evidence alone, the experienced physician will be reluctant to state with "reasonable medical certainty" that there is "clear and convincing evidence" that the child's condition or injuries were non-accidental.

Exceptions to this generalization can include the following:

A. Unexplained injuries to many parts of the body (excluding the forehead, chin, elbows, knees and shins in toddlers and older children), especially if the bruises, abrasions, lacerations or fractures are in different phases of healing.

B. *External Injuries* commonly associated with physical abuse:

1. External injuries which resemble the imprint of an object or substance probably used to inflict the injury. Causative agents include:

a. Human teeth, hands (open and closed), fingers, feet.

b. Ropes, cords, wires, belts, buckles, straps, switches whips, paddles, gags, etc.

c. Cigarettes, household appliances.

d. Hot water (splash or immersion), chemicals.

2. Other external injuries due to single severe or multiple trauma:

a. Scalp—Bare patches (due to hair pulling)

b. Ears—"Cauliflower ear," ruptured ear drums.

c. Eyes—Bleeding into the tissues around the eye, the conjunctiva, anterior chamber and/or retinae. Dislocation of lens, rupture of choroid membrane.

d. Nose—Hemorrhage or dislocation of cartilage.

e. Mouth—Bruising of lips, rupture of frenula, fracture of teeth due to trauma, i.e., forced feeding. Burns of the lips, tongue, palate and/or pharynx due to hot liquids or chemicals.

C. Unexplained internal injuries (often without evidence of external injury).

1. Head Injuries:

a. Intracranial hemorrhage (bleeding into the retina of the eye, into the brain, or into the coverings of the brain (subdural or subarachnoid hemorrhage) due to vigorous shaking or blunt trauma.

b. Extracranial hemorrhage (subgaleal or cephal-hematomas) due to hair pulling or blunt trauma.

2. Neck Injury:

Subluxation or dislocation (whiplash injury) due to shaking.

3. Chest Injuries:

Hemothorax or pneumothorax (blood or air in plural space) due to fractured ribs.

4. Abdominal Injuries:

a. Rupture of liver, spleen, pancreas, kidney, gut, bladder or other organ.

b. Hemorrhage into the peritoneum or mesentery.

5. Skeletal Injuries (especially in infants and toddlers):

a. Spiral fractures due to forcible twisting or transverse due to blunt trauma.

b. Metaphysical avulsion due to sudden strain (jerking).

c. Joint dislocations.

d. Periosteal thickening and elevation of long bones due to blunt trauma.

e. Skull fractures due to blunt trauma and separation of the sutures due to chronic subdural hematoma.

f. Rib fractures (except newborn). Usually multiple, and often in different stages of healing.

D. Evidence of intoxication with drugs, alcohol, other chemicals, (including carbon monoxide).

E. Evidence of asphyxiation (smothering, strangling or drowning).

F. Evidence of emotional abuse.

1. Unusually fearful of parent, caretaker or other adult, extremely watchful, "freezes" on approach, unusually stoic, grins inappropriately.

2. Unusually hyperactive, unable to concentrate on any one activity, agitated, unwilling to play or otherwise interact with adults.

3. Unable or unwilling to perform age appropriate skills or tasks.

NOTES

1. Photographs if appropriately identified and, especially if they include reference standards (measuring rule or tape, color spectrum, etc.), can supplement written descriptions and sketches of the child's injuries or condition.

2. Copies of X-Ray films are usually available on request, but the radiologist's or physician's report is usually acceptable. "Skeletal surveys" are often performed on children under 3 years, especially when multiple injuries are suspected.

3. Blood coagulation studies are usually performed if there is multiple bruising or hematomas, and the cause is unexplained. These studies usually include a hemoglobin, hematocrit, platelet count, bleeding time, partial thromboplastin time and prothrombin time. These are compared with values for normal subjects.

II. *Physical Evidence of Sexual Abuse:*

A. General: Any injury to the genitals that cannot be explained satisfactorily as accidental (e.g., a straddle injury) or the presence of sexually transmitted infection suggests the probability of sexual abuse.

B. Specific:

1. Bruises, abrasions, lacerations, and tearing of skin and mucous membrane of the vulva, scrotum, penis, anus and mouth and adjacent areas.

2. Presence of semen (if rape alleged within previous 12 hours).

3. Infected lesions of the skin or mucous membranes (gonorrhea, syphillis, herpes genitalis, and other sexually transmitted diseases).

4. Poor anal sphincter tone (suggestive of recurrent abuse).

In all cases where the sexual assault has been alleged to occur within the previous 12 hours, medical evidence (physical and laboratory) should be collected and documented (in anticipation of possible criminal prosecution) by a gynecologist or other specially trained physician.

III. *Physical evidence of serious physical neglect:* As defined in ACT 124, the physical condition of a child is required to be both serious and within the control of the person responsible for the child's welfare. To be serious the physical condition must "endanger the child's life or development, or impair her/his physical functioning." Such conditions must be due to the "willful or wanton failure to provide the essentials of life." Medical evidence for serious physical neglect includes:

A. *Marasmus or gross malnutrition*—This includes:

1. Failure to attain or maintain expected height and, especially, weight for age while in the custody of the parent or caretaker, with dramatic gains in weight when fed and nurtured by others.

2. Wasting of muscles and subcutaneous tissues, with or without edema.

3. Anemia and other specific dietary deficiency diseases (scurvy, rickets, pellagra, etc.), and

4. Absence of any known genetic or acquired disease causing the child not to eat, absorb or utilize normal food. These are usually included with a progressive diagnostic evaluation consonant with admission to a hospital or temporary placement with a relative or foster parent.

B. Untreated wounds, infections and/or infestations resulting in sepsis (septicemia) or physical deformity, or other threat to life, health or physical functioning.

C. Exposure to extreme heat or cold or to toxic substances, endangering the child's life.

D. Emotional deprivation, including absences of appropriate parent-child interaction, resulting in agitation (extreme anxiety), severe withdrawal (depression, self mutilation, suicide) or sustained developmental arrest or regression.

B. Social Reports

Frank Foerster, *Legal Aspects of Child Abuse and Neglect Cases in Texas* (1979), 53-54.

G. Social Study

In a suit affecting the parent-child relationship, the court may order that a social study be made of the circumstances and conditions of the child and of the home of a person seeking managing conservatorship or possession of the child. The social study may be made by any person, or public or private agency appointed by the court. If an authorized agency is managing conservator, then that agency shall make the study. The court shall set criteria for the social study.

The findings and conclusions of the person or agency making the study shall be filed with the court on a specified date. The report shall be made part of the court record. *D.F. v. State* held that the social study should not be before the court if it is not admitted into evidence. 525 S.W.2d 933 (Tex. Civ. App.-Houston [1st Dist.], writ ref., N.R.L.). The contents of the study may be disclosed to the jury only subject to the rules of evidence. Sec. 11.12(c). This means that the author of the study must be available in court to identify it and be cross-examined. *Magallon v. State,* 523 S.W.2d 477 (Tex. Civ. App.-Houston [1st Dist.], 1975, no writ). If the author is not present, however, the burden is on the person complaining of the study's admission to object to the author's unavailability. If the complaining party fails to object, s/he may not complain on appeal of the admission of the study. *In the Interest of Barrera,* 531 S.W.2d 908 (Tex. Civ. App.-Amarillo 1975, no writ).

In a bench trial, the appellate court will assume that the trial judge disregarded any inadmissible evidence in the study. *Fletcher v. Travis County Child Welfare Unit,* 539 S.W.2d 184 (Tex. Civ. App.-Austin 1976, no writ). However, a decision was reversed where a court ordered a supplemental social study after the hearing and upon which its judgment was based. Appellant should have had the opportunity to cross-examine the author in the hearing. *Kates v. Smith,* 556 S.W.2d 630 (Tex. Civ. App.-Texarkana 1977, no writ).

Section 11.14(c) states that a representative of the agency making the study may be compelled to attend and testify. Section 11.14(f) says that not just *any* representative, but the person who authored the study must be available for cross-examination if the study is admitted.

New England Resource Center for Protective Services, *Preparing for Care and Protection Proceedings, A Guide for Protective Service Workers* 23, 28-30

Appointment of Investigator

The court also uses the preliminary hearing to appoint an investigator to investigate the conditions affecting the child. The law requires that the investigator be "qualified as an expert" or "an agent of the department (of Public Welfare) or an approved charitable corporation or agency substantially engaged in the foster care or protection of children." The investigator may file with the court (and *will* file where the judge so requests) "a report in full of all the facts obtained as a result of such investigation." The court will not appoint an investigator employed by the same agency as the petitioner. This most frequently arises when the DPW is the petitioner. However, some courts may wish to appoint an investigator from a branch of the DPW with which the petitioner is not associated. In such cases, the petitioner should inform the court that the DPW's policies prohibit this dual role.

Investigation

Generally the court will name an agency rather than an individual to conduct the investigation. The agency will upon notification assign a particular worker. The petitioner will probably be the first person interviewed by the investigator. This preliminary interview may be done by phone or in person. Although the statute does not provide guidelines for the contents of the investigator's report, a format which has been developed by public and private social service agencies usually includes the following types of information: identifying data for each member of the family (name, age, birthplace, present address); a description of the presenting problem; a summary of events; a description of the current situation; a summary of interviews with each member of the family; a description and copy (if possible) of any information obtained from hospital, school, and other records; a description of facts gathered during conversations with collateral sources such as neighbors, relatives, petitioner, school teachers, nurses, etc.; an assessment of the present risk to the child; a general evaluation of the information gathered; and a recommendation for an intervention plan that includes conditions to be met by the parents and a timetable for meeting these conditions.

At this point, a special mention should be made about the portion of the investigator's report dealing with recommendations. The trial on the merits will deal with two issues: the question of whether the child needs care and protection (adjudication), and the question of how this need can be fulfilled (disposition). These are distinct issues. Obviously, there can not and should not be any discussion of possible disposition prior to a finding that a child needs care and protection. This means that the investigator's report should in fact be two separate reports: the first containing the findings relative to conditions affecting the child, and the second containing the recommendations. This second report should not be submitted to the court until *after* the child has been found in need of care and protection. Petitioners should ask the investigator to follow this procedure.

The petitioner can and should facilitate the investigation by providing as much information to the investigator as he/she has available. In particular, the petitioner can save the investigator considerable time by furnishing him/her with the names, addresses, and telephone numbers of relevant sources.

The investigator's report is of great significance, as it often serves as a foundation for the hearing on the merits. The statute does not require that the report be filed with the court prior to the hearing, but most courts have a rule that the report is to be filed 48 hours before the hearing. Unfortunately this rule is seldom enforced, which means that frequently parties have not had an opportunity to review the report prior to the hearing. If the petitioner and his/her attorney believe they need an opportunity to review and investigate information contained in the report prior to the full hearing, they should request a continuance of the case for that purpose.

Los Angeles Superior Court, *Policy Memorandum Re Dependency Proceedings* **(1976), 4.**

(4) Pre-Adjudication Social Study

(a) A Pre-Adjudication Social Study is a report made by DPSS to the court before a case is adjudicated. The

report contains the results of an investigation made by DPSS into the facts and circumstances of the case and a recommendation by DPSS of the action it believes the court should take. Any statements made by the parents in the course of the investigation may not be used against them at the adjudication hearing, if the case is adjudicated; however, such statements may be considered by the court at the disposition hearing, if a disposition hearing is held. Any other information obtained by DPSS in the course of the investigation may be used at both the adjudication and the disposition hearings.

(b) The court may order DPSS to prepare a Pre-Adjudication Social Study if all parties who have appeared in the case agree to such order and waive time accordingly. The case will normally be continued for three weeks for this purpose.

(c) A request of the court to order a Pre-Adjudication Social Study may be made at any time before the adjudication hearing is completed. Generally speaking, however, the court will not order such study on the date the case is set for adjudication in the absence of unusual circumstances for so doing.

(See Standards Relating to Abuse and Neglect, 5.2F, in Section V.C.)

Brian Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes, 54* **Chicago-Kent L. Rev. 641, 668-669 (1978).**

The Mandated Investigation

Every state has identified at least one statewide agency to receive and investigate reports of suspected child abuse. These agencies have been criticized for hiring untrained staff, for not providing in-service training, for keeping poor records, for keeping too many records, for having too few minority workers, for intervening too late, for intervening capriciously, for failing to provide coordination, for failing to budget properly and for not creating adequate treatment programs.[176] Nowhere has criticism been more severe or more focused than on the agency's investigation of the report of suspected child abuse.

The first generation reporting statutes were rather simplistic in their approach to the investigation. They simply required that an investigation be made when a report was received. No guidelines were provided for the when, the what and the how. Predictably, results were tenuous at best. Today, only a few states have retained such simplistic language. Indiana, for example, states that:

> upon receipt of a report...the law enforcement agency or county department of public welfare receiving such report shall immediately cause an investigation into the facts contained therein and, upon completion, if the facts so warrant shall submit a written report to the prosecutor in the county where the injury or injuries were inflicted.[177]

The majority of states have recognized that piecemeal, fragmented and tardy investigations do not provide enough data to make prudent decisions. The trend in recent years has been to develop specific guidelines for the child abuse investigation. Arkansas,[178] for example, requires the investigating agency to determine the nature, the extent and the cause of child abuse, the identity of the person(s) responsible for the abuse, the names and conditions of *other* children in the same home, the condition of the home environment, the condition (by an evaluation) of the persons responsible for the child and the type (quality) of relationships that the child has with his parents and other persons responsible for his care.

To accomplish these objectives, the investigating agency is required to make a visit to the child's home and permitted to make a physical, psychological or psychiatric examination of the child in question. Other states have provided for an even more comprehensive and timely child abuse investigation.

Legislative provisions such as these presume that a good child abuse investigation can be mandated. The presumption is not true. The availability of trained staff in adequate numbers with sufficient resources is a condition precedent to mandating any type of comprehensive investigation. In most jurisdictions, it is lacking.

FOOTNOTES

176. *See generally* Fischer, *supra* note 147; Campbell, *supra* note 147.
177. IND. CODE § 12-3-4.1-2 (Cum. Supp. 1976).
178. ARK. STAT. ANN. § 42-813 (Cum. Supp. 1976).

C. Psychiatric Examinations of Parents

Brian Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of the Child Abuse Reporting Statutes, 54* **Chicago-Kent L. Rev. 641, 669-670 (1978).**

Psychological/Psychiatric Examination of the Parent

A psychological or a psychiatric examination of the child's parents coupled with a social history can be quite valuable in helping to determine the probability of culpability[179] and the best dispositional alternative.[180] Such examinations have been used rather routinely by juvenile courts. In most cases, however, they have been used *after* the issue of abuse has been resolved but before the issues of custody and treatment have been decided.[181] In these cases the results of the examination are used to help determine the most appropriate disposition. Since the issue of abuse has already been resolved, it cannot be argued that the examination is being used as a fishing license to establish culpability.

Nevertheless, a number of courts now provide for a psychological or psychiatric examination of the parents before the issue of abuse is resolved. Seven states have now drafted provisions into their reporting statue which encourage and permit such examinations before the adjudicatory hearing.[182] Provisions such as these are subject to criticism.

The criticism that is most often leveled against such provisions is that a forced examination before a finding of abuse has been made is tantamount to forcing the parent to testify against him or herself. Proponents of such provisions argue, however, that the juvenile court is not a criminal court.[183] The purpose of such proceedings, they argue, is to determine if the child has been abused, not who abused him and to determine what treatment ought to be offered to protect the child's safety and interests. The parent is not forced to testify against his interests because his interests are not in question and not in jeopardy. While

the argument may be technically correct, the actual result can be somewhat different.

FOOTNOTES

179 A psychiatric evaluation in this sense is really a determination of whether or not the parent has a high potential for abuse. A high potential for abuse coupled with unexplained injuries could be regarded as circumstantial evidence to show culpability. A number of predictive questionnaires or parenting profiles have been developed and are quite accurate. *See* HELFER, *The Predictive Questionnaire*, HELPING THE BATTERED CHILD AND HIS FAMILY 271 app. A (1974).

180 The psychiatric evaluation in this sense is used to determine the feasability of offering certain kinds of treatment. In certain cases it indicates that treatment per se would be futile and another disposition must be sought, *i.e.*, termination of parental rights.

181. In juvenile court to resolve the issue of child abuse there are two separate hearings. The first is the adjudication. At the adjudication, there is only one issue to resolve: Has the child been abused? The second hearing is the disposition. At the disposition hearing there are only two issues to resolve: What treatment should be offered and who will have custody of the child?

182. ARK. STAT. ANN. § 42-817 (Cum. Supp. 1976); CONN. GEN. STAT. § 17-38a(f)(1) (Cum. Supp. 1978); LA. REV. STAT. ANN. § 14:403(G)(4) (West Cum. Supp. 1976); TEX. FAM. CODE ANN. tit. 2, §34.05 (Vernon Cum. Supp. 1976); VA. CODE § 63.1-248.14 (Supp. 1977); WASH. REV. CODE § 26.44.08(2) (Supp. 1975); W. VA. CODE § 49-6-4 (Cum. Supp. 1977).

183. While it is true that the juvenile court is civil in nature, many would argue that the court's authority to separate the parent from the child (*temporarily* or *permanently*) gives the court a punitive dimension. The penalty involved is a loss of the child.

New York Family Court Act, Section 251 with Commentary.

§251. Medical examinations

After the filing of a petition under this act over which the family court appears to have jurisdiction, the court may cause any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court when such an examination will serve the purposes of this act, the court, during or after a hearing, may remand for a period not exceeding thirty days any such person for physical or psychiatric study or observation

(a) to the health services administration of the city of New York, if the court is located in a county within the city of New York, or

(b) to a hospital maintained by the county in which the court is located, if the court is in a county outside the city of New York, or

(c) to a hospital maintained by the state of New York, or

(d) a qualified private institution designated by rule of court.

Provided, however, that outside of the city of New York, if the court shall order a psychiatric examination of any such person, the court may direct the director of an institution in the department of mental hygiene serving the institutional district in which the court is located to cause such examination to be made. Such director shall be afforded an opportunity to be heard before the court makes any such direction. The director may designate a member of the staff of his institution or he may designate any psychiatrist in the state to make the examination. The psychiatrist shall forthwith examine such person. The examination may be made in the place where the person may be or the court may remand such person to such institution or to a hospital or other place for such examination for a period not exceeding thirty days. During the time such person is at such institution for examination, the director may administer or cause to be administered to such person such psychiatric, medical or other therapeutic treatment as in his discretion should be administered. The state commissioner of mental hygiene shall prescribe and furnish blanks for remand commitment to an institution in the department of mental hygiene and admission to such institution shall be had only upon such blanks. Upon completion of the examination, the director shall transmit to the court the report of the psychiatrist who conducted the examination.

Practice Commentaries

By Douglas J. Besharov

Like so many other sections of the Family Court Act, the origins of this section are found in the Children's Court Act (Section 24) and the Domestic Relations Court Act [Sections 61(7), 85(1)(3), and 92(18)(19).] [Compare with N.Y.CPLR § 3121 and N.Y.CPL §§390.30, 730.10-9.] By its terms and by being in one of the Article of general applicability of the Act, this section applies to all proceedings brought "under this act over which the family court *appears* to have jurisdiction . . ." (Emphasis added.) [See also, Martin v. Martin, 72 Misc.2d 222, 224, 338 N.Y.S.2d 234, 236, 237 (Fam.Ct., N.Y.Co., 1972), suggesting such a position but not reaching the issue in an application for a psychiatric examination under Article 4 because of the clear "appropriateness" of CPLR section 3121.]

The word "appears" is a reference to the fact that the examination may be ordered at any time subsequent to the filing of the petition if the court makes a preliminary determination of jurisdiction. A few judges require an evidentiary showing of apparent jurisdiction though most seem to rely on the allegations of the petition. [See *e.g.*, In re Shirley D., 63 Misc.2d 1012, 1013, 314 N.Y.S.2d 230, 231 (Fam.Ct., Kings Co., 1970), in which the judge relied on the allegation petition and the respondent's courtroom demeanor.] Conversely, the examination may be ordered long after the original fact-finding, adjudication, and order of disposition.

Perhaps the most perplexing practice issue that arises under this section occurs in its application to child protection proceedings under Article 10, *infra*. It is well established that the only permissible use of psychiatric examination in an Article 7 proceeding is to determine competency to stand trial and sanity and, after a fact-finding, to help determine a proper order of disposition. [*Cf.* Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); United States v. Allbright, 388 F.2d 719 (4th Cir. 1968); Sas v. Maryland, 295 F.Supp. 389 (D.Md.1969).] In Article 10 proceedings, however, the respondent parents' mental condition is often the prime issue before the court and it may be the major or even sole basis of an adjudication of abuse or neglect. "[I]n some cases it would be difficult, if not impossible, to separate the issue of mental condition from the issue of neglect." [In re Shirley D., 63 Misc.2d 1012, 1015, 314 N.Y.S.2d 230, 233 (Fam. Ct. Kings Co.1970).] Not to have the results of a psychiatric examination of the respondent parent would force the court to do without the very information it needs to make a reasoned and intelligent decision concerning the parent's ability to properly care for a child. Usually, psychiatric examinations are performed before court action has been commenced and, perhaps more significantly, before counsel has entered the situation and prevented the examination. But what if the Court deems an evaluation to be necessary after the proceeding has been commenced and after counsel is present to actualize any rights the parents may have? Since the findings of the examination may be used to determine the prime issue before the court, and not merely such ancillary issues as competency or sanity, is a court ordered examination a violation of the parent's right against self-incrimination? (See Schmerber v. California, *supra*.)

Emphasizing the non-criminal, child protective purpose of Article 10 proceedings and distinguishing between "inculpatory" statements which it said would be "completely inadmissible on the issue of guilt" and the

"content of communications elicited in such an examination [which] does not bear on the issue of guilt but only on the issue of mental condition." the one reported decision on the subject would allow such examination. [In re Shirley D., *supra,* 63 Misc. 2d at 1015, 1016, 314 N.Y.S. 2d at 233-34 (Fam. Ct., Kings Co. 1970).] But the court recognized that:

> It is possible, however, that potentially incriminating statements may be a necessary part of a successful, beneficial psychiatric examination. Then it would be possible to get the incriminating statement into evidence via the psychiatric report. However, courts have recognized this possibility and have assiduously protected the rights of the accused by limiting the use of such statements to the issue of mental condition and by not allowing them to be used as substantive evidence of guilt. In this way the only potential damage of a psychiatric examination is eliminated. (63 Misc. 2d at 1018, 314 N.Y.S.2d at 236. Citations omitted.)

But, clearly the matter remains troublesome, especially in those situations where the parents refuse to submit to the examination. Would a court be willing or authorized to hold the parents in contempt for such understandable conduct?

D. Psychiatric and Psychological Examinations of the Child

Leon A. Rosenberg, "The Psychologist in Court Proceedings Involving Children," in *Advocating for Children in the Courts* (ABA, National Legal Resource Center for Child Advocacy and Protection 1979), pp. 273-276.

The next source of information comes from current assessment of the child. I am referring to a clinical impression of the current functioning of the child. Basically, this is obtained through an interview. That interview may include a play session as well as direct talking to the child. It typically includes a survey of the child's feelings toward peers, feeling about his parents, attitudes toward school (if he is old enough for school), attitudes toward siblings, and his understanding of the reasons why he is seeing a professional in the first place. The clinical assessment examines the appropriateness of his thought processes as he expresses them verbally, and the means by which he adapts to the real world of the child. A decision as to the quality of that adaption is based on a comparison with what is appropriate for that age child. Hostility toward a sibling, for example, is not surprising, but one is concerned about the depth of that hositility, its mode of expression, and whether or not both are appropriate to the age of the youngster. An eight-year-old "hates" his sister and may say this with vehemence and indulge in fantasies involving her physical destruction. If a fifteen-year-old boy invests a good deal of his energy in such destructive fantasies, we are dealing with a completely different matter. The interview technique will also concern itself with the child's sense of right and wrong, with the examiner being concerned about the presence or absence of guilt, the appropriateness of the severity of the guilt feelings, and the means by which the child deals with such feelings. The quality of anxiety that the youngster is dealing with will be sampled by seeking out information regarding fears, nightmares, etc.

Of course, not all of this can be readily available from direct interviewing. The play interview seeks very similar material but utilizes a setting that is less threatening to the child. The technique requires the examiner to deal with symbolic representatives presented by the child. Of course, some children are very direct in their presentation of their percept of family interactions, for example, when they act it out through doll play. One still has to recognize, however, that children most often do not make a specific reference to a parent, such as: "I fear my mother." Instead, the fears are expressed by a doll baby in response to a mother doll, and the clinician has the task of interpreting that doll play interaction.

Psychological testing can be viewed as a structured play interview where the examiner uses specific material to which the child responds. Personality assessment tools used with children are also attempts to gather information that can not be obtained by direct interviewing. Projective tests, such as Human Figure Drawings, the Children's Apperception Test, the Thematic Apperception Test, the Rorschach, etc., are attempts to stimulate the fantasy of the child so as to produce information regarding feelings that the youngster cannot directly express (8,9,10). This inability to "directly express" is a function of protective mechanisms that all human beings utilize to avoid experiencing extreme degrees of anxiety. Sometimes these defensive techniques produce distortions of reality that are the basis for significant psychopathology. In our diagnostic process our job is to determine what those techniques are, how badly do they distort reality, and why are they being utilized. Even with young children, many things cannot be dealt with directly because they involved too much discomfort. We sample the fantasy of the youngster as an additional means of gathering such information. I must emphasize that we are talking about an *additional* means of gathering information, and that the testing tool has to be see as part of a total evaluation, making its own contribution but having specific limitations.

Whether we are dealing with pictures of people or inkblots, the entire range of projective tests are useful because of their ability to stimulate fantasy, which reflects on internal conflicts and which also indicate the child's perceptions of significant aspects of his real world, both of which may significantly influence his behavior. These perceptions may not be accurate. In fact, they very often are distortions of reality. The degree to which an individual is responding to a distorted view of reality is one part of a clinical determination as to how mentally disturbed he or she may be. If the child's story, for example, in response to a Thematic Apperception Test card, strongly indicates a perception of mother-figures as attacking children, this is not interpreted as meaning that mother may actually have physically attacked the child. It only indicates that the youngster perceives the mother-child relationship as one which is dangerous and threatening. That perception may come from actual experiences of being physically attacked, or from long-term exposure to threats of attack, or other forms of psychological stress. One does not determine from projective testing whether or not a mother has physically abused a child. On the other hand, one can define what is the normal parent-child relationship, as reflected in the projective stories of thousands of children, and indicate

when a particular child's perception is significantly deviant. That deviance can clearly indicate that something is pathological in the relationship between the child and the female authority figures in his/her life.

Certainly, there are many kinds of "tests" in the psychological sphere and a good deal of confusion exists regarding utilization and interpretation. The word "test" implies numbers. There are scoring systems for the Rorschach and Thematic Apperception Test, and many clinicians utilize these scoring systems to aid them in their interpretation of the material. The major use of such scoring systems, however, is in research. Clinical interpretations of the material, on the other hand, does not depend upon these scoring systems. Hence, there is a significant difference between a research report in the literature that fails to find a statistically significant difference between a normal control group and a diagnosed pathological group on six of the Klopfer scores on the Rorschach, and my clinical interpretation of the same Rorschachs to determine whether or not that pathology is in operation. The accuracy of that interpretation depends *completely* upon the training and experience of the psychologist examining the data. This is an extremely important point we will come back to when discussing the presentation of this material in court.

When attempting to integrate material from history, current clinical assessment, and psychological testing, one has to recognize that the issue is not deciding which source of information is more "accurate" than the other. It is a question of combining the data, recognizing the differences that exist between the sources of data. For example, the guardedness demonstrated by the child during the clinical interview may indicate that something is amiss in the relationship of the child with her mother, but not much more can be elicited at that point. The fantasy productions stimulated by the Thematic Apperception Test and Rorschach, may give us a much clearer picture of the unconscious conflicts associated with her relationship with mother-figures, her fears associated with a perceived threat to basic dependency needs, and a picture of some of the deviant ways in which the child is attempting to adjust to this stress. The history may very well round out this picture by specifying such realities as the length of time that the mother was in and out of psychiatric hospitals, and documenting highly significant psychopathology which would have influenced her relationship with her child. Hence, the integration of this material gives us a picture of a deviant mother-child relationship based on significant psychopathology in the mother. This results in significant emotional conflicts within the child, which in turn, produce deviant behavior in the youngster. The "deviant behavior" taken alone may stand out only as evidence of a possibly disturbed child but with no hint as to the degree of disturbance involved and its etiology. This combination of data enables the psychologist to say something intelligent regarding the current needs of the child, in relationship to the mother-child interaction. Hopefully, this can be presented in a manner that would better enable a judge to identify the possible effects of decisions influencing that relationship; e.g., separation, return, etc.

Harold P. Martin, ***Treatment for Abused and Neglected Children*** **(National Center on Child Abuse and Neglect, H.E.W., 1979), A-1, A-2.**

Tests Frequently Used to Assess Development of Children

Bayley Scales of Infant Development (1969). This is a developmental test for children from birth to 30 months of age. It has a motor scale and a mental scale. An infant behavior record is less often used. Bayley Scales is very well standardized and stands as a most respectable infant test.

Gesell, or Revised Gesell Developmental Schedules (1947 on). This is a test for children from 4 weeks to 6 years of age. It is divided into motor, adaptive, language and personal-social scales. While there is legitimate criticism of the standardization, it is an excellent clinical tool in the hands of an experienced developmentalist.

Griffiths Scale of Mental Development (1954, 1970). Similar to the Gesell, this is a "British" version, standardized on English children. The five scales are locomotion, personal-social, hearing and speech, eye and hand, and performance. It was originally a test for children from birth to 2 years, but has recently been extended for up to 8 years of age.

Cattell's Infant Intelligence Scale (1940). Also similar to the Gesell, this was an attempt to extend downward in age the Stanford-Binet. It covers children from 2 to 30 months of age. It gives a mental age and I.Q. score.

Merrill-Palmer Scale of Mental Tests (1931). Testing children from 1.5 to 6 years of age, this test is highly loaded with performance items and has very few language tests. It is inherently interesting to most chidlren.

Stanford-Binet Scales (1972). This is appropriate from age two through adulthood. It is heavily loaded with language items after six, and has many perceptual-motor tasks in the preschool years. It gives an overall I.Q. and mental age.

McCarthy Scales of Children's Abilities (1972). This is a test for children from 2.5 to 8.5 years of age. It has five different scales: verbal, perceptual, quantitative (knowledge of numbers), memory, and motor. It also gives a General Cognitive Scale (GCS) which is a combination of performance on the first three of the five scales listed above.

Wechsler Preschool Primary Scale of Intelligence (1963) (WPPSI). This is a downward extension of the WISC, covering children from 4 to 6.5 years of age. Like the WISC, it has five subtests which combine to give a performance I.Q., and five subtests which combine to give a verbal I.Q. A full scale I.Q. is also derived. The many subtests are valuable, especially in handicapped children.

Columbia Mental Maturity Scale (1959). This is a test for children from 3.5 to 13 years of age. It is often used for difficult-to-test children, inasmuch as it requires very little verbal direction and response. It tests reasoning. The child is presented with cards with pictures, from which he must choose the "one that doesn't belong."

Leiter International Performance Scale (1952). This is a test frequently used with deaf or language-impaired children inasmuch as it requires no verbal directions and no verbal responses. It tests children from 2 years of age through adulthood. Conceptual formation is measured, as in the Columbia Mental Maturity Scale.

Vineland Scale of Social Maturity (1965). This is a test frequently used for severely and profoundly retarded children. It does not measure mental abilities, but self-help skills and social maturity. It includes a list of questions to be asked of the parent or caretaker of the child. It does cover birth through adulthood. It may be the only way to get some objective measure of development in the severely retarded child who cannot be tested directly.

Wechsler Intelligence Scale for Children-Revised (WISC-R) (1971). Like the WPPSI described previously, this has five verbal and five performance subtests. It is applicable to children from 6 to 17 years of age. It is felt by many to be the most valuable tool to assess intelligence in this age group.

There are a variety of tests, called "achievement tests," which are commonly used with school-age children. The most widely known achievement tests are the WRAT (Wide Range Achievement Test) and the PIAT (Peabody Individual Achievement Test). Achievement tests are designed to measure how well a child has learned academic subjects. Results are usually reported in grade levels, that is, a score of 3.6 in reading means the child is reading at the level of the sixth month of the third grade. Achievement tests can be an indicator of academic progress which is often independent of intelligence.

E. Circumstantial Evidence

Nanette Dembitz, *Child Abuse and the Law—Fact and Fiction,* 24 Record of the Association of the Bar of the City of New York 613, 617-619 (1969).

When the child is too young to speak (and most suspected serious abuse occurs to young infants), the judge is advised by all commentators that he can look to medical testimony to establish that the injury was inflicted by the parent. That is, if a physician testifies that the injury could *not* have been incurred in a fall or whatever accident the parent describes, but that it must have resulted from some type of blow, the court has a basis for inferring a parental blow. However, the medical facts rarely, if ever, fit this neat equation, nor afford the security of scientific certainty.

The medical testimony during the two months that this writer sat in the initial child abuse term was usually that the child's fracture or other injury was clearly due to a blow, as distinguished from a disease. However, on the crucial issue of whether the blow was received in the accidental fall alleged by the parent, the strongest testimony by any physician was that it was *"unlikely"* that the injury occurred in that manner (for example, "it is unlikely that the child got the bruises on his side in the fall his mother describes, because a child that age is more likely to fall on his abdomen"). Even the "vintage" of many injuries could only be roughly approximated. Indeed, despite the emphasis in child abuse literature on the significance of a *series* of injuries to a young infant, the repetition of injury may not be any proof of parental abuse. For an infant's hyperactivity or a child's "accident-proneness" or a parent's neglectful supervision would be *continuing* tendencies as much as would be the parent's alleged tendency to batter the child, and each of these tendencies would be equally likely to produce a *series* of injuries.

Eyewitnesses

If there is anyone present at the time of the injury besides the parent suspected of abuse, it generally is the other parent, and his testimony usually must be discounted because of his self-interest. One parent may accuse the other to deflect blame from himself; or the accusation of child abuse may be used vindictively in a deteriorated relationship, like the sometimes exaggerated or false complaints by one parent against the other in a child-custody case.

The problem of comparative credibility between an accusing and accused parent is sometimes alleviated by the accuser's change of heart at the hearing. One pretty but sad-eyed mother took the witness stand and completely reneged on her charge that her child's concussion resulted from his father's banging his head against the wall. Actually, she testified dolefully, the father, who had not married her, had left her before Ronald Jr.'s injury and their second baby's birth ("the day our second child was born was the day Ronald Senior married someone else"). When she then had to move to a worse apartment, she put her crib in storage along with the other furniture she and Ronald Sr. had bought, so the junkies next door wouldn't steal it. Little Ronny hurt his head falling off the cot where he slept. The cross-examining police attorney, trying to show that the father must have influenced her to change her story, could not shake her in her insistence that she was telling the truth because she saw now that spiting Ronald Sr. was of no use to her and the children.

What The Child Says

When the child is old enough to talk, can the judge rely on his testimony to decide whether his injury was inflicted on him by his parent? To spare the child from the emotional trauma of testifying formally against his parent and also to encourage him to talk freely, Family Court judges generally interview the child in chambers in child maltreatment cases—as in custody cases—,and may also bring the parent and child into chambers together to appraise their interaction. But in spite of efforts to make friends with the child, gain his confidence, and then to elicit the truth by varying approaches, the interview frequently is inconclusive about the alleged parental abuse. A child often cannot or will not recount the crucial incident. If he suffered a concussion, he may have a true amnesia. Then too, by the time the child gets to court, perhaps after a prolonged hospital stay, a version of the incident may have been fixed in his mind by parents or social-workers;

or he may be unable to separate reality from a fantasy reflecting his wish to blame, or on the other hand exculpate, a parent; or he may deny any abuse by his parent though he complained of it out-of-court, because he senses that it might result in the court's removing him from his home against his wishes.

Because of the difficulties of securing reliable testimony from children as to the way they were injured, hearsay testimony has been accepted from Child Welfare workers, doctors, neighbors, and other witnesses, as to the child's statements to them about his parent's acts. This ruling on admissibility is supported by the decisions on flexible dealing with children in civil proceedings involving family relationships, and also by the trend throughout the law towards commonsense liberalization of the prohibition against hearsay. Nevertheless, this hearsay frequently proved, on cross-examination, to be unconvincing. ("Did you ask the child whether his father hit him, and did he merely nod in reply?"). To the distress of conscientious social-worker witnesses, it was generally insufficient, standing alone, to support a finding against the parent.

Thus, even taking the most flexible approach to truth-finding, the upshot of the difficulties of proof of child abuse is this: It is rare, as the truly careful commentators recognize, that child abuse in the sense of parental non-accidental infliction of serious injury, can be proved with a reasonable degree of certainty absent a parental admission. The Family Court fortunately can, however, guard a child from further harm when his injury must have resulted *either* from parental battering *or* from inadequate parental attention, under the court's general power to protect him from "neglect" and "improper guardianship."

Family Law—Parental Rights—Principles of Res Ipsa Loquitur Apply to Proof of Child Abuse and Neglect. ***Higgins v. Dallas County Child Welfare Unit,*** **544, S.W. 2d 745 (Tex. Civ. App.—Dallas 1976, no writ). 9 Texas Tech. L. Rev. 335-342 (1978).**

The Dallas County Child Welfare Unit petitioned the juvenile court for termination of the parent-child relationship between Sammy and Hazel Higgins and their child, Patrick Higgins.[1] The welfare unit based its request for termination on Texas Family Code section 15.02(1)(D) and (E), which provide for involuntary termination of the parent-child relationship if the court finds that the parent has abused or neglected the child.[2] At the age of fifteen months Patrick was admitted to Parkland Hospital after his mother noticed a swelling in both his hands and feet. Doctors diagnosed his condition as an upper respiratory infection.[3] Following a ten-day hospital stay for treatment of this condition, the hospital released Patrick, but four days later it readmitted him after his mother observed a swollen knee. At that time x-ray pictures were taken and the treating physician found fractures of both legs.[4] As neither parent could explain how the fractures occurred, doctors pronounced Patrick the subject of a "possible battered child syndrome,"[5] and the juvenile court placed him under the temporary managing conservatorship of the Dallas County Child Welfare Unit.[6] Three caseworkers visited the Higgins family while Patrick was under this temporary managing conservatorship. At the trial the first caseworker testified that Mr. Higgins did not relate well with Patrick and that Patrick would have nothing to do with his father.[7] The second and third caseworkers both testified that the parents were uncooperative when asked to attend family counseling sessions.[8] Neither the welfare unit nor Mr. and Mrs. Higgins called as a witness the neighbor with whom Patrick stayed while his mother worked. The neighbor had kept Patrick for a period beginning prior to his first hospital admission.[9]

Although the jury declined to find that Mr. and Mrs. Higgins had personally abused the child, it found by a preponderance of the evidence that they had knowingly placed and knowingly allowed Patrick to remain in conditions and surroundings that endangered his physical well-being and that it was in the child's best interest to terminate parental rights.[10] Mr. and Mrs. Higgins on the ground appealed that there was insufficient evidence to support the jury finding.[11] The Dallas Court of Civil Appeals sustained the Higgins' claim and reversed and remanded the case.[12] However, the court held that a res ipsa loquitur type of circumstantial evidence can be sufficient to establish child abuse or neglect under Texas Family Code section 15.02(1)(D) and (E).[13]

In *Higgins v. Dallas County Child Welfare Unit*[14] the welfare agency argued that the doctrine of res ipsa loquitur should be applied in child abuse and neglect cases and that under this doctrine there was sufficient evidence to support the verdict.[15] The court observed that the application of res ipsa loquitur to child abuse and neglect cases was a question of first impression in Texas.[16] While not adopting the tort theory of res ipsa loquitur with all its procedural ramifications,[17] the court concluded that circumstantial evidence of the child's injuries and the parent's control of the child can be sufficient to prove child abuse and neglect.[18] The court adopted a two-part test similar to the traditional res ipsa test. First, the party seeking to terminate the parent-child relationship must show serious injury or detriment to the child's health that would normally not occur in the absence of parental abuse of neglect.[19] Second, the party must show parental control of the child during the time that the injuries are alleged to have occurred.[20] The jury is authorized to infer abuse or neglect from proof of these two elements.[21] The court reasoned that such an approach to proof in abuse and neglect cases is necessary because of the difficulty of obtaining proof of neglectful or abusive conduct on the part of the parent. The court cited as examples the facts that abusive actions take place most often in the privacy of the home, that parents generally refuse to testify against one another, and that the young victims are often unable or too frightened to testify.[22]

Having determined that the Dallas County Child Welfare Unit could present a res ipsa case, the court then turned to the question whether the evidence the agency had offered supported the jury finding of neglect. The court concluded that the evidence was insufficient as to

both elements of the res ipsa test. First, evidence was lacking on the extent of Patrick's injuries during his first hospital visit.[23] Second, the record did not reflect who cared for the child on what occasions because the neighbor keeping Patrick was not called to testify.[24] Also, there was no evidence that the conditions at the neighbor's house were unsafe or that Mr. and Mrs. Higgins were aware of such conditions.[25] Thus, the court concluded that the evidence was factually insufficient to support the jury's finding of neglect.[26]

Higgins v. Dallas County Child Welfare Unit[27] is an example of a movement toward providing greater protection to children by relaxing evidentiary rules in child abuse and neglect cases.[28] One important element of this movement is the adoption of a res ipsa theory of proof of abuse and neglect.[29] The development of the "battered child syndrome" diagnosis[30] has provided the basis of a res ipsa form of proof. The syndrome means that the child has been the victim of multiple and serious injuries that are not normally caused by accidental means.[31]

New York has taken the lead in employing the concept of the "battered child" and relaxing evidentiary rules to better serve the interest of the child. In *In re S.*,[32] the family court borrowed the principle of res ipsa loquitur from the law of negligence to hold that circumstantial evidence of only the condition of the child and parental control during the time the injuries occurred is sufficient to establish parental abuse and neglect.[33] The court gave no reasoning for its decison other than that the evidence of the battered child speaks for itself.[34] Four years later the New York Legislature enacted the Children's Bill of Rights, Article 10 of the New York Family Court Act.[35] Section 1046(a)(ii) provides that proof of injuries that would not ordinarily occur except by an act or omission of the parent or person responsible for the child is prima facie evidence of child abuse or neglect.[36] Pursuant to this statutory provision, the family court in *In re Tashyne L.*[37] received evidence of a three-month old child admitted to the hospital with acute abrasions, dehydration, respiratory distress, and multiple fractures. The trial judge also concluded that the parents had control of the infant during the time that the injuries occurred. The appellate court held that this evidence supported a finding that the child was abused.[38]

Since its enactment, section 1046(a)(ii) of the Children's Bill of Rights has withstood both due process and fifth amendment challenges. In *In re J R*[39] the family court considered a mother's claim that the statutory prima facie case of abuse or neglect deprived her of her children without due process of law. The mother's primary argument was that the statute altered the burden of proof by creating a presumption that the parent must rebut in order to preserve his parental rights.[40] The court concluded that the statutory presumption did not shift because the party seeking to terminate the parental rights must still prove the elements of injury and control;[41] after injury and control are proved, only the burden of going forward with the evidence shifts to the parent, who may then offer explanations of the injuries or rebut control.[42] *In re S.*[43] concerned the question whether this requirement of explanation violated the self-incrimination protection of the fifth amendment. The family court found no fifth amendment violation because the parents are not required to testify. However, if they do not testify, they must suffer the consequences of termination.[44]

Texas, like other states, has dealt with the problem of child abuse and neglect statutorily.[45] Effective January 1, 1974, section 15.02 of the Parent and Child Title of the Texas Family Code replaced the antiquated provisions of Art. 2330, "Dependent or neglected child."[46] In section 15.02 the legislature outlined more specifically what conduct of parents justifies involuntary severance of the parent-child relationship.[47] However, the Family Code section did not specify in detail the evidentiary standards applicable to abuse and neglect cases; consequently, the courts have had to decide such questions.

Before *Higgins v. Dallas County Child Welfare Unit*,[48] Texas courts allowed circumstantial evidence, including evidence relating to the child's injury and the parental control of the child, to prove abuse and neglect. However, the courts required more than just evidence of injury and control; the primary focus of cases was on the conduct or condition of the parent rather than the condition of the child. For example, in *Carter v. Dallas County Child Welfare Unit*,[49] the court held that evidence of the schizophrenic condition of the mother which by its nature caused or forced her to engage in conduct which endangered the physical and emotional well-being of her children supported a termination of parental rights. Similarly, in *Patton v. Welch*[50] the father's criminal record evidenced conduct that caused him to abuse his children, and in *H.W.J. v. State Department of Public Welfare*[51] the fact of the father's imprisonment was a condition that caused conduct that endangered the physical and emotional well-being of his child. Other cases focused on such evidence of parental conduct as lack of cooperation with welfare authorities,[52] repeated absences and poor records by the children at school,[53] cluttered and unsanitary households,[54] inability to acknowledge a family problem,[55] sexual relationships of the parent,[56] feeding the children sour milk,[57] and repeated failure to pick up the child at a babysitter's.[58] Also, the court has considered testimony that the parent is not apt to follow through with long-range goals, such as establishing a career or home and that the mother wants to keep her baby to get back at her parents.[59]

In contrast, *Higgins v. Dallas County Child Welfare Unit*[60] allows, by a res ipsa loquitur theory, the condition of the child to be sufficient proof of abuse or neglect on the part of the parent. The court's rationale for adopting this theory is that it is difficult to acquire evidence of abusive or neglectful parental conduct.[61] Focusing on the child to determine parental conduct provides a less stringent evidentiary standard yet still implements the purpose of section 15.02. Because the primary objective of section 15.02 should be to protect children, the foremost concern should not be the parent's conduct per se; rather, it should be how that conduct affects the child. The courts are not concerned whether the parent has, for example, a psychological problem unless that problem adversely affects the child. A res ipsa evidentiary approach is consistent with this concern.[62]

However, although res ipsa focuses on the child, it does not do so to the extent that it unjustly infringes on parental rights. The party seeking termination must prove that the child's injuries are of a type that ordinarily occur by non-accidental means.[63] Testimony of medical experts should be required to explain that the multiple and severe injuries of the child evidence a "battered child," rather than an accidental fall or a tussle with a sibling. Also, the parent has the opportunity to offer a reasonable explanation for the injuries and thereby rebut the inference of abuse or neglect created by the existence of the injuries. Thus, the res ipsa theory also conforms to the purpose of section 15.02 by insuring that parental rights are not terminated unless the parent has engaged in abusive or neglectful conduct.

The procedural implications of the two-part test of *Higgins* is a problem future cases must decide. The langge of the court suggests that a finding of the two elements of the test will create only an inference of abuse or neglect.[64] If the test creates only an inference, the issue of abuse or neglect is a jury question, and the jury may decide for or against termination whether the parent presents any rebuttal or not.[65] The creation of a mere inference is consistent with the tort application or res ipsa in Texas;[66] however, the *Higgins* court specifically declined to adopt the procedural ramifications of the tort theory of res ipsa.[67] The New York decisions create more than an inference of abuse or neglect; they create a rebuttable presumption,[68] and the parent must offer some evidence to rebut the presumption or lose parental rights.[69] The most desirable procedural effect is the creation of an inference. The creation of a rebuttable presumption would place too great a burden on the parent to prove he did not commit a wrongful act. In light of the strong feeling for preservation of parental rights if at all possible, the creation of an inference would best safeguard the parent against wrongful termination.

Laura M. Miller

FOOTNOTES

1. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 746 (Tex. Civ. App.—Dallas 1976, no writ).
2. TEX. FAMILY CODE ANN. § 15.02(1)(D) and (E) (Supp. 1976). The applicable sections read as follows:

> A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:
> (1) the parent has:
> . . . .
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
> (K) . . . and in addition, the court further finds that
> (2) termination is in the best interest of the child.

3. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 747 (Tex. Civ. App.—Dallas 1976, no writ).
4. *Id.*
5. *Id.* at 747.
6. *Id.*
7. *Id.* at 747-48.
8. *Id.* at 748.
9. *Id.*
10. *Id.* at 748-49.
11. *Id.* at 749.
12. *Id.* at 747.
13. *Id.* at 750.
14. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).
15. *Id.* at 749-50.
16. *Id.* at 750. The court first interpreted the pertinent subsections of Texas Family Code § 15.02. It concluded that subsection (D) protects a child if a parent knowingly neglects it by exposing it to dangerous surroundings and that subsection (E) concerns aggressive behavior by a parent toward a child that results in harm to the child's physical or emotional health. *Id.* at 749.
17. These include the effect on burden of proof, burden of going forward with the evidence, pleading, defendant's evidence. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936), and issue submission, 12 HOUS. L. REV. 962 (1975).
18. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 750 (Tex. Civ. App.—Dallas 1976, no writ).
19. *Id.*
20. *Id.*
21. *Id.* at 750.
22. *Id.*
23. *Id.*
24. *Id.* at 750-51.
25. *Id.*
26. The Higgins also asserted that (1) the welfare unit must prove its allegations by clear and convincing evidence instead of the preponderance standard and (2) the court improperly framed the special issues to include both parents. *Id.* at 747, 749. The court noted that a preponderance of the evidence standard is provided for in TEX. FAMILY CODE ANN. § 11.15 (1975) and held that the same standard applies to § 15.02 cases. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ). Regarding the joining of the parents in the special issues, the court concluded that each parent should have his rights in a parental termination proceeding submitted separately to the jury. The court reasoned that this was the legislative intent of Texas Family Code § 15.02 because the section refers to parent in the singular and that a joint submission would require the jury to refuse to terminate parental rights even though it was convinced one parent was abusive or neglectful. *Id.*
27. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).
28. Brown, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 70 (1973); Katz, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. L.Q. 151, 167-69 (1977).
29. The doctrine of res ipsa loquitur is that an inference of negligence may be drawn from proof that the defendant had control of the instrumentality causing injury and that the accident was of the type that does not occur in the absence of negligence. *See* PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 39-40 (4th ed. 1971). Some courts hold that res ipsa creates a rebuttable presumption of negligence while others, including Texas, hold that the doctrine merely creates a permissive inference of negligence. Gulf, C. & S.F. Ry. v. Dunman, 27 S.W.2d 116, 118 (Tex. Comm'n App. 1930, opinion adopted).
30. Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 365-68 (1971).
31. People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919, 921 (1971). Medical experts recognize certain criteria as indicative of a "battered child." These include a child under the age of three, evidence of repeated bone injuries, subdural hematomas with or without skull fracture, soft tissue injury, and the explanation for the injury does not fit the injury. *Id.*
32. 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. 1965).
33. 259 N.Y.S.2d at 165.
34. *Id.*
35. N.Y. Fam. Ct. Act (McKinney 1975). *See also* CONN. GEN. STAT. ANN. § 17-38a(f)(4) (West 1975) and R.I. GEN. LAWS § 40-11-7 (Supp. 1976).
36. N.Y. Fam. Ct. Act §1046(a)(ii) (McKinney 1975).
37. *In re* Tashyne L., 53 App. Div. 2d 629, 384 N.Y.S.2d 472 (1976).

38. 384 N.Y.S.2d at 474.
39. 87 Misc. 2d 900, 386 N.Y.S.2d 774 (Fam. Ct. 1976).
40. 386 N.Y.S.2d at 779.
41. *Id.* at 780.
42 *In re* Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966).
43. 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct. 1971).
44. 322 N.Y.S.2d at 177. The res ipsa theory as used in child abuse and neglect cases is analogous to the evidentiary theory in two homicide convictions. In Commonwealth v. Paquette, 451 Pa. 250, 301 A.2d 837 (1973) a stepfather was convicted for the murder of his infant stepchild. The court held that evidence that the adult had sole custody of the child for the period of time in which the child suffered serious injuries that were not accidental was sufficient to allow the jury to infer that the adult inflicted these wounds. 301 A.2d at 840. *See also* State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973).
45. Katz, *Child Neglect Laws in America,* 9 FAM L.Q. 372 (1975).
46. Tex. Rev. Civ. Stat. Ann. art. 2330 (1971). This provision had been in effect since 1907.
47. See note 2 *supra.*
48. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).
49. 532 S.W.2d 140 (Tex. Civ. App.—Dallas 1976, no writ).
50. 538 S.W.2d 7 (Tex. Civ. App.—Texarkana 1976, no writ).
51. 543 S.W.2d 9 (Tex. Civ. App.—Texarkana 1976, no writ).
52. Moreland v. State, 531 S.W.2d (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).
53. *Id.*
54. *Id.*
55. *Id.*
56. *In re* RDP, 526 S.W.2d 135 (Tex. Civ. App.—Dallas 1975, no writ).
57. *Id.*
58. *Id.*
59. *DF v. State,* 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See also In re* Susan Lynn M., 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1976); *In re* C.O., 541 P.2d 330 (Colo. Ct. App. 1975); Sanchez v. Walker County Dept. of Family & Children Servs., 138 Ga. App. 49, 225 S.E.2d 441 (1975); *In re* Bessette, 551 P.2d 653 (Mont. 1976); *In re* Norwood, 194 Neb. 595, 234 N.W.2d 601 (1975); New Jersey Div. of Youth & Family Servs. v. Huggins, 148 N.J. Super. 86, 371 A.2d 841 (Camden County Ct. 1977).
60. 544 S.W.2d 745, 750 (Tex. Civ App.—Dallas 1976, no writ).
61. *Id.*
62. The res ipsa inference does not replace the use of conduct evidence in proving child abuse and neglect if available, but merely supplements it. *Id.*
63. *Id.*
64. *Id.*
65. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972).
66. See note 29 *supra.*
67. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 750 (Tex. Civ. App.-Dallas 1976, no writ). See note 17 *supra.*
68. *In re* J R., 87 Misc. 2d 900, 386 N.Y.S.2d 774, 780 (Fam. Ct. 1976); *In re* Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966).
69. *See.* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972.)

Section IX.

Improving Social Worker and Other Expert Testimony

The purpose of this section is to explore methods of improving the quality and reliability of information presented by experts in abuse and neglect cases. Judges might, for example, encourage expert witnesses to learn about how to testify or may urge counsel to prepare witnesses more thoroughly. Finally, the section will examine various ways of helping judges evaluate the expert information they receive.

A. Introduction

1. Courts may rely greatly on testimony and reports by social workers, doctors, and mental health professionals in abuse and neglect cases.

2. Testimony and reports by these experts are not always adequate. Several problems are:

poor preparation by the expert,

ignorance of court procedures and the limits of testimony permitted, and

language that is too technical for easy comprehension by judges and attorneys.

B. Improving Testimony Through Instruction

1. There are many pamphlets, monographs, and journal articles prepared for social workers and doctors involved in abuse and neglect litigation. These writings typically explain court procedure and rules of evidence, and they provide instructions about how to prepare reports and give testimony.

Judges can encourage prospective witnesses to read such material.

Judges can aid in the preparation of manuals, especially for social workers, that provide information about child protective legal proceedings in the jurisdiction.

2. Judges can give informal tutoring to professionals who appear in court, for example, through meetings with social workers.

3. Judges can help organize workshops and other training sessions for social workers and other experts.

State or local bar associations, universities, or child protective service agencies can help sponsor and participate in such activities.

Judges can also participate in training sessions—e.g., by giving speeches that explain the court process.

4. The court intake staff, when it participates in abuse and neglect cases, can instruct social workers as to the appropriate form and content of reports prepared for the court.

C. Improving Testimony Through Efforts of Attorneys, Especially Petitioner's Attorney

1. Attorneys can improve the quality of reports and testimony by pre-trial preparation of social workers, doctors, and other expert witnesses.

2. The quality of expert testimony and reports is greatly affected by the quality of legal representation for the petitioner, who presents most expert testimony and reports. Representation is generally provided by the district or county attorney's office.

Representation of child protection agencies is probably best when counsel specializes in child protection cases. An effective and increasingly common system is to assign abuse and neglect cases to one or a few attorneys in the district attorney's office. Welfare agency attorneys may have offices in the child protective agency's building, thus facilitating communication with social workers.

Judges may be able to improve experts' presentations in abuse and neglect cases by urging district or county attorneys to adopt similar arrangements to those listed above.

D. Judicial Aids in Evaluating Expert Testimony and Reports

1. Judges may have difficulty evaluating the opinions or conclusions reached by doctors and social workers.

Much of the information that forms the basis for experts' reports and testimony is not available to judges.

Judges may not understand the terminology or concepts used by the experts.

2. Methods for assisting judges in the evaluation of expert reports and testimony include:

judicial education in the technical aspects of child abuse and neglect (See Section I. A),

use of independent experts to review and, when appropriate, contest expert testimony presented by the petitioner (See Section III. E), and

cross-examination of experts by opposing counsel. (See Section III. D.)

Support Readings

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B. Improving Testimony Through Instruction

Judge Enrique Pena, "Protective Conservatorship," in *Child Abuse and Protective Services in Texas* (1976), D-44-47.

b. Preparation of Case By Social Worker.

(1) Introduction.

This section is intended to stimulate the interest of those social workers who have had no legal training or have no legal consultation available to them in the preparation of their cases. CAVEAT: This section is not to be considered as an exhaustive treatment of the subject matter. The suggestions come from the author's personal experience as county attorney and juvenile judge.

(2) Making A Record.

The first principle that social workers engaged in child protective work should adhere to is: EVERY PROTECTIVE SERVICE CASE HAS A POTENTIAL FOR COURT ACTION. Therefore, the building of a legally-usable record of facts begins at *intake*. The worker should explore all resolutions of neglect or abuse, whether the same are merely nonjudicial or for the purpose of laying a foundation in the family case file should court intervention become necessary.

The worker must bear in mind that once a decision has been made to go to court, the county attorney must prepare and file pleadings in order to establish jurisdiction, which information will be obtained from the records of the worker who in essence is the supplier of the information. If the facts are not in the record to establish jurisdiction, the county attorney has no case to file.

The second principle is: THE RECORDS SHOULD BE ACCURATE, VERIFIED, UNBIASED AND WELL-DOCUMENTED.

The worker must realize that the records will be available to the parent's attorney through discovery procedures. If these records are inaccurate, unverified, biased, or if they contain conclusions not based on fact, that worker can expect damaging cross-examination.

Experience has demonstrated that those social workers who make it a practice to take informal case notes, immediately after the occurrence of a fact, will be able to refresh their memory of significant observations, statements, inconsistencies and ideas, than the worker who attempts to rely on his memory.

In short, all kinds of observable information should be recorded precisely.

The third principle is: DON'T MAKE CONCLUSIONS OUT OF SPARSE FACTUAL INFORMATION.

Conclusionary reports, based on worker-client feelings, or diagnosis without documentation will result in strained social work-law relationships and the exclusion from evidence of the very facts which may protect a child.

The fourth principle: PRESERVE ALL PERTINENT EXHIBITS IN THE CASE FILE.

The social worker in the process of working with the family will encounter material that should be preserved in the file, such as birth, death, marriage certificates, medical records of the child and school attendance records of the child.

Photographs of the child in abuse and neglect cases should be preserved with notations as to when and where each photo was taken, by whom, the time of day, and what the photo dipicts.

(3) Hearsay Testimony

Hearsay testimony is defined as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assertion." McCormick, *Evidence,* 2nd ed. (West Publishing Co., 1972).

The reason for this rule is that there is no opportunity to test the reliability of the statement through cross-examination of the person who made it.

Another reason for the rule is that the witness must have first-hand knowledge of the facts about which he is testifying.

The exceptions to the hearsay rule is a troublesome area for attorneys, judges and social workers.

A general rule is that the worker can testify about statements made personally to him by parents. The worker can also testify as to what he saw or participated in the activity he is testifying about.

Social workers can maximize their opportunities for gaining first-hand knowledge by personally confirming observations reported by others.

Social workers can testify as to statements made by the child as an exception to the hearsay rule. *Huber v. Buder,* 434 S.W. 2d 177 (Tex. Civ. App. 1968, ref. n.r.e.).

The basis for the exception is that the statements are not admitted as representing truth of the matter stated, but to inquire into the attitude and reactions of children, and to show the mental and emotional state of the child.

(4) Pretrial Conferences.

Pretrial conferences between the county attorney and social worker should always be held. No competent attorney ever takes a case to trial without preparation. If the worker has kept a complete, accurate file, the conference will be productive.

The conference prior to trial should involve two phases: (1) Advising the county attorney of the full facts of the case; the names of the witnesses and the testimony expected to be presented by each witness; any weaknesses in the case should be brought out and discussed; and going over reports made by physicians, psychologists or other experts expected to be used as witnesses. (2) The worker must be prepared for both direct and cross-examination.

It is essential that workers be absolutely candid with the county attorney. Any problems or disagreements between the worker and the county attorney should be resolved at the pretrial conference, not the trial.

Judge James Delaney, "The Legal Process—A Positive Force in the Interest of Children," in American Humane Association, *Fourth National Symposium on Child Abuse* **61, 64-65 (1975).**

Most of the trouble, that I see, at least in courts with social service workers and other people who have worked with abused children and neglected children, is that they don't know their business when they come into court. They may be excellent psychiatric social workers and child protective service workers and the like, have a masters degree and all that sort of thing, but they don't seem to know the rudiments of the law and I think you have to learn something about this.

You have got to quit just talking to each other. I know that you are very comfortable when you discuss sibling rivalries and things like that with each other, but unless you learn some of the nomenclature that goes on in court that is useful there, you can't become effective persons in working with the law.

Judges, of course, and lawyers like to talk with each other. We feel comfortable. We're very uncomfortable often with you in the behavioral specialties. We understand something about the orthopedist and the neurosurgeon, because we hear this. We hear a certain amount of testimony in court cases, on automobile accidents and things like that. We're sort of turned off by psychiatrists, of course, because we hear them, too, especially where there is a plea of "not guilty by reason of insanity." You have one guy that is qualified, at least he says, "This fellow doesn't know what he is doing, doesn't know right from wrong, can't possibly stand trial." The other guy on this side of the room says, "He is perfectly sane." So, you see, we really don't know what to think sometimes. We're skeptical, in other words, of the behavioral specialist because this is the limited view we receive.

So, I think it is up to you to a large degree to come into our courts and help educate us. And, I don't mean just waiting until an abuse case comes along. But, if you would reach out to us and come in and say, "Won't you help us understand the rules of evidence," we're very flattered when you do this sort of thing. I would love to help and I do it all the time. I meet with social workers and public health people and pediatricians and staffs at hospitals talking to them about the kind of information that we need and how you distinguish between evidence that is admissible and evidence that is not. It is just the way you have to present it. But, I think, my observation has been that the social service people don't use the law in an effective way because they're afraid of it and they don't know how to get involved.

So one of the caveats I would offer is if you will start, if you haven't already done so, using or getting some help from the bar association, from your local court, from the county attorney, from anyone else that knows something about the law and how to use it you will learn a good deal yourself. But this will have a two-fold benefit because you will be educating fellows like myself who are steeped in the adversary system. You will give us a new dimension, a new understanding of what your problems are and what the pathology of child abuse is and how we may deal with it. These are the kinds of things that we need to know to make the law effective.

National Center on Child Abuse and Neglect, *Leader's Manual—A Curriculum on Child Abuse and Neglect,* **Discussion Guide to Film "The Medical Witness," 249-251.**

(This film may be obtained at a rental cost of $15 from the National Audio Visual Center, GSA Order Section, Washington, D.C. 20409, Order #00696.)

I. Preparation for Court

A. Careful preparation is the key to effective testimony. As a general rule, whenever the physician suspects a case may involve child abuse, he/she should record the findings in detail, with complete descriptions of each injury and of all conversations with the parents and child.

B. The physician should carefully review his/her notes and records prior to testifying. Often, the doctor will be asked to describe his/her involvement with the case chronologically. The doctor should be prepared to testify as to when his/her examination of the child began and what specifically occurred thereafter.

C. Medical records should always be subpoenaed in a child abuse hearing. The doctor should expect careful examination and cross-examination based on information contained in the records.

D. It is a good idea to talk with the attorney for the petitoner (county attorney, agency attorney, etc.) before the trial to review the case. You should review the case with the attorney and discuss the need for certain witnesses or documents. You should discuss the types of questions that will be asked of you, and "role-play" a few questions and answers with the attorney, for both direct and cross-examination.

E. In many cases, the attorney presenting the case will not arrange to review the doctor's testimony with the doctor until just before the hearing, if at all. For this reason, if the doctor is concerned about his/her testimony, or the attorney's ability to present it properly without prior preparation, the doctor should call the attorney and insist on a pre-trial meeting.

F. In every State, reporting laws suspend confidentiality between physicians and patients for purposes of reporting suspected child abuse and neglect. Therefore, the physician is legally required to report and, if subpoenaed, to testify.

G. In some abuse and neglect situations, the physician may have treated the family for some time, or may have attempted to work with the family around the dynamics of the abuse situation. In such instances, the physician may be very concerned about destroying the relationship that has been built up with the family by testifying in the abuse or neglect hearing. Although in an admittedly difficult position, this physician has a duty to protect the child and may have no alternative to testifying in the hearing. Physicians should realize that even if the child is removed from the home, they can continue to work with the family and to assist it in obtaining help, so that the child can be returned home as soon as possible. If they personally cannot continue to work with the family, they should assist others who can provide such help.

H. Many physicians are uncertain as to whether they are allowed to talk with the attorney for the parents or the attorney for the child prior to the hearing. There is no prohibition against such conversations; the doctor is free to act as he or she chooses. The doctor should be aware, however, that the attorney for the child or for the parents will cross-examine on any inconsistencies between what the doctor tells him/her informally and what the doctor testifies to in court.

I. The physician can usually arrange with the juvenile court to be placed on "stand-by" or "on-call" subpoena. This will allow the doctor to remain with his or her work until telephoned by the court, and avoid lengthy delays at the courthouse while waiting to testify.

II. Direct Examination

A. The medical witness presents evidence establishing the nature, extent and seriousness of the injuries to the child, as well as his/her opinion as to the cause of the injuries.

B. The doctor will *not* be expected to prove *who* caused the injuries to the child.

C. The doctor should testify objectively about his/her knowledge of the case and avoid becoming emotionally involved in the case while testifying.

D. The witness is allowed to use the medical records, or any other notes, to refresh his/her memory while testifying. Because the opposing attorney has the right during cross-examination to see such reports and notes and ask questions on information in them, the witness should be prepared to deal with unsupported opinions, inaccurate information, or inconsistencies between his or her testimony and the records or notes.

E. To testify accurately and authoritatively about the case, the witness should know these basic principles of testifying:

a. Answer only the questions asked—do not volunteer information.

b. If you do not understand the question, have it repeated. Never guess at what a question means.

c. If you do not know the answer to a question, say so. Never guess at answer. If you are not certain of an answer, say you are not certain.

d. Never get angry or defensive with the defense attorney. Be calm, cool, objective, honest and concerned about the family.

e. If you are asked to give a yes or no answer and feel that such an answer would be misleading without an explanation, ask the judge to allow you to explain the answer properly, or indicate to your attorney that you want to explain that answer.

f. Show respect for the court. Dress conservatively.

g. Be exact in your testimony. For example, say "1 p.m." instead of "around noon," or "3 fractures" instead of "numerous fractures."

h. Take time in answering questions. Think before you answer. Do not be hurried by the opposing attorney.

i. Use layman's terms when testifying. Be careful to explain all medical terms so that the judge and attorneys are able to understand your testimony.

Review, for example, the following terms and consider how you would explain them while testifying:

1. Subdural hematoma
2. Subconjunctival
3. Ecchymosis
4. Purpura
5. Laceration
6. Hemorrhage
7. Abrasion
8. Simple fracture
9. Compound fracture
10. Spiral fracture
11. Impetigo
12. Quadrant
13. Erythema
14. Trauma
15. Percentile
16. Growth curve
17. Poorly nourished
18. Well nourished
19. "Failure to thrive"
20. 1st degree burn/2nd degree burn/3rd degree burn
21. Anterior
22. Posterior
23. Superior
24. Inferior
25. Multiplanar

F. Some basic rules of evidence:

a. Medical records are generally admissible as evidence. A physician is allowed to take these records on the witness stand to refresh his/her memory about the case.

b. In general, the witness can testify only about those facts he or she knows personally, not about what others have said to him or her in order to prove the abuse or neglect. Hearsay evidence is inadmissible, but there are numerous exceptions to the rule, so check with your county attorney as to whether you will be able to testify about certain statements made to you. One important exception to the hearsay rule is that statements made to you by those involved directly in the case—i.e. the parents and children—are admissible.

c. The expert witness is allowed to give opinions in areas related to his or her expertise. Most witnesses are allowed to testify only as to factual matters—what they have seen, heard, felt, etc. They are not allowed to give

their opinions about what these facts mean. Physicians, however, as expert witnesses have sufficient expertise and experience in medical areas so that they are allowed to express their opinions in order to help the judge or jury decide the case. For example, a physician usually qualifies as an expert who can give an opinion as to whether the child's injuries were accidental or not. Often, a social worker may qualify as an expert witness as to the behavior patterns of the parents or child. In order to qualify as an expert, the witness will be asked to state facts about his/her education and experience. The opposing attorney or judge may ask further questions about the witness's expertise, and then the judge will decide whether the witness qualifies as an expert. In each case, the judge has final discretion to decide whether a witness so qualifies.

d. Photographs can also be introduced as evidence. This may be done by the photographer's testimony (what kind of camera, lens, film, time of day, etc.) or by another witness's testimony, if the photo is illustrative of that witness's description of the scene depicted in the photo. For example, if a physician testified about the bruises and cuts on a child in the hospital and he/she was shown a picture of the child taken by the police at approximately the same time the doctor saw the child, the doctor is allowed to testify that the photo was a "true and accurate representation" of what he/she saw and the photo can then be admitted into evidence.

III. Cross-examination

A. Cross-examination is usually the most difficult part of testifying for the physician in a child abuse or neglect case. The key to effective performance during cross-examination is adequate preparation. The attorney for the petitioning agency should be able to assist the physician in preparing for cross-examination by pointing out the likely questions which will be asked and by role-playing the cross-examination.

B. It is important to remain calm on cross-examination. Do not become defensive, angry or condescending during cross-examination. It will diminish your credibility with the judge and will detract from your ability to respond competently to the questions asked.

C. Doctors are often cross-examined on the degree of certainty with which they are able to diagnose child abuse or neglect. Sometimes a physician is not in a position to be 100 percent certain of the diagnosis, but can articulate reasons to the court why, in his/her best medical judgment, he/she believes the injuries to have resulted from abuse or neglect.

D. Often the defense attorney questions the doctor about each specific injury separately, trying to suggest that each injury, by itself, might have been accidental. If the defense attorney is successful, he or she concludes by arguing that if each injury could have been accidental, then all the injuries could have been accidental and therefore, there is no good evidence that any abuse has occurred. A physician should make it clear to the court and to the defense attorney that it is the existence of numerous injuries, often in different stages of healing, which indicates that the child has been abused.

E. Another strategy often used by the defense attorney is to attack the physician's expertise by closely questioning him or her on his or her past involvement and experience with child abuse and neglect cases, trying to establish that the physician is not specifically experienced in the child abuse and neglect area. The defense attorney's strategy is principally designed to upset the witness. The physician should bear in mind that in the vast majority of cases, his/her overall professional background and experience will be sufficient to qualify him/her as an expert witness in the eyes of the court.

F. The defense attorney may attack the physician for failure to perform all medical tests needed to eliminate conclusively the possibility of natural causes for some of the child's injuries. If, in fact, the physician has not performed every possible test, he or she should be prepared to explain the reasons he or she felt the omitted tests were unnecessary in the case.

C. Improving Testimony Through Efforts of Attorneys, Especially Petitioner's Attorney

Support Center for Child Advocates, Inc., *How to Handle a Child Abuse Case, A Manual for Attorneys Representing Children* **(1978), Chapter VII.**

VII. The Expert Witness

A. Preparing the Expert Witness, *Stephen Ludwig, M.D.*

It is well known that the anxiety stimulated by a courtroom presentation can make the most competent, expert witness appear to be a novice. Nowhere in professional training curricula is there an attempt to prepare the young social worker, psychologist, teacher, occupational therapist, nurse or physician to communicate within the courtroom. Often, these professionals have not been trained to communicate with one another. The following is an outline which may be used by lawyers to prepare their expert witnesses. Transmitting some of these concepts to a witness may help them allay their anxiety and make more meaningful and efficient use of their time before the court.

1. Introduction to Court:

a. *Setting the Scene:* It is useful to give the witness a physical description of the courtroom. In almost all cases, professionals have been sold the media version of an intense criminal proceeding before a jury.

b. *Make the Expert Feel Expert:* The witness will find solace in the fact that the court will see them as an authority in their particular field. No one in the courtroom will know what the witness knows, nor will they have the experience of the expert. The expert should have well defined their ability to express opinion as well as fact.

c. *Provide Context:* Let the expert witness feel that his/her testimony is one piece of an entire case which the lawyer is coordinating. Let the professional know in

broad terms what piece is their's and how it fits in with what will come before and after.

d. *Provide Alliance:* The expert witness will feel less anxiety if the feeling can be transmitted that there is an alliance with the lawyer. Together, you are a team of child advocates.

2. Preparation

a. *The Expert:* Nothing will relieve the expert's anxiety more than a thorough review of notes, charts, etc. The expert should be instructed specifically to make such a review. The professional should also be told that the court will be more impressed by someone recalling information from memory, but that an index card with dates, numbers, outlines will be acceptable.

b. *The Team:* If a group of professionals who normally work together are all to testify, they should be instructed to get together to review areas of support and overlap. Situations where consultations have been sought should be reviewed carefully so that it is clear that the consultant has provided the requested information.

c. *The Lawyer:* The ideal is for the lawyer to review the specific questions to be asked of the expert. A "dress rehearsal," although time consuming, may be useful for both advocate and witness.

3. On-Call

Most professionals will appreciate an on-call arrangement. This courtesy, if it can be arranged, will dispell perhaps the most common rationalization for not testifying.

4. Qualification—"Enough is the Right Amount"

The expert's credentials should be reviewed prior to court and a determination as to what will be relevant. Some witnesses may be overqualified and their expertise "toned down."

Without reviewing all the sub-categories of an expert's activities, one point needs to be stressed. "Experience with similar cases" is an area which has been neglected by some legal advocates in favor of a display of academic degrees. Social workers, psychologists and psychiatrists must be qualified as experts. The court is unable to translate the observations of these professionals—thus such observations must be presented along with their interpretation.

5. Direct Examination

a. *"Let It All Hang Out":* The witness needs to know that this is the time to display as much information as possible. They should know to relate all they can during this part of the testimony whether asked specific questions or not. For example, when asked for their findings, physicians should know not only to give a description of the physical findings, but also the findings on taking a medical history, the general appearance of the child (happy, sad, markedly thin, etc.), the laboratory findings, the findings on review of the past medical history and past medical records, the findings of observing the parent-child interaction. Careful description is important.

b. *"A Picture's Worth:"* Witnesses should know that they can use pictures, charts, graphs, etc. These services will impress the court, save many words of explanation, and will allow for less misinterpretation.

c. *"Watch Your Language:"* An expert should know to use enough professional jargon to maintain credibility as an expert. There is also a need to temper jargon with explanations so as to be understood by a non-expert audience. Language which is either too technical or not technical enough is to be avoided.

d. *Probable vs. Possible:* The expert needs to know the difference between these words and when to use each.

e. *Recommendation:* The expert should make clear what expectations are held for the future of the child and family. Frequently, in the turmoil of bringing forth evidence of abuse/neglect, the essence of the case is lost (i.e., what to do next). The expert should make known his opinions (e.g., placement, follow-up, etc.) even if not asked the specific questions.

6. Cross Examination

a. *Relieve Anxiety:* Perhaps the most difficult area for the experts to accept is the questioning of their authority. It is important to define defense counsel's role and remove, as much as possible, the feeling that cross examination is done on a personal basis. Still, the expert must know that attempts will be made to discredit testimony.

(1) Reassure the experts that they are the ones who hold the expertise in the final analysis.

(2) Most experts need to be reminded several times that it is not they who are on trial, nor are they the judge.

b. *Awareness of Cross Examination Techniques:* There are some likely trouble spots you may anticipate.

(1) Yes or No—The witness may be asked a question in terms of yes or no orientation when the answer cannot be simplified. The witness should be aware of the right to qualify answers. The witness need not be put in the position of knowing the absolute.

(2) Admit the Possible—The witness may be discredited for failure to admit to a hypothetical explanation rather than accepting such as a hypothetical and adding a statement of "unlikely in this case," "not likely in my experience."

(3) Complex Question—The witness needs to know that he/she may ask that a complex question be broken into more simple form. Similarly, many witnesses don't realize that if they don't understand a question, they need not answer it.

(4) Answering the Unanswerable—The witness should not be afraid to say "I don't know." "This is not in the scope of my expertise or experience." It is better to say so than to get trapped in an unsure area.

(5) "In other words"—The witness should not allow the defense counsel to redefine a statement unless it is absolutely precise.

(6) Justification of Charts, Notes—Defense counsel may use the witness' own notes primarily to point out exclusions. The expert cannot be expected to precisely record every conversation, transaction, and observation.

B. Examination of Expert Witness, *Peter Marvin, Esquire*

1. Role of the Expert

a. The principal function of the expert witness is to provide the link between observed facts and the causes or

the effects of that observed fact. The witness' expertise permits him to bridge this gap.

b. Examples of this bridging function include ascribing causes to physical injuries sustained by a non-communicative child and determining the type and extent of emotional or psychological injury suffered by a child.

2. Role of the Counsel for the Parent as it Effects the Expert

a. Because the Juvenile Act requires the Court to find by "clear and convincing evidence" that the child is deprived, counsel for the parents on occasion proceed as if at a criminal trial, not presenting an affirmative case, but attempting to discredit the child's case so that the standard of evidence is not met.

b. The expert witness, playing a key role in the child's case, is liable to bear the brunt of the counsel for the parent's attack.

c. Expert witnesses who are inexperienced in appearing in Court need to be especially warned of this coming attack.

d. Although the attack cannot always be avoided, full discussion with the expert before hand, identifying the expert's potential vulnerabilities, will minimize the effects of the counsel for the parent's questioning.

3. Areas of Vulnerability

a. In presenting a pediatrician who will testify both as to the injuries suffered by a non-verbal child, and the cause of the injury, it must be recognized that there are several possible causes of the injury. Although the Doctor's evaluation of the probable cause is based on his expertise, he cannot always rule out other possible causes. Counsel for the parent will attempt to bring out these other possible causes. It is important to advise the Doctor during preparation that he must be prepared to support his evaluation of the cause. On direct examination, it is occasionally useful to raise and discredit these other possible causes.

b. Problems also arise concerning the emergency room treatment of the child. It is important to establish that the battered child was examined by the doctor appearing as a witness. If the witness is a supervisor to whom the child was shown, it must be established that the supervisor reached an independent diagnosis. Care must be taken in determining which considerations preclude calling all who have seen the child.

c. Psychological and emotional injuries present difficult problems of proof. Psychiatrists and psychologists are trained to diagnose the patient's present state and its causes, not to make predictions about the future. However, the Court is often more interested in prediction and prognosis. If a psychiatrist or psychologist is being presented, it is very important to have that expert review any proposed disposition.

In this field especially, the science is more art than science and there are substantial differences between practitioners. Because counsel for the parent may often probe into alternative diagnosis, it is necessary that the witness be prepared to defend his theories. Such defense should not, however, be carried to the point of making the witness appear dogmatic or to have foreclosed consideration of alternative theories.

d. In qualifying the witness, problems of alleged bias of the expert are at times encountered. Certain physicians tend to appear frequently at these proceedings, on behalf of the child. Be aware of this so that by introducing this fact on direct, you can minimize its impact.

4. Conclusion

Especially for a first time witness, the adversary process can be quite unnerving. To the greatest extent possible, warn the witness that his professional judgments are going to be attacked and prepare him to expect this and deal with it without becoming overly defensive or hurt.

Rowine Brown, Elaine Fox and Elizabeth Hubbard, ***Medical and Legal Aspects of the Battered Child Syndrome,*** **50 Chicago-Kent L. Rev. 45, 75-78 (1973).**

B. Preparing the Physician Witness

When a hearing is to be held, the physician is the key to the case and he should appear in court to testify. His presence in the courtroom and his testimony on behalf of the child can be as life saving as the medical procedures he instituted in the hospital emergency room. Depositions of medical testimony are frequently introduced in court, but they are insufficient, expensive and impossible to cross examine. Every attempt should be made to handle the physician with dispatch and priority in the courtroom. If the doctor can appear on schedule, present his testimony and depart from the courtroom promptly at the conclusion of his appearance, the reluctance of physicians to testify might be reduced substantially.

The attorney should always conduct a pre-trial conference with the physician to advise him of the questions he will be asked on behalf of all parties to the litigation. The physician may not be aware of what evidence may be admissible in court or what weight will be given to the different data he will present. The physician must be prepared to present an accurate account of the injuries sustained and an educated opinion concerning the age of these injuries. He should be able to introduce documentary and demonstrative evidence accumulated during his medical attendance on the child, such as the hospital record, photographs and X-Rays. He should also be urged to refer to full length skeletal schemes and charts to depict exact sites of multiple injuries, and to demonstrate how permanent damage could result. The physician may also be able to demonstrate a disproportionate amount of soft tissue injury, or the presence of prior fractures and bone injuries at various stages of healing, indicating prior repetitive acts of abuse.

It is important that the physician be well prepared to present his opinion concerning the causation of the injuries. He must be able to convince the court that the child could not have sustained his injuries by a mere fall, accidental means or illness. Had the child been hurt as the parent stated, the doctor should compare the results of injuries which could be anticipated therefrom with those which the child actually received.

Even though the abuser may have made an admission at the time the child was brought to the physician for medical care, it is beyond the competence of the physician to determine who inflicted the injuries to the child. The fact that the injuries were inflicted, rather than accidental, may prompt the physician to persuade the court that the environment in which the child is living is dangerous or life threatening to the child.[165]

C. Preparation of the Social Worker[166]

Training in psychology and human relationships equips a social worker to contribute valuable evidence in any proceeding on child abuse. The system itself should be altered to qualify the social worker as an expert witness. Such workers have had special training in tactful interviewing and are apt to elicit information of extreme importance for the hearing. They are also trained in the observation of people and their reactions. The social worker may readily perceive when the parent, maintaining a defensive or hostile attitude, is fabricating, and further, the social worker may have observed the attitude of the parent to the child. The social worker may also have had the opportunity to observe the parent or parents in their relationship with the injured child.

Social workers may obtain the confidence of the abuser by offering assistance with the problems that beset the abuser. Social workers feel they have a confidential relationship with the people they interview, although they do not enjoy a legal privilege of confidentiality as is often recognized in the physician-patient relationship.

Obtaining evidence from social workers in the courtroom may be hampered by their reticence to speak out in front of the parents in court. Once the parents hear the social worker testify against them, the parents may be unwilling to cooperate with the social worker in the future. They will consider the testimony of the worker as a breach of confidence which will impair any relationship between the family and the worker. Ideally, the family should not be present in court when the social worker testifies.

Pre-trial conferences with the social worker will enable the attorney to learn first hand all the personal knowledge the social worker has gleaned about the family and the child. The attorney should obtain the social history of the family, and formulate the questions which he will ask the social worker at the trial. He will question the worker about interviews the worker had with the family and about observations the worker has made concerning the family.

D. Other Witnesses

The attorney should include in his pre-trial conferences other witnesses who may have knowledge of the particular child abuse case in litigation.[167] Such potential witnesses would include nurses, school teachers, neighbors, relatives, psychologists and any others who have had contact with the family situation. Their testimony against the allegedly abusive parent may be determinative of the decision the court will make concerning the best interest of the child. Such multi-disciplinary cooperation, which affords collective strength, also succeeds in placing the relevant facts before the judge.

RECOMMENDATIONS

Since the inception of the battered child syndrome theory, many recommendations have been put forth in an attempt to offer some guidance and direction in meeting the multi-faceted problem of the battered child. A few of these recommendations will be enunciated in this section.

A. Attorneys

Usually overworked state's attorneys represent the interest of the abused child. Their extensive case load prohibits the necessary time expenditure in case preparation for hearing in Juvenile Court. More lawyers should be assigned by the state's attorney to represent these children. Through directing child abuse cases exclusively to a single attorney or team of attorneys within the state's attorneys office, specialization in child abuse will be encouraged and increased efficiency and expertise will contribute towards the development of the most effective representation of the battered child.

Private law firms may make a major contribution by encouraging their attorneys to handle cases *pro bono publico*. A law firm could establish a one-to-one relationship with an urban hosptial which receives a large number of child abuse victims. They could also establish an on-call arrangement with smaller hospitals where only an occasional victim might be admitted. The attorney for the firm would hold conferences with involved personnel, study all available records, handle all pre-trial conferences and motions and represent the child in all court proceedings. A roster of attorneys should be made available to hospitals to call in cases of emergency where an immediate temporary injunction might be necessary to remove a child from a home.

B. Judges

Judges in the child abuse division of the Juveniel Court should have a working knowledge of the psychology of abusing parents as well as a clear focus on social and legislative goals. Such specialized education could be made available through symposiums, seminars and programs sponsored by Continuing Legal Education, similar to the medical profession sessions acquainting the practicing physician with the child abuse problem.

Physicians and psychiatrists should publish informative articles directed towards the legal profession to increase their understanding of child abuse and the child abuser. Knowledgeable judges may help organize and conduct multi-professional seminars on the battered baby syndrome for the other juvenile court judges and lawyers who rotate through the courts. Judges should also encourage the American Bar Association, and state and local bar associations, to establish child abuse teams and committees and to include articles on the various aspects of child abuse in their legal publications.

> Hence, in a judicial approach to the treatment of child abuse, a massive program of community education is needed. The court must be seen, not solely as a punitive, avenging agency whose services are sought only as a last resort, but as another resource, along with the social and behavior scientist, the physician, legal services, the police and other community agencies concerned with prevention, detection and treatment of child abuse and neglect.

FOOTNOTES

165. The Illinois neglect statutes' focus on the environment surrounding the child being injurious to his welfare helps the court protect the child. Ill. Rev. Stat. ch. 37, §702-4 (1971).

166. Interview with Rae Fischer, Director of Social Services, Michael Reese Hospital, in Chicago, February 21, 1973; Interview with Sheldon Key, Director of Social Work, Childrens' Memorial Hospital, in Chicago, March 2, 1973; Interview with Lou Penner, Executive Director, Juvenile Protection Association, in Chicago, March 7, 1973.

167. Interview with Aaron Kramer, Attorney with Schiff, Hardin, Waite, Dorschel and Britton, in Chicago, February 15, 1973.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Section 8.41. Reprinted with Permission.

F. [§8.41] Persons Present

The right of the minor and parents to a closed hearing and the exceptions thereto are discussed in §6.5. The right of the minor, persons entitled to notice, and the attorney for minor and parents to be present at the hearing is also discussed in §6.5.

The requirement that the probation officer be present (§280) and his role in the hearing regarding presentation of evidence are discussed in §8.8. Representation of both the minor and the probation department is also discussed in §8.8.

A problem has arisen in many contested §300 cases. Matters involving battered or abused children and those relating to incest or child molestation are frequently very bitterly contested. In these matters the court should assume the normal judicial role, avoiding any appearance of assisting one side or the other. The matters at stake are so important to the welfare of the minors concerned that the evidence should be marshaled and presented in the most capable way possible to assure protection of the minors.

These factors explain why some judges have insisted that an attorney (county counsel, district attorney, or attorneys attached to the probation department) appear and present the matter for the probation department in all contested §300 cases. It is extremely frustrating for investigating authorities to carefully prepare a §300 case, only to have jurisdiction denied because of the ineptitude of the probation officer who presents the case. In a battered child case this is often a matter of life or death for the child. The argument that introduction of counsel into a juvenile court proceeding will render the proceeding an adversary one, to the detriment of the child, would certainly not apply in §300 cases.

Douglas Besharov, "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," 23 *Villanova L. Rev.* 458, 515-517 (1978)

C. Counsel for the Child Protective Agency

The child protective agency also needs legal assistance when appearing in court. Historically, prosecutors played a minor role in child protective proceedings.[301] If evidence had to be collected or witnesses called to testify, the protective worker did so. As long as juvenile courts were informal with relaxed rules of evidence, the petitioning protective worker did not need legal assistance. But the expanded participation of counsel for the parents has increased the formality of juvenile court proceedings, and protective workers unassisted by legal counsel are at a severe disadvantage. Without counsel to assist the worker in pretrial investigation, case preparation, petition drafting, courtroom presentation, and legal argument, otherwise provable cases are often dismissed when the parent has the one-sided advantage of vigorous defense counsel.[302] It might seem to the parents' advantage if the protective worker's case preparation and presentation suffer from a lack of legal assistance. But this is not always so. Fearing that an abused child might be returned unsafely to his parents, judges may feel the "uncomfortable pull toward a prosecutive stance when zealous defense counsel have elicited a one-sided development of case facts with no one to intervene but the judge."[303] Yet, if a judge becomes the advocate of the petitioner's case, and performs the functions of the absent prosecutor, he cannot maintain an unbiased view of the case, and he cannot assess the evidence impartially—or at least that will be the appearance to those involved in the proceeding.

A few states require the presence of an attorney to assist the petitioner in child protective proceedings.[304] In other states, however, the law merely provides that the judge may request that a local public law official assist the petitioner.[305] In many communities, this function is served by the district attorney or similar criminal court prosecutor.[306] But even though many prosecutors understand and strive to achieve the juvenile court's social purpose in child protective cases, a number of communities use the civil law officer to represent the child protective agency in order to minimize the punitive nature of juvenile court proceedings.[307] Sometimes, the local agency hires its own counsel or uses internal legal staff.

All attorneys representing the child protective agency must understand the child protective system's emphasis on treatment and ameliorative services[308] and must appreciate that their preeminent professional, ethical,[309] and constitutional[310] obligation is to see justice done. In child protective proceedings, this means they must seek to protect, fairly and honestly, the physical and legal rights of the child. If the child's interests seem to conflict with the position of the child protective agency, the attorney must be prepared to disagree and to take appropriate action.[311]

To establish eligibility under the Federal Act, a state may designated as the child's guardian *ad litem* the

> attorney charged with the presentation in a juvenile proceeding of the evidence alleged to amount to the abuse and neglect, so long as his legal responsibility includes representing the rights, interest, welfare, and well-being of the child; where such appointments are made, the legal opinion of the State Attorney General must specify that such attorney has said legal responsibility.[312]

While this may not be the best way to ensure that a child's interests are represented before the court, it is one way to do so and a number of states have provided written documentation that attorneys assigned to present child protective petitions in juvenile courts have this authority and responsibility. For example, Arizona law provides: "The county attorney, upon the request of the court, a governmental agency or his own motion, may intervene in any proceedings under this article to represent the interest of the child."[313]

FOOTNOTES

299 *Cf.* Morrisey v. Brewer, 408 U.S. 471 (1972) (no entitlement in parole revocation proceedings to the type of full adversary hearing mandated in a criminal proceeding).

300 *E.g.*, ALA. CODE tit. 13A, §5-124 (Supp. 1975); MASS GEN. LAWS ANN. ch. 119, §29 (West 1975); MINN. STAT. ANN. §260.155(2) (West 1971); OHIO REV. CODE ANN. §2151.352 (Page 1976).

301 *See generally* D. BESHAROV, *supra* note 211, at 39-43.

302 *Cf. In re* Lang, 44 Misc. 2d 900, 255 N.Y.S.2d 987 (Fam. Ct., N.Y. Co., 1965) (dictum) (absence of provision for prosecuting counsel in delinquency cases presents grave danger of dismissal merely for lack of proper presentation).

303 Skoler, *Counsel in Juvenile Court Proceedings—A Total Criminal Justice Perspective*, 8 J. FAM. L. 243, 270 (1968). *Cf.* Bible v. State, 253 Ind. 373, 254 N.E. 2d 319 (1970) (no right to jury trial in juvenile proceedings, the civil nature of which will be better preserved and impressed on the child by a judge alone). For a number of legislative proposals to deal with this question, *see* U.S. JUVENILE JUSTICE STANDARDS, *supra* note 215, 15.1-.19; Fox, *Prosecutors in the Juvenile Court: A Statutory Proposal*, 8 HARV. J. LEGIS. 33 (1970); Lermert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 432-35.

304 *E.g.*, NEV. REV. STAT. §128.100 (1975); R.I. GEN. LAWS ANN. §40-11-14 (Supp. 1976).

305 *See, e.g.*, ARIZ. REV. STAT. §8-535(E) (Supp. 1976); COLO. REV. STAT. §19-1-106(3) (1974). *See also* MASS GEN. LAWS ANN. ch. 119, §26 (West 1975).

306 *E.g.*, COLO. REV. STAT. §19-1-106(3) (1974); N.Y. FAM. CT. ACT §254(b) (McKinney 1975).

307 *E.g.*, N.Y. FAM. CT. ACT §254 (McKinney 1975).

308 *See* text accompanying notes 208-21 *supra*.

309 ABA CODE OF PROFESSIONAL RESPONSIBILITY EC7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict").

310 *See* Brady v. Maryland, 373 U.S. 83 (1963). According to the Brady Court: "Society wins not when only the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly . . . [the prosecution] wins its points whenever justice is done its citizens in the courts." *Id.* at 87, *quoting* Address by Sol. Gen. Sobeloff, Judicial Conference of the Fourth Circuit (June 29, 1954).

311 For example, if the agency decides that court action is required, but the attorney concludes that there is insufficient evidence or that the child's interests indicate court action to be inappropriate, he must be free to prevent the commencement of the proceeding, or, if it already has been commenced, to move for its dismissal.

312 45 C.F.R. §1340.3-3(d) (7) (1976).

313 ARIZ. REV. STAT. §8-535 (E) (Supp. 1976).

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Section X

Coping with the Media and Hysteria

The emotional situation and the heinous nature of alleged child abuse sometimes attracts the press and excites the public. This may disrupt proceedings and bias the judge. The privacy of hearings in juvenile courts alleviates the problem of public curiosity. The press, however, has a right to information and usually is allowed to observe abuse and neglect proceedings if sufficient safeguards are observed.

A. The General Problem

1. Juvenile courts occasionally receive cases involving particularly lurid abuse or other sensational acts. The typical public reaction is strong sympathy for the child and desire to punish the parent.

2. These cases, therefore, attract media coverage, which requires the court to balance the media's right to information (freedom of the press) against the need for effective and fair court proceedings.

In general, courts permit media access to court proceedings under specified conditions. (See Section C.)

Media presence at abuse and neglect cases may have adverse consequences, including:

A. aggravating the emotionally-charged atmosphere of the hearing,

B. placing pressures on the court to remove the child and punish the parent, and

C. intensifying the parents' disgrace.

B. Privacy of Hearing—General

1. The reasons for privacy of abuse and neglect hearings include:

Anonymity protects children and parents from community stigmatization, and aids in rehabilitation efforts.

The presence of reporters and other spectators may inhibit open communication by witnesses.

2. Statutes typically specify that certain persons can attend juvenile proceedings, while others are admitted only at the discretion of the judge.

Parties and their attorneys can attend, except that in some courts parents can be excluded, e.g., when the child testifies. In many states a child (but not his or her attorney) may be excluded at the discretion of the judge.

Court officers and members of the bar often have a right to attend.

Access by the media is often at the discretion of the judge.

Some courts have established formal procedures through which requests to attend hearings are made and processed.

3. Public hearings can be held only if authorized by the parties.

Whether parents have a right to a public hearing is uncertain. A major reason for privacy in abuse and neglect hearings is protection of the parents; however, the judge may also believe that publicity would harm the child.

C. Media Access to Hearings

1. The media and courts should cooperate to maximize access, while limiting its harmful effects.

2. Some judges permit media access to adjudicatory hearings only.

Judges can use their discretion to refuse access when press coverage is likely to be harmful—for example, when the identity of the parents and child cannot be kept confidential due to press coverage prior to court proceedings.

Press access to hearings other than adjudicatory hearings—especially disposition hearings—is less likely to be granted. Some judges, however, inform the press of the disposition after an order is entered.

The media may also be granted access to court records in the adjudicatory hearing, but probably not reports used in the disposition hearing.

3. The court and media should establish specific procedures to safeguard the rights of parents and children.

The parties' identities should not be made public (although if the parents are prosecuted criminally, their identities cannot be withheld).

Photographs and television coverage should be prohibited, except perhaps when permission is obtained from the parties.

To guard against dissemination of inaccurate information about parents' actions, courts should request that reporters attend the complete hearing and give attention to the parents' defense.

D. The Effect of Press Coverage on Dispositions

1. Press coverage may contribute to instances of public outrage. This, in turn, may affect the court's dispositions, both in the immediate case and in future cases.

When a case attracts media interest, the judge may be overly prone to remove the child from home because he fears adverse publicity should the parents continue to abuse or neglect the child, particularly if the child subsequently dies.

Instances of such publicity may intimidate judges in future cases, leading to a general bias against returning children to their homes. The publicity may also result in legislation designed to restrict home placement.

Press coverage may also lead to inadvisable prosecution of parents.

2. These problems can be mitigated if the press is better informed about child abuse and neglect problems.

Judges and attorneys can educate reporters by discussing the general problems in informal background sessions and by encouraging reporters to attend court hearings, thereby furthering their knowledge of abuse and neglect issues.

Support Readings

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B. Privacy of Hearings

District of Columbia Superior Court Neglect Proceedings, Rule 24.

Rule 24. Regulation of Conduct in the Courtroom

(a) Persons Admitted to Hearings. (1) *General.* Pursuant to D.C. Code § 16-2316(c), the general public shall be excluded from judicial hearings concerning children alleged to be neglected. However, persons having a proper interest in the particular case or in the work of the Division may be admitted upon approval of the judge before whom the hearing is scheduled, or his delegate. Such a person shall apply for permission to attend a hearing or series of hearings by stating in writing his name, address and telephone number, business or professional affiliation, reason for wishing to attend, that he will refrain from divulging information identifying the child or members of his family or any other person involved in the proceedings. The required information shall be furnished in duplicate on a form supplied by the Division, which the applicant shall personally sign. When stamped "approved" by the judge or his delegate, the original application shall be kept on file by the Division, and the second copy, also stamped, shall be carried with the applicant at all times during his attendance at hearings.

(2) *Persons Who Need Not Apply for Admission.* The following persons shall be deemed to have a proper interest in the work of the Division and need not apply for admission under subsection (a) (1) of this rule in order to be admitted to Division hearings (but shall nonetheless be required to refrain from divulging information identifying the child or members of his family or any other person involved in the proceedings):

(A) Any member of the bar of the Superior Court;

(B) Authorized personnel of the Division;

(C) Authorized representatives of the Social Services Administration of the D.C. Department of Human Resources.

(3) *Persons Deemed Admissible Upon Application.* The following persons shall be deemed to have a proper interest in the work of the Division, and shall be admissible to Division hearings after filling out an application under subsection (a) (1) of this rule:

(A) Any authorized representative of the news media;

(B) Any attorney not a member of the bar of the Superior Court.

(C) Superior Court personnel other than those working in the Division.

(4) *Other Persons.* Eligibility of other persons for admission shall be governed by the provisions of subsection (a) (1) of this rule.

(b) Taking Photographs and Radio and Television Broadcasting.

(1) *Taking Photographs, Radio and Television Broadcasting Prohibited.* The taking of photographs, or radio or television broadcasting will not be permitted in any of the courtrooms of the Division during the progress of judicial proceedings, or in any of the anterooms adjacent thereto, in the detention rooms, in the lobby, or in the corridors of the court house occupied by the Division.

(2) *Limited Permission to Take Photographs.* The taking of photographs in any office or other room of the Division shall be only with the knowledge and consent of the official or person in charge of such office or room and of the person or persons photographed.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 97-98. Reprinted with Permission.

5.1 G. Attendance at all proceedings.

In all proceedings regarding the petition, the parents of the child should be entitled to attend, except that the proceeding may go forward without such presence if the parents fail to appear after reasonable notification (including without limitation efforts by court-designated persons to contact the parents by telephone and by visitation to the parents' last known address of residence within the jurisdiction of the court). The child identified in such petition should attend such proceedings unless the court finds on motion of any party, that such attendance would be detrimental to the child.

COMMENTARY

Elemental notions of due process require that all affected parties be given adequate opportunity to be present in judicial proceedings affecting important interests such as those at stake here. See *Stanley v. Illinois,* 405 U.S. 645 (1972). It is equally clear, as a matter of general law, that parties' failure to attend proceedings after adequate attempts at notification cannot itself stymie the public purposes to be served by the proceedings. In these proceedings, the need to protect children provides a clear interest mandating that proceedings should go forward if parents fail to attend, after reasonable attempts at notification. The question of proceeding without the presence of the child raises different issues. Even in criminal matters, where the accused's presence at trial is explicitly guaranteed by the Constitution, it is now clear that counter-

vailing interests in the conduct of an orderly trial can justify his/her presence at trial. Nonetheless, some children might be seriously psychologically harmed if they witnessed the testimony regarding their parents' conduct toward them or other stressful aspects of the proceeding. Thus there can be justification for excluding a child from presence at some part, or all, of the proceedings. The laws of twenty-two states currently provide that the child's attendance may be waived at such proceedings. Katz et al., "Child Neglect Laws in America," 9 *Fam. L.Q.* 1, 32-33 (1975). This subsection ensures, however, that such exclusion will not be automatic, and that before any such exclusion is ordered specific proof must be adduced and the court must specifically find that the particular child would be harmed by attending the proceedings. Such proof could consist, for example, of psychological or psychiatric evaluations of the child, *in camera,* on-the-record interviews with the child by the court or other sources calculated to provide specific data regarding the impact of attendance on the child. Further, the subsection provides that exclusion of the child from the proceedings must be initiated on motion of one of the parties, rather than *sua sponte* by the court, so that the moving party will bear the responsibility of placing evidence before the court regarding the need for the child's exclusion.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 6, Conducting Juvenile Court Hearings, Section 6.5. Reprinted with Permission.

D. [§6.5] Persons Present

Sections 346 and 676 provide that, unless requested by the minor *and* any parent or guardian present, the public is excluded from hearings. However, that section goes on to grant to the court the power to admit such persons as the court "deems to have a direct and legitimate interest in the particular case or the work of the court."

See Rule 1311(e), which further provides that persons admitted under such circumstances must respect the confidentiality of juvenile proceedings and must not reveal the identity of a minor, parent, or guardian nor any details of the case that might reveal their identities.

Often, the court will admit at varying times the family social worker and social worker supervisor, relatives, close friends, and cleric whose presence is desired by the family, probation officers and trainees, attorneys interested in observing and learning about the process, the parents of a juvenile witness during the witness's appearance, the parents of the victim of the offense when the victim is a minor, the adult victim of the offense, law students who are studying the work of the court, newspaper reporters, interested nonwitness law-enforcement officials, and representatives of other community agencies or groups who are interested in studying juvenile court procedures. Witnesses are normally excluded until after they have testified.

Rule 1311(b) provides that the following persons are entitled to be present at a juvenile court proceeding:

(1) The minor who is the subject of the hearing;
(2) (A) all parents, de facto parents, and guardians of the minor, or
(B) if there is no parent or guardian residing within the state, or if their place of residence is not known
(i) any adult relative residing within the county or, if there is none,
(ii) the adult relative residing nearest to the court.
(3) Any counsel representing the minor or the parent, de facto parent, guardian, or adult relative;
(4) The probation officer or social worker, as the case may be, except where waived by the person, the court, and the minor;
(5) The prosecuting attorney, as provided in subdivisions (c) and (d);
(6) The court clerk;
(7) The official court reporter, as provided in rule 1312; and
(8) At the court's discretion, a bailiff.

The comments accompanying Rule 1311(b) state that a "de facto" parent "may include a foster parent [citation omitted], a stepparent [citation omitted], or any other person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care [citation omitted]." There would appear to be no question that these persons have an absolute right to be present at the jurisdiction hearing. However, many judges feel that, when the child is being placed with the parents on probation, in conducting the disposition hearing they should feel free to talk to the parents privately, or the child or other person privately, to accomplish the ends envisioned by the juvenile court law. The judge frequently must discuss the errors or omissions of the parents, and the child should not be a party to such discussions. Whenever the child is removed from the hearing it is recommended that the attorney for the child remain. All discussions before a juvenile court judge are reported by an official court reporter, so that the appellate court is able to review what took place in the child's absence. When the child is to be removed from the parents and placed in a relative's home, foster home, or public or private institution, there appears to be little need for talking to the parents privately during the disposition hearing.

Rule 1311(c)-(d), which is based on §§681 and 351, delineates the circumstances under which the prosecuting attorney is entitled to be present at a juvenile court proceeding. The prosecuting attorney *shall* appear on behalf of the people of the State of California in all phases of §602 proceedings. The prosecuting attorney *may* appear in §601 proceedings if (1) the minor is represented by counsel, and (2) either the probation officer or the court requests the prosecuting attorney to be present and the court consents to his presence. The prosecuting attorney *shall* be entitled to be present in §300 proceedings whenever "(1) any parent, guardian or other person having care or custody of the minor or residing in the home of the minor is charged in a pending criminal prosecution based upon unlawful acts committed against the minor; and (2) [t]he court consents to or requests the prosecuting attorney to be present to represent the minor in the interest of the state."

There is one other limitation on persons who can be present. Rule 1311(a), which generally restates the first

paragraph of §§345 and 675, provides that "[n]o person on trial, awaiting trial, or under accusation of crime, other than a parent, de facto parent, guardian or relative of the minor, shall be permitted to be present at the hearing, except while testifying as a witness."

New York Family Court Act, Section 1043 with Commentary.

§1043. Hearings not open to the public

The general public may be excluded from any hearing under this article and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case.

Practice Commentary

by Douglas J. Besharov

By a 1975 amendment, this section is now limited to provisions concerning the privacy of proceedings. Previous provisions concerning notice of rights and assignment of counsel for respondents are now covered by general provisions for the assignment of counsel in all Family Court proceedings. [*See* N.Y.Fam.Ct.Act §§ 261 and 262 (1975).]

The obvious intent of this section is to safeguard the privacy of parents and children involved in child protective proceedings.

Under this section closed hearings are not required, but are discretionary: "the general public *may* be excluded from any hearing..." (emphasis added). On the basis of this section's wording, the court presumably should determine the issue for each case, but in practice, the general public is routinely and automatically excluded from every hearing. Through administrative policy, all outsiders, including representatives of social service agencies or the news media, need the approval of the Administrative Judge before they may attend any Family Court hearing in most counties of the state. In addition, the word "hearing" is, by usage, not limited to formal preliminary, fact-finding, and dispositional hearings; and so the public is excluded from motions, adjournment requests, and even calendar calls. [*Cf.*, N.Y.Fam Ct.Act § 531 (1975) providing, in paternity proceedings, that "the court may exclude the general public from the room where the proceedings are heard..."]

Furthermore, although statutory authority exists to exclude the public only in child protective [N.Y.Fam.Ct.Act § 1043 (1975)], delinquency and supervision [N.Y.Fam.Ct.Act § 741 (1975)], and paternity proceedings [N.Y. Fam. Ct. Act §531 (1975)], the Family courts act as though privacy provisions applied throughout the Act. The lack of similar provisions in permanent neglect, family offenses and other proceedings may be due to legislative oversight or may reflect a legislative intent not implemented. In any event, the court's power to exclude the public has apparently never been challenged.

Those "persons and the representatives of authorized agencies" who have "an interest in the case" retain their right to be "admitted". Thus, social workers from an agency which investigated or was otherwise involved in the case as well as the parties and court employees cannot be excluded, subject to the court's power to exclude potential witnesses prior to their testimony. (Recently, there has been a trend to allow and encourage attorneys to observe court proceedings so that they will better understand court practices.)

Since only the parents normally would suffer from the obloquy of a public hearing, it is questionable whether the court could constitutionally prevent them from waiving a private hearing, at least absent a finding that a public hearing would be contrary to the best interests of the child. [*See, e.g.*, In re Braum, 382 N.Y.S. 2d 672, 673 (Fam. Ct. Stuff. Co. 1976), permitting a public hearing, over the objection of the county attorney, on application of the attorneys for the respondent and child.]

C. Media Access to Hearings

Advisory Council of Judges of the National Council on Crime and Delinquency, *Guides for Juvenile Court Judges on News Media Relations* (1965), 5-12.

The juvenile court is an integral part of the judicial system. Therefore, the public has a right to know the manner of the court's operation, the court's basic principles and philosophy, the kind of staff the court has, the degree of the court's success or failure and the reasons therefore, the kinds of problems the court deals with day after day, and the impersonal facts of cases which may illustrate these problems. The court has an obligation to make this information accessible to the news media; the news media, in turn, have an obligation to provide the information to the public.

The attitude of the juvenile court and the news media toward each other in the United States has too often been characterized by limited understanding of their mutual responsibilities. The news media maintain that "the public has a right to know." The juvenile court has the responsibility of safeguarding the rights of the individual and protecting the parties, as well as protecting society.

Judges and news media sometimes have stereotyped notions about each other. Some judges see the news media as sensationalist hunters of scare headlines, with a callous disregard for the dignity and privacy of the individual; consequently, their reaction to legitimate interest in the court's business is one of undue suspicion and mistrust. Similarly, some news media view the juvenile court judges as sob sisters, do-gooders, coddlers of rascals, holders of secret and "star chamber" sessions, and this stereotype colors their reactions to the way the court handles the delinquency problem.[1]

"Freedom of the press properly conceived is basic to our constitutional system. Safeguards of the fair administration of . . . justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication."[2]

News media and judges should be striving toward the same goal: correction and rehabilitation of the juvenile offender and the prevention and reduction of delinquency.

Are we individually, or jointly, doing all we can? Have we explored every avenue for accomplishing a common purpose? Are we too set in our ways, unwilling to experiment, to do research that may add greatly to the solution of the problem?

The aim of this statement of guides is to clarify the issues at the root of the difficulty and to propose a general procedure to which juvenile courts and news media can subscribe.

Guiding Principles

1. News media and judges should work together with confidence in, and respect for, each other.
2. News media should be welcome to all sessions of the juvenile court.

3. Responsibility for developing sound public interest in and understanding of the child, the community, and the court must be shared by the judge and the news media.

4. All official records should be open to the news media with the judge's consent, unless inspection is prohibited by statute.

5. Confidential reports should not be open to inspection by the press, except at the express order of the court.

6. The judge, at his discretion, may release the name or other identifying information of a juvenile offender in his court.

7. The court should strictly adhere to the Canons of Professional Ethics, which generally condemn the release of information concerning pending or anticipated judicial proceedings.[3]

8. If an act of delinquency is publicized, news media should be informed of the disposition of the case.

The following are the major points at issue which seem to bring about the most friction and which are greatly misunderstood:

1. Privacy of hearings.
2. Confidentiality of records.
3. Anonymity.
4. Information on pending cases.
5. Release of information on dispositions.

Privacy of Hearings

The law itself protects the child, who is the subject of the proceedings, from the stigma of criminal conviction by stipulating that juvenile court proceedings and adjudications are noncriminal and by providing for the avoidance of public trials and the resultant publicity. Dispensing with the open trial—that is, one which may be witnessed by the general public and which is the constitutional right of a defendant in a criminal case—the law seeks other ways to protect the child in court. It is the duty of the juvenile court to provide this protection.

Some have equated privacy of hearings, generally as required by law, with secrecy. Private hearings are not secret, although they are confidential in the best interest of the child involved. Generally in practice, as well as in law, the press is not barred from attending juvenile court hearings.

Section 19 of the Standard Juvenile Court Act asserts, as does the law in many states: "The general public shall be excluded, and only such persons shall be admitted who are found by the judge to have a direct interest in the case or in the work of the court." The comment on this provision notes that the reference to persons who have "a direct interest...in the work of the court" includes "newspaper reporters, who should be permitted—indeed, encouraged—to attend hearings with the understanding that they will not disclose the names or other identifying data of the participants."

The U.S. Children's Bureau would make such auditing by the news media conditional on "the understanding that they will not disclose the names or other identifying data of the participants."[4] But the National Council of Juvenile Court Judges has repeatedly expressed its view that the news media must not be so circumscribed.[5]

Although no one is eager to have his dirty linen washed in public, it is frequently essential to bring out ugly but pertinent personal facts. Highly personal and emotional problems may be of the utmost importance to wise disposition of a juvenile case.[6]

To insure protection of the participant's right of privacy, the juvenile court judge should exercise reasonable discretion with regard to the news media in court, just as he exercises control and considerable discretion with regard to others in court.

The news media should be asked to remain for the whole proceeding, observing the emotions of the individual involved and bearing in mind the court's purpose—to help correct and rehabilitate children in trouble.

Secret hearings, as distinguished from private hearings, erect "upon a foundation of public ignorance a mountain of public indifference to the whole problem of youth in crime." To surround the juvenile court with secrecy is to sweep the whole problem under the rug, an action which would be in direct conflict with the philosophy of the court.

A function of the news media is to report to the public on the activities of government, including the courts, so that the public may have the information it needs for taking whatever action is necessary for the commonweal.

Is ther an irreconcilable conflict between the two responsibilities—on the one hand, the court's responsibility to protect the privacy of the parties and, on the other, the news media's responsibility to inform the public of what is going on in the courts? We think there is not. But in actual practice, whether or not the two responsibilities are harmonized depends largely on the judge—specifically on his ability to obtain the confidence and respect of the news media. In many communities judicial discretion in guarding privacy is exercised to the full satisfaction of the news media.

The result of this kind of relationship is a flow of information, through news stories on individual cases and through series of feature articles on the work and problems of the court, that serves the best interests of all concerned—the children before the court, the general public, the news media, and the court itself.

Much of the friction that has been created by the assumed conflict between the privacy of juvenile court hearings and the news media's obligation to inform the public is synthetic. The fact is that in most communities the court has been of little interest to the news media. Its jurisdiction, for the most part, is run-of-the-mill; its cases involve childen, whose offenses generally are devoid of the drama and violence attending adult crime and crime reporting. In spite of sporadic waves of editorial anger about "secrecy" in juvenile court proceedings, the real problem faced by most judges is not how to exclude the mass media but rather how to entice them into court.

Few courts have adequate social services, and judges are constantly striving to inform the public and the legislature about the detrimental results of inadequate services. Courts often—even regularly—stress this in their official reports. But a more effective way of doing this is to see to it that the reporters and editors of the community understand the nature of the cases confronting the court and the way that the court's ability to deal with

them is affected by its standards, staff, facilities, and resources.

The best way to do this is to have the editors and reporters see for themselves—to have them in court to observe the children and families as they appear before the judge, to listen to the reports of investigators, and to witness the efforts of the court toward constructive dispositions. Accordingly, the judge must find ways of taking the initiative in inviting the news media to the hearings and in interpreting what is occurring.

The most serious consequence of secrecy is its effect on public information:

> Society does not always act to solve the problems of which it knows. . . . However, knowledge is the essential preliminary to action. If it sometimes does not act with knowledge, it surely never acts without it. . . .
>
> It is very doubtful that a democratic people, by secrecy, can be persuaded to support policies that they do not understand. If they oppose enlightened policies, the proper way to put them into effect is not to pursue them secretly but to educate the people to believe in them. . . . Government never will be able to cope with juvenile crime until it is handled in a way that calls forth the interest, compassion, cooperation, and support of all the people.[7]

Wigmore explains why the juvenile court requires privacy and cautions against its carrying privacy too far:

> The modern juvenile court relies upon kindly paternal spirit in its procedure, as a necessary means to reach the emotions of the delinquent and to secure candid avowals and ready amenability to treatment. With this purpose, it seeks to eliminate the usual incidents of a criminal court, particularly the strict formality and tense combativeness. Privacy of examination of the delinquent and his family is therefore regarded as generally useful and occasionally essential; and statutes usually provide for this.
>
> But in so far as. . . practice habitually exercises the power [of strict privacy], it has its dangers. No court of justice can afford habitually to conduct its proceedings strictly in private.[8]

Confidentiality of Records

The access of the news media to hearings should be supplemented by other information needed to understand the scope of the court's work or the chain of events in any particular case. This means that certain records should be available to the news media.

What are these records? They are the documents whose equivalents in the criminal courts are available to the public; in the juvenile court they are not available to the public, but are open to inspection, "with consent of the judge, by persons having a legitimate interest in the proceedings"[9] or in the work of the court, which group includes news media. Generally these records are the following: the court dockets, petitions, complaints, motions, findings, verdicts, judgments, orders, decrees, and other papers filed in proceedings before the court.[10]

"Consent of the judge" in the provision quoted above is significant; it affords a means of control of the information to prevent misuse that would conflict with the responsibility of the court to protect the parties.

Distinct from such "official" records are the confidential reports of social and clinical studies or examinations, school records, and personal records regarding the child's background and family life, which are used by the judge to assist him in arriving at a disposition. For this the closest control is necessary; they cannot, therefore, be inspected by the news media, except in unusual circumstances with permission of the court.

In a criminal court, the equivalent documents are the presentence investigation and related clinical reports. Prepared for the judge following conviction after trial or a plea of guilty, they are designed to help him determine the sentence to be imposed. Like the prehearing reports in the juvenile court, they are not available to the press and for the same reason: the confidential nature of the information. They contain highly intimate information about the defendant, his relationship to other members of the family, and psychological analysis of his behavior and personality; and they are likely to include descriptions of personal problems not directly related to the offense or the matter under consideration. Such information is generally respected and held confidential. Only in extraordinary circumstances would the news media ask for or be given this information.

Anonymity

The Standard Juvenile Court Act declares that "The name or picture of any child subject to the jurisdiction of the court shall not be made public by any medium of public information, except as authorized by order of the court.[11] That provision, or language very similar, is the law in some states. In most states, much the same result is attained by the court's control over the privacy of proceedings. There, however, the control cannot be as firm since, in the absence of an explicit rule, reporters can obtain names from police and others outside the court who have knowledge of the case. The specific statutory prohibition prevents publication of names without court approval.

Does publishing the name of a delinquent (or of an alleged delinquent) without the judge's approval serve any constructive purpose? Does the name and address of the delinquent qualify as information the public must have in order to be fully aware of its juvenile court and delinquency situation? The distinction between publication of names and other identifying material, and publication of other information about the court is obvious: the latter promotes public understanding of an important community agency; the former does not—rather, it usually hampers efforts at individual rehabilitation.

The Standard Act makes the following comment:

> The prohibition of publication of the name or picture of any child does not interfere with the most comprehensive reporting of the work of a juvenile court. . . . The prohibition protects against reporting that may be unnecessarily destructive in individual cases. The attention gained by publicity may propel the sophisticated, aggressive, and "hardened" delinquent into further delinquent acts out of a desire for more recognition. For the majority of youngsters involved in delinquent behavior, publicity would be a crushing blow to them and their families. In either case, the objective of providing effective guidance and correctional treatment which will prevent further delinquent behavior would be very seriously and adversely affected.[12]

There are exceptions; in some situations, the public interest may justify permitting the name of the juvenile to

be released for publication. In every case, however, the discretion required in deciding whether the name should be released for publication is best exercised by the judge, "who is charged with protection and treatment of the child and is best informed regarding his condition and behavior."[13]

In the last few years an increasing number of news media, seriously concerned with their responsibilities to inform the public, have become equally concerned lest they unnecessarily harm any young person through publicity. Underlying this concern is their realization that the decision as to what names may be published by the news media should be "determined by the courts . . ., not by an editor's judgment."[14]

It should go without saying that a judge should not set himself up as a news media editor, who has the responsibility of deciding what *should* be published out of the great mass of material available. The decision as to whether the name *may* be published is exercised by the judge; having been given the name by the court, the editor then decides whether it *should* be published.

In most instances, news media do exercise self-restraint.

On the level of debate in terms of freedom of the press, the individual's right of privacy, and the public's right to know, this question of publication of names of juvenile offenders would seem to be one of the great issues of the century. However, a survey conducted a few years ago by Paul H. Jess, of the State University of Iowa School of Journalism, showed that in very few instances—4 per cent in a sampling of 782 items—did the newspapers exercise their right, when they had the right by law, to print the names.

Information on Pending Cases

One of the cardinal rights guaranteed by the Constitution is the right to a fair trial or to a fair hearing.

Judges and news media must always bear in mind that if any information is disseminated pending hearing, it should be the kind that will not deprive the child of a fair hearing. If a fair hearing is not afforded, the child is deprived of his rights and reversible error has been committed.

Release of Information on Dispositions

If an act of delinquency and the hearing held on it are publicized, information on the disposition of the case should also be released.

There are instances when a child is detained for an alleged act of delinquency, the incident is publicized, and later, after a fair hearing, the child is cleared of any wrongdoing. In all fairness, the disposition should be publicized to complete the original story.

Unless the news media and the public are made aware of the disposition of delinquency cases, they will naturally suppose that the juvenile court is doing nothing for correction, rehabilitation, or prevention.

No judge can refuse to inform the local news media on the disposition of a case and then reasonably complain that the news media are not sympathetic to the court's problems and that the public has no understanding of what the court is trying to do.

Again, as has been emphasized above, the information as to disposition must be given with wise discretion and understanding.

Conclusions

No set of guides can fit every circumstance. The size and character of the community, the court, and the news media may require some modifications of approach. What can be done in a small town may not be feasible in a large city.

The problems discussed here are not susceptible of simple and easy solution, but they can be dealt with constructively if both parties—the juvenile court and the news media—will tackle them in an atmosphere of cooperation and understanding. No problem is beyond solution if those involved are willing to reason together with understanding and in good faith.

FOOTNOTES

1 Fred W. Woodson, "Newspaper Publication of Names of Juvenile Offenders," *Focus*, September 1954, p. 154.

2 Justice Felix Frankfurter, in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

3 American Bar Association, Canons of Professional Ethics. No. 20.

4 U.S. Children's Bureau, *Standards for Specialized Courts Dealing with Children*, 1954, p. 59.

5 National Council of Juvenile Court Judges, *1958 Yearbook*, pp. 69-70; see also National Council on Crime and Delinquency, Standard Juvenile Court Act (1959), Comment on Sec. 33.

6 National Council on Crime and Delinquency, *Guides for Juvenile Court Judges*, 1958.

7 James Russell Wiggins, *Freedom or Secrecy* (New York, Oxford University Press, 1956), pp. 46-47.

8 John Henry Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Boston, Little Brown, 1940), vol. VI, p. 340.

9 Standard Juvenile Court Act (1959), Sec. 33.

10 *Ibid.*

11 *Ibid.*

12 *Id.*, Comment on Sec. 33. See also Woodson, *op. cit. supra* note 1; Gilbert Geis, "Publicity and Juvenile Court Proceedings," *NPPA Journal*, October 1958; "The Public's Right to Know—A Symposium," and James E. Fain, "Who Do the Courts Belong to, Anyway?", *NPPA Journal*, October 1959.

13 Standard Juvenile Court Act (1959), Comment on Sec. 33.

14 Salt Lake City *Desert News*, Jan. 23, 1956.

D. The Effect of Press Coverage on Dispositions

Judge Justine Polier, "The Family Court in an Urban Setting," in Kempe and Helfer, *Helping the Battered Child and his Family* (1973), 208, 210.

When stories of child abuse are published, the reflex response of the general public is to demand punishment for the parent and removal of the child. Descriptions of injuries inflicted on a child evoke a sense of horror, fury and the feeling that no punishment can be too great for such a crime. The thousands of children brought before the court as neglected are viewed in a quite different light or are largely ignored by the public. There is no public clamor to punish the parent or to secure appropriate

services for the child. Indeed, there is little interest in, or support for, helping the parent become a better parent.

Judge Nanette Dembitz, *Child Abuse and the Law—Fact and Fiction,* Record of the Association of the Bar of the City of New York 613, 614-616 (1969).

Mistakes in Passage of Child Abuse Act

The first fact to be recognized is that the new Child Abuse Act encumbered rather than improved the protection of children and administration of justice in the Family Court. It was the misbegotten legislative response to shocking newspaper accounts in March 1969 as to the death of three-year old Roxanne Felumero, who was suspected of being the victim of a beating by her stepfather. The Family Court had, according to the news media, returned Roxanne from a foster home to her parents although she had been brutally beaten while with them, and although the child-service agency that had been supervising her care objected to her return. The news stories were the diametric opposite of the truth on both these points—a fact unequivocally disclosed by the report of the Judiciary Relations Committee of the First Department of the Appellate Division after the Child Abuse Act was passed.

Contrary to the flamboyant and reassuring headline proclaiming the new Act a new "Bill of Rights" for children, the hastily-drafted Child Abuse Act in fact added nothing to the Family Court's powers to protect children from injury by their parents, for the simple reason that the Family Court Act already on the books gave the court every possible power. Under the court's authority over children suffering from "improper guardianship", which preeminently included physical abuse, the court was already exercising the power to order the removal of children from their homes and their retention in hospitals or shelters. These orders were frequently made on an emergency basis without even prior notice or hearing for the parent—after brief, *ex parte* hearing of the evidence allegedly showing the child's danger. (The court held a full hearing for the parents *after* insuring the child's safety.)

The Legislature, it is to be hoped, will follow the recommendation of the Association of the Bar's Committee on the Family Court and Family Law, under the chairmanship of Richard M. Palmer, that the Child Abuse Act "should be repealed at the earliest opportunity..." The committee's cogent and forthright voice was particularly commendable because it pierced the enveloping fog irrationality even before the Appellate Division publicized the falsity of the media stories on the Family's Court handling of the Felumero case.

One of the chief faults of this ill-considered legislation is that it tends to obstruct the court's protection of a child when his injury may have been due to parental neglect rather than a willful blow. And the mandate of the Child Abuse Act that the court *must,* regardless of individual circumstances, remove a child from his home upon any finding of abuse—a provision directly inspired by the false press reports on the court's conduct in Roxanne Fulemero's case—is, I believe, not only unwise but unconstitutional.

Section XI.

Negotiated Settlements and Consent Stipulations

Attorneys and judges typically prefer that parents consent to an agency plan rather than undergo an adversary court hearing. The arguments for and against this emphasis will be explored. This leads to a discussion of the methods used by courts to affect settlements, including holding preliminary conferences and making modifications in the petition. The final topic is the protection of rights and the acceptance of a treatment plan after a negotiated settlement.

A. Benefits and Disadvantages of Settlements

1. The great majority of petitions are settled in most courts.

2. Settlements mitigate several problems in abuse and neglect litigation.

Bitterly contested hearings may hinder later treatment.

Airing facts of abuse and neglect in a hearing can increase the parents' stigma.

Since abuse and neglect hearings are often lengthy and require substantial preparation, settlements can save time for courts, attorneys, social workers, and expert witnesses.

3. On the other hand, some courts and lawyers may place too much emphasis on settlements.

Parents who reluctantly settle under pressure from the court or from attorneys may later feel aggrieved for not having had their day in court. This grievance may lessen the parents' incentive to comply with the treatment plan agreed to as part of the settlement.

A settlement may be based on the interests of the parents and child protective agency only, although the child's interests can be protected if counsel for the child actively participates in forming the settlement agreement.

The absence of a fact-finding hearing deprives the court of concrete information that may be needed in further court proceedings if the parents do not comply with the settlement agreement. If a postponed adjudicatory hearing is required later, the time lapse may make it more difficult to prove abuse or neglect.

B. Techniques Used by Courts to Encourage Settlements

1. Some judges actively participate in settlement efforts.

Judicial participation can increase the number of settlements, but it often involves the use of judicial authority to affect state intervention without giving the parents their day in court and without sufficient development of the facts to determine whether jurisdiction exists.

Judicial settlement efforts are typically made in a conference scheduled for that purpose or during a preliminary hearing. Discussions should include counsel for the child, as well as parents and social workers.

In courts where the intake staff screens abuse and neglect petitions, the staff may also participate in settlement efforts.

2. Without entering settlement talks, judges may encourage settlement by:

Suggesting to the parties that they meet for settlement talks and facilitating the talks by, for example, supplying a room in the courthouse for the purpose, and

Freely granting adjournments if all attorneys indicate that a settlement appears likely.

3. Judges can facilitate settlements by modifying the wording of the petition, making it more acceptable to the parties. Examples are eliminating heinous factual allegations and substituting allegations of neglect for allegations of willful abuse.

4. Judges can permit settlements without making a ruling on the petition, thus permitting treatment without the stigma of a formal adjudication.

C. Court Procedures When Accepting Settlements

1. Two procedures can help protect parents' rights:

Before accepting admission of allegations in the petition, judges should make clear to the parents that they have a right to a fact-finding hearing and, where applicable, to appointed counsel.

Parents should be questioned to ensure that any admissions of abuse or neglect are voluntary and that there is a factual basis for the admissions.

2. When a treatment plan is included in a settlement, the court should require that it be accepted by all parties, including the child (or his attorney).

The plan should be in writing and present in detail the obligations of the parents and the child protective agency to decrease the possibility of later disputes about whether the plan is violated.

The judge should also review the details and requirements of the plan with parents, making clear what actions the parents promise to take.

Especially when the child is not represented by counsel, the judge should personally examine the plan for possible modification.

Support Readings

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A. Benefits and Disadvantages of Settlements

Judge Ellen Ewing, "Dependency, Neglect, Need and Abandonment of Juveniles," in Office of Continuing Legal Education, Kentucky, *Report of Seminar on Juvenile Law and Procedure* (1975), 84, 87-88.

In 1974 there were 972 cases of dependent children brought before the Jefferson County Juvenile Court. In 1973, interestingly enough, the number of cases before the court was 1354. That's a 28 percent decrease. This might lead you to believe that there was a decline in neglect or child abuse in Jefferson County, but this, unfortunately, was not the case. What really happened in that interim was that the protective service department connected with the court beefed up their forces and made a more substantial effort to keep cases out of court. The approach that we take is that when the report of neglect or even of physical abuse is brought to our attention through the social service agency that is attached to the court, if the parents are cooperative and admit that there is a problem and that they need help, then there is a substantial effort made to keep that case out of court and to work with the parents. When the parents deny that there is any problem and are very reticent about receiving any help with their child, then a petition is taken and the child is brought before the court. The increased effort to keep them out is reflected by the decline in cases that are presently coming before the court.

QUESTION: I'd like to ask you a philosophical question. I prosecute here in Fayette County and find it difficult, if not impossible, to have a child determined dependent. I can much easier prosecute a felony case, even a class A felony, in Fayette County than I can a dependency case. I'd like to know how you personally feel that the equities should be balanced between parents and child. This especially concerns the rules of evidence and whether they should be construed as narrowly as possible to aid the child or to aid the parent.

JUDGE EWING: It's a difficult problem. One approach we take in order to avoid the problem is to delay trying the case for as long as possible. We attempt to get parents to agree to certain things without actually trying the case. Another problem with a trial in this type situation is creating the adversity between the child and the parent. You have everyone in there talking about what a rotten person the parent is and all these terrible things they did. These are the same people who are going out the next day to do social work and supervise. It's a very destructive kind of proceeding in terms of the relationship between social agencies and parents and oftentimes children and parents. Children are really put on the spot sometimes because they have to talk about what their parents have done. We attempt to avoid it; that's one way we deal with it. The dependency trials are probably the most lengthy trials we have, but fortunately, they are not too frequent. I guess this happens since conviction is by a preponderance of the evidence.

Institute of Jucicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 10.1 Reprinted with Permission.

10.1 Definition

For purposes of this Part, "voluntary placement" is any placement of a child under twelve years of age into foster care when the placement is made at the request of the child's parents and is made through a public or state supported private agency without any court involvement. This Part does not apply to placements in a state mental hospital or other residential facility for mentally ill or retarded children.

COMMENTARY

The standards in this Part provide regulations for the "voluntary placement" process. Under existing law part of a parent's custodial rights includes the right to place the child in a living environment outside the natural parents' home. The range of such "placements" is enormous—from private schools to mental hospitals, from summer camps to foster family care with strangers. When these placements are made through a public agency, they are generally called "voluntary placements."

The standards are not meant to regulate all such placements. Obviously there are significant differences among them, although in many ways they all represent points on a continuum. The proposed standards are meant to apply only to placements into noninsitutional foster care, when the placement is made through a public or state supported private agency. Placements in private schools or placement of a child to live with relatives are excluded, unless there is state involvement. So are placements into state mental hospitals or residential institutions for mentally ill or severely retarded children.

Placements involving public support are singled out for three reasons. First, there is substantial evidence that some of these placements are made under coercion from welfare departments, which may threaten the parents with juvenile court proceedings if they do not place their child. See Levine, "Caveat Parens: A Demystification of the Child Protection System" *35 U. Pitt. L. Rev.* 26-29 (1973); Campbell, "The Neglected Child: His and His

Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 *Suff. U.L. Rev.* 649-51 (1970). Regulation is needed to prevent this. Second, there is also substantial evidence that as many as half of all voluntarily placed children are never reunited with their families, at least if they remain in care longer than six months. See Fanshel, "Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study," 55 *Child Welfare* 143 (1976); A. Gruber, *Foster Home Are in Massachusets* (1973); California Health & Welfare Agency, *Children in Foster Care* (Report Reg. No. 340-0395-501, 1974). Sometimes this is because the parents are not provided with services that would help them resume custody. Parents may even be discouraged from visiting or resuming custody. In other instances, the children are effectively abandoned by their parents. Many children are voluntarily placed by unmarried mothers who never assume any responsibility for them. These parents do not visit or maintain contact with their children. Regulation is needed to assure that such children are not left permanently in an unstable foster care situation. Finally, there is evidence that in some states welfare agencies make if difficult for parents to resume custody, even though the placement was voluntary. Regulations are needed to clarify parents' rights and to insure that they are fully aware of the consequences of a voluntary placement.

Placements in mental hospitals and similar facilities are not covered because there is now substantial doubt whether parents can place children in such institutions without court approval. Several courts have mandated full civil commitment procedures in such cases. See *Bartley v. Kremens,* 402 F. Supp. 1039 (1975), *cert. granted Kremens v. Bartley,* 96 S. Ct. 558 (1976); *J.L. v. Parham,* 412 F. Supp. 112 (M.D. Ga. 1976). These standards adopt no position on the issues surrounding the placement of children into mental hospitals or similar facilities.

The standards are limited to placements of children under twelve. Placements of children twelve and over should require the child's consent.

These standards apply to placements made by both parents when they are living together or by the parent with legal custody if there is only one parent as a result of divorce, separation, death, or absence of the other parent. In such situations consent of the absent parent is not required.

Gerald Eaton, *A Manual for Neglect Proceedings in New Hampshire District and Municipal Courts* (New Hampshire Task Force on Child Abuse, n.d.), 37-38.

In many cases the court should try to avoid the evidentiary hearing by having the parties work out an agreement and submit a consent decree. The petitioner and the court should not be greatly concerned about what factual allegations of neglect are proven. The most important outcome of these proceedings is a plan for the child and the family to improve the home environment, curing the problems which brought about the neglect, returning the child to a much stronger home, and ending the State's intervention with the family. All parties should be involved with negotiations along with persons whose expertise or experience would be helpful in deciding what is best for the family.

The full evidentiary hearing should be avoided if at all possible. The trial-like atmosphere can be very damaging to the child, the parents, and relationships between the family and persons who have been helpful to the family. The child should not be put in a position to feel as if he or she is testifying against his or her parents and contributing to a separation of the family. The judge may decide to talk with the child privately outside of the hearing procedure. The parental behavior which brought about the neglect or abuse may have been caused by pyschological problems of the parents, and the evidentiary hearing will only reinforce any guilt feelings that the parents already have. Persons who have helped the family, e.g., visiting nurse, family doctor or the case worker, should not be put into the position of testifying or "prosecuting" against the parents if at all possible. Although they may be subpoenaed and required to testify,[6] their therapeutic relationship with the family may be impaired by helping to prove that the parents have neglected or abused their child.

Frank Foerster, *Legal Aspects of Child Abuse and Neglect Cases in Texas* (1979), 25-27.

Some Practical Considerations for the Adversaries

In many instances the temporary nature of the order proves to be an illusion. For numerous reasons including parental location, identification and service of citation, parental rehabilitation efforts, child welfare worker turnover, attorney delaying tactics, and crowded court dockets, the temporary order lasts for months and frequently stretches into months or even a year or more before the case reaches final judicial decision.

Given these delays which often leave the child in the legal limbo of foster care, the parents in a position of confusion and helplessness, and the state in a legal quagmire which hampers purposeful planning for the child and the family, the ancillary hearing becomes a crucial stage in the legal process of these cases. The chief adversaries, the state agency and the parents, require insightful advice from their legal representatives.

Child Welfare personnel and their attorneys must carefully consider the absolute necessity of legal intervention into the family. The natural tendency by the agency mandated to protect children is to move to intervene through court action when their investigation indicates a home situation bordering on minimally acceptable levels of care. The courts, for the most part, are inclined to back this position by agreeing to removal. Because the order is presumed to be temporary, a sense of protection is conveyed from the removal. The inclination is to say now that we have removed the child, she/he is protected when, in fact, this may prove detrimental in the long haul.

While the defense attorney is ethically bound to represent the wishes of his client at this hearing, she/he must

also consider whether this is the proper time for his client to assume an unyielding position about keeping the children in the home. Careful evaluation of his/her client's ability to care and provide for the children must be undertaken. Can the parent make the necessary changes which will convince the agency that further court action is unnessary? Can those changes be accomplished with the children remaining at home? Are these changes necessary or specious demands by the child welfare agency? Can the agency realistically offer services to aid the parent in achieving change? Will the parent agree to the court plan? All of this information must be gathered and evaluated and presented to the parent in order to allow that parent to make an informed decision on whether to fight or agree to the temporary orders requested by the agency.

Where the choice is made to remove the child from the home and the parents resist, a reasonable likelihood exists that a full-blown hearing, often acrimonious, will ensue. A primary reason is that the parents do not want to relinquish custody to the state agency. A second reason concerns the desire of the defense attorneys to obtain, at this time, as much information about the state's case as possible. Thirdly, the issues require that medical experts be called in to testify on the physical or emotional harm suffered by the child. Finally, these hearings have increasingly become the setting in which the parents are informed of the seriousness of the charges and the changes they must make in order to regain custody. A full airing of the evidence with charges and counter-charges will follow.

All sides, then, must remember that the patterns which emerge from the confrontation around this hearing often set the course of conduct for all future relationships among the parties. Because of the issues involved and the sensibilities offended the parties often come out swinging and never stop until the final order is rendered and the appeal resolved. The child, the focus of this hostility, often is lost in the fighting. Whether she/he stays home, is removed, or is returned can often be inconsequential to the satisfying of egos which are involved.

Paul Piersma, et al., *Law and Tactics in Juvenile Cases,* (Philadelphia: American Law Institute, 1977), 492-493, 512-513.

19.4 Temporary Custody Agreements With Social Agencies

In many states, it has become common for the welfare department or social service agency, which has contact with an indigent family, to circumvent the formal legal processes in obtaining the custody of children. This is usually accomplished through a contract with the family by which the agency assumes custody while the family supposedly is given time to aright itself. A recent survey in Massachusetts indicated that over one half of the children in foster care were there under this type of voluntary agreement between parents and the public welfare agency. Geiser, *The Shuffled Child and Foster Care,* 10 TRIAL 27 (1974).

The "entrustment agreement," as it is generally known, may commonly be secured through misinformation, fraud, or even threats to seek a termination of all rights in court. Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U. PITT. L. REV. 1 (1973). The uneducated parent, who is most often the victim of these agreements, may not realize that he has the choice to reject the offered assistance. "A social worker acting in complete good faith may press his argument so adequately that he gives the impression that the parents are required by law to acquiesce in the transfer of custody." Campbell, *The Neglected Child: His and His Family's Treatment under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 SUFFOLK L. REV. 631, 650-51 (1970).

The contract itself will often be very detailed in spelling out the visitation rights and support duties of the parents, but will leave the determination of the time in which the child will be returned to the home to the unfettered discretion of the agency. Unfortunately, trusting parents are not always aware of this factor and may be sorely disappointed when they request the return of their child, only to learn the agency can refuse to surrender the juvenile.

Although there have been few cases challenging the lawfulness of these agreements, it is suggested that a writ of *habeas corpus* may be a viable method of attack. There is case law in some states criticizing the use of a contract with respect to children.

> "[C]ontracts as to the custody of children are voidable agreements . . . and are subject to being set aside by the courts in the best interests of the child." . . . That a child cannot be made the subject of a contract with the same force and effect as if it were a mere chattel has long been established law. *Commonwealth ex rel. Children's Aid Soc'y Gard,* 362 Pa. 85, 92, 66 A.2d 300, 304 (1949).

This case was cited as authority in *Commonwealth ex rel.* Berg v. Catholic Bureau, 167 Pa. Super. Ct. 514, 76 A. 2d 427 (1950), in which a document purporting to surrender a child for adoption procedures was set aside. This type of case should be used in actions attempting to set aside the contractual authority of an agency over a parent, especially when no specific statutory approval of these agreements exists.

In other states, a body of case law is emerging that disregards contracts between social welfare agencies and foster parents when enforcement would result in a disservice to the best interest of the child who is the subject of the agreement. *Stapleton v. Dauphin Country Child Care Serv.,* 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). This is found to be true even in states that have statutes supporting the agency's right to exercise complete control over placements and removals. See, *e.g., In re C.M.D.,* 256 A.2d 266 (Del. 1969); *Fleming v. Hursh,* 271 Minn. 337, 136 N.W.2d 109 (1965). Although agencies cite great problems that will occur if their agreements are ignored, this difficulty was specifically considered in *People ex rel. I—v. Convent of Sisters of Mercy,* 220 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951), in which the court concluded:

> This Court refuses to sacrifice this infant's interest because of a claim that the interests of children, not before the Court, will be affected by a possible impairment of a placement system. . . . *Id.* at 121, 104 N.Y.S.2d at 945.

Once a court has made it clear that the agency's convenience and authority are secondary to the best interests of the child, a strong presumption should arise that the parents are entitled to the child's custody unless the agency can make an affirmative showing of their present unfitness.

20.9 Waiver of Hearing on Neglect Because of Voluntary Agreement

As discussed in Section 19.4, many children are placed in the custody of agencies through voluntary agreement executed by the parents. This can result in numerous problems, for the parent rarely stands in an equal bargaining position with the agency. Most commonly, the parent turns to the agency when experiencing some difficulty and consequently accepts help on whatever terms it is offered. The social worker and agency with which he must deal often have an additional hold on the parent when it is the source of support for the child. Finally, many parents do not speak the language of the social worker and at times cannot read the agreement they execute, even when it is in their own tongue.

The result of these inequities may range from a parent experiencing difficulty in regaining custody of a child to the substitution of an agreement for a court finding of neglect. The previously cited section offers suggestions for attacks upon the complete discretion granted through the agreements to agencies in determining the placement of children. Additional arguments may be made when these contracts are substituted for a court adjudication of neglect.

If signing a voluntary agreement is being asserted as a waiver of a need for a hearing on neglect, the requirements for a knowing and voluntary waiver must be met. (See Section 5.4 for a discussion of adequate waiver.) Additionally, counsel may argue that inadequate notice has been given (Section 20.2) and that the finding of neglect was improper because the parent was not assisted by counsel. (See Section 20.3 for the right of a parent to be represented by an attorney in a neglect proceeding.)

B. Techniques Used by Courts to Encourage Settlements

Judge James Delaney, "The Legal Process—A Positive Force in the Interest of Children," in American Humane Association, *Fourth National Symposium on Child Abuse* (1975), 62, 65-66, 68.

When you do file an official case, or when we file one for you on your behalf, we again only penetrate into this family situation as deep as we need to go. In other words, I mentioned informal adjustment. The second stage is perhaps an official filing where we sit down with the family, discuss the problem that exists and whether they are at that point willing to accept the kind of services that are necessary to alleviate the problem. This is where you with a case plan come into the picture. It doesn't do any good if you come in and say this woman is a poor housekeeper or she goes off and neglects her children or something like that. I need to know why she does it, what the problems are and what you want me to do, how I can become your instrument to impress on this family the changes that have to be made in order to protect these children and keep the family together. This entails a case plan, and I think we ought to sit down with the client and discuss this. I think that we ought to agree that these are the things that have to be done. Then, once that is agreed upon, you become an instrument of the court. You become the emissary of the law in seeing that this plan is carried out.

Now, very often this is as far as we need to go. I have found many cases where we have filed an official petition and have come in for what we call the advisory hearings. This is the initial hearing to find out whether the case is going to be contested or not, whether the people have an attorney, whether one should be appointed to represent them, whether the child needs to have a guardian appointed, and so on. Very often, at this stage of the game, we will find that the parents agree that something has to be done. They don't want to be branded as abusing parents nor do we necessarily want to brand them in that fashion. It may be enough merely to have this petition hanging fire. We say, "All right, if you follow this case plan that has been outlined, we'll review this case in 2 months, or 3 months, or one month, or whatever time seems to be indicated, and if you are making satisfactory progress, we will continue it a little further. And we will get out of this case. We'll get out of your lives, when you demonstrate that you'll do the things necessary to be adequate parents."

So, again, we have used the law in a very positive way without branding anybody—without a trial—without a confrontation. Well, we have had a confrontation, but it isn't the kind that stirs up a lot of enmity and creates a great deal of apprehension. Finally, if we don't get anyplace—and sometimes we don't—these general techniques don't always work as you know—then we have to posture the thing either for an admission or a consent decree. That is where the family agrees that the statements in the petition or at least some of them are true, and the court should take jurisdiction of the family and the children. Or they set it up for a contested case.

Again, I have found that in many cases, many case workers have kept cases out of court either because they have assessed the evidence and felt that it wasn't adequate or their attorney has assessed the evidence and said, "This won't stand up. We haven't got a leg to stand on." From a practical standpoint, if you've got a factual case of abuse you would be amazed at how infrequently you really have to try that case. So I wouldn't worry about the quantum of proof or the value of the evidence. If you've got a genuine case where the child needs the protection of the law, don't hesitate to file. Let us in the courts worry about whether the evidence is adequate. If it isn't, we will have to dismiss it, of course. But again, my experience has been that almost invariably when people are confronted with the kinds of problems they face, one or the other of the parents, if it is a two-parent home, are almost willing to confess the jurisdiction of the court—in other words, to give us by consent the right to intervene in their lives.

Our welfare department has two attorneys actually and they do all this work. They prepare petitions and they present cases and they work with caseworkers. They train them. They build a case. They know what they are doing. And, I'll tell you, if you've got a well prepared case, you're not going to have the trial. You come in and lay this stuff out. We have a pre-trial conference before we actually go to trial, where we roll this stuff out—the medical report, the social service report, a picture of what is wrong in the home, relationship of the parents to each other, some of the background on children, their school records—things of that kind, you don't have to try this case. That lawyer representing those parents is going to be so much on your team that you wouldn't believe it. Instead of threatening you and challenging you in court and suggesting that you are trying to impose your middle class values on the family, he's going to be on your team. He's going to be telling these parents. "Look, you are in serious trouble. You better get with it and do what you're asked to do here because if you don't, you are going to lose your children, and there isn't anything in the world I can do about it. If you love your children, if you want to keep them, you'd better get with it." So this is the kind of thing you get, I think, these are the dividends that you receive if you know how to use the law better.

Judge Homer B. Thompson, *California Juvenile Court Deskbook*, 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300, Section 8.37. Reprinted with Permission.

B. [§8.37] The Petition

Section 332, derived from §656 (reviewed in §8.2) insofar as that section related to dependent children, applies to §300 cases.

The objection that the facts as stated, even if true, do not bring the minor under the jurisdictional provisions of the law is more often made in §300 cases than in §601 or §602 cases. The court will normally rule on this objection at the outset of the jurisdiction hearing.

Often the parent or parents will be willing to admit that part, if not all, of the facts pleaded are true. Hence, by amendment of the petition at the outset to eliminate portions objected to by the parents, a contested hearing may be averted. The only question remaining is whether removal of the objectionable allegations leaves enough facts in the petition to sustain jurisdiction.

Sometimes the parents simply object to the way the facts are stated. The petition may be amended to restate or modify the manner in which the allegations are made and thereby transform a contested hearing into an uncontested one. Often the parents are sensitive to the manner of statement, but really do not deny the basic facts as to what occurred. In this connection, the parents sometimes object to the jurisdictional conclusion (*e.g.*, unfit home by reason of neglect or cruelty) but are willing to admit that the facts that show it to be such a home are true. Here the court shuld explain that the ultimate jurisdictional conclusion is a question of law to be decided by the court if it finds the specific facts are true. When this explanation is given, the parents will often admit the facts and then leave it up to the court to decide whether, assuming they are true, the facts pleaded bring the case within the jurisdictional provision.

E. Ronald Bard, "Adjournment In Contemplation Of Dismissal: A Legal Mechanism For Accountability," *Juvenile Justice* (1976), 11-14.

In the field of child abuse and neglect, juvenile and family court judges have long spoken of and written about their overcrowded courtrooms and court dockets. Some judges have also sought to establish themselves in the role of a facilitator or catalyst with social workers providing assistance to dysfunctional families. They have felt that the law, as interpreted and implemented by the court, should be more of a treatment tool in the social worker's rehabilitation kit than a club to force unwilling parents to change their aberrant behavior. Many practioners have also felt that existing child abuse and neglect laws have not afforded the abusing or neglectful parent a legal mechanism to hold the authorized social services agency accountable for the lack of mandated services. In other words, there has often been a lack of confidence in the system which is mandated by the law to provide rehabilitative services to the dysfunctional family.

The New York State Assembly with the urging of that state's Temporary Commission on Child Welfare has sought to respond to these important issues through the passage of legislation which utilizes the concept of "adjournment in contemplation of dismissal." The purpose of the new law (Section 1039, New York Family Court Act) is to provide "an expeditious means for affording protection to abused or neglected children and their parents under the supervision of the Family Court and a child protective agency without having to resort to a time-consuming and stigmatizing adjudicatory hearing."[1]

Before we examime the specific sections of this law a general overview of the law might prove helpful. The law attempts, through the mechanism of quasi-contractual arrangment, to bring about a negotiated agreement between the natural parents (and their attorney); the child (and its attorney); the social services agency (and its attorney); and the court so that all parties become aware of their responsibilities to each other and their rights under the law and are given notice that they will be held accountable if they breach the contract. Upon the breach of the contract the agreement breaks down and the parties face the adjudicatory phase with its often unsuccessful outcome for any of the parties.

Subsection (a) of Section 1039 provides that:

> Prior to or upon a fact-finding hearing the court may upon a motion by the petitioner with the consent of the respondent and the child's attorney or law guardian or upon its own motion with the consent of the petitioner, the respondent and the child's attorney or law guardian, order that the proceed-

ing be adjourned in contemplation of dismissal. The court may make such order only after it has apprised the respondent of the provisions of this section, particularly subdivision (e), and it is satisfied that the respondent understands the effect of such provisions.

This subsection establishes a legal mechanism to temporarily avoid the both stigmatizing and time-consuming adjudicatory phase of child abuse and neglect cases. There must be a motion made by the pettitioner (the Department of Social Services) or a motion by the court itself, with consent of all the parties, that the proceeding be adjourned in contemplation of dismissal. Before the court may make such an order, however, the respondent parent and the child's attorney must consent and the court must be satisfied that the respondent parent understands the legal situation. The court must especially be satisfied that the respondent parent understands Subsection (e) which states:

> Upon application of the petitioner or the child's attorney or law guardian, or upon the court's own motion, made at any time during the duration of the order, the court may restore the matter to the calendar, if the court finds after a hearing that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. In such event, circumstances of neglect shall be deemed to exist, and the court may thereupon proceed to a dispositional hearing under this article and may, at the conclusion of such a hearing, enter an order of disposition authorized pursuant to section one thousand fifty-two with the same force and effect as if a fact-finding hearing had been held and the child had been found to be an abused child or a neglected child.

Subsection (e) provides a means for the petitioner or child's attorney or law guardian to hold the respondent parent accountable to substantially observe the terms and conditions of the order as defined in Section (c) and to establish the fact that the respondent parent is expected to cooperate with the supervising child protective agency. If the court finds *after* a hearing that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency, the court may decide that circumstances of neglect shall be deemed to exist, and the court may then proceed to a dispositional hearing.

Some critics of the law have objected to this part of Subsection (e) on the grounds that the fact that a parent who has not yet been adjudicated an abusing or neglectful parent should not be foreclosed from the protection of due process for failing to cooperate with the efforts of a supervising child protective agency. Some have also said that, although they support the intent of the legislation, they feel it would have been better for the legislature to have provided for the holding of a fact-finding hearing *before* adjourning in contemplation of dismissal while witnesses are still present and evidence available.

Although the criticism is correct, in that a serious question of the due process protection due the respondent parent is at risk, the issue must be faced that if a fact-finding hearing were held *before* adjourning in contemplation of dismissal the whole purpose of the new law would be compromised. As was mentioned earlier, the purpose of the law is to eliminate the time-consuming and stigmatizing effects of an adjudicatory hearing. It must also be remembered that the respondent parent has, in the first instance, the choice of whether to agree to the adjournment process or to proceed to the adjudicatory state (Subsection (a)). Another factor to consider is the risk the petitioner takes in agreeing to an adjournment in terms of the loss of witnesses and other presently available evidence. During an adjournment period the petitioner's witnesses may disappear or have a lapse of memory. Other necessary evidence may become stale.

On a more practical level, it is unlikely that the petitioner would agree to the adjournment route unless it had confidence that the particular respondent parent was a likely candidate for assistance without the necessity of adjudication.

It is also possible for the court to use the occasion of the hearing mentioned in Subsection (e) to give the respondent parent a last warning before ruling that circumstances of neglect exist. The author believes that this could provide an additional opportunity to perhaps avoid the due process question mentioned earlier.

It should be pointed out at this time that this law has provided a means whereby the child protective services agency is mandated to account for its stewardship.

Subsection (d) provides that:

> Upon application of the respondent, or upon the court's own motion, made at any time during the duration of the order, if the child protective agency has failed substantially to provide the respondent with adequate supervision or to observe the terms and conditions of the order, the court may direct the child protective agency to observe such terms and conditions and provide adequate supervision or may make any order authorized pursuant to section two hundred fifty-five this act.

This section provides that if the child protective service agency does not provide the respondent parent with "adequate supervision" or fails substantially to observe the terms and conditions of the order, the respondent or the court itself may initiate a Show Cause proceeding.

One of the important elements in Subsection (d) is the reference to Section 255 of the Family Court Act. That section states:

> It is hereby made the duty of and the family court or a judge thereof may order, any state, county and municipal officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act. It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act. The court is authorized to seek the cooperation of, and may use, within its authorized appropriation therefor, the services of all societies or organizations, public or private, having for their object the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.

One court that interpreted this section said, after reviewing the legislative history of the law, that Section 255 "was designed as a specific remedy to enable the Court to cut through the bureaucracy, fragmentation and

lack of coordination which so inhibits the provision of services for families and children before the Court."[2]

The legislature has shown, by its reference to Section 255 that its intention is to provide a means for respondent parents to be provided the kind of services needed to overcome whatever present obstacles they have to proper child rearing.

We have seen that this law provides for an adjournment period during which the parties to the action may attempt to avoid the adjudicatory phase and be given an opportunity to have the petition dismissed. To understand the time frame during which this opportunity is afforded we must examine Subsection (b) which states:

> An adjournment in contemplation of dismissal is an adjournment of the proceeding for a period not to exceed one year with a view to ultimate dismissal of the petition in furtherance of justice. Upon the consent of the petitioner, the respondent and the child's attorney or law guardian, the court may issue an order extending such period for such time and upon such conditions as may be agreeable to the parties.

The next issue to be considered is what the adjournment order entails. Subsection (c) states:

> Such an order may include terms and conditions agreeable to the parties and to the court, provided that such terms and conditions shall include a requirement that the child and the respondent be under the supervision of a child protective agency during the adjournment period. Such agency shall report to the court in such manner at such times as the court may direct.

Under this subsection the parties to the action are given an opportunity to agree on a plan to help the parents and to unite the family. Let us take a moment to discuss this subsection because in this writer's opinion it holds the key to the success of an "adjournment in contemplation of dismissal." This author believes that the intention of the legislature is that the adjournment order be, in effect, in the nature of a written contract between all the parties stating very clearly what each party is expected to do to fulfill its obligations towards effecting rehabilitation of the family.

In the case of the social services agency their attorney should consult with them before agreeing to any particular treatment plan. The agency attorney must understand his role in this setting. He serves, in effect, as the spokesman of the agency and should not overstate the ability of the agency to perform the services agreed upon. Because the agency will be held accountable for that which they agree to provide, the nature of services to the family the agreement should be realistic and should be performed.

In the instance of the attorney for the natural parents, he must make sure that his clients understand their obligations under the agreement and their ability to perform. They must also understand the penalty for nonperformance and the effect it will have on their attempt to keep the child with them. The attorney also must attempt to have the social services agency provide the most useful services to the family, and then he must be prepared to hold the agency accountable under the agreement if they fail substantially to provide the agreed upon services.

In the case of the attorney for the child, this writer finds a real weakness in the law in that Subsection (d) does not have a mechanism for the child's attorney (or law guardian) to hold the social services agency accountable for failure to provide agreed—upon services to the respondent (parents). As many of us know, who have represented children, often times even when rehabilitative services are not being provided by the social services agency the parents (or their attorney) are reluctant to complain or are not interested enough to complain. In other words, they either are afraid of the system or are willing to leave well enough alone. The child's attorney must be an advocate who serves as the fulcrum of the agreement between all the parties. He must, in effect, keep both the social services agency and the parents honest by insisting that the agency actually provide the agreed upon services and that the parents avail themselves of these services so as to bring about as quickly as possible a situation which will allow the petition to be dismissed.

The court, of course, has its role to play in the treatment plan. The court must insist upon strict accountability on the part of all parties. It must not lend its imprimatur to an unrealistic treatment plan nor to a plan that will result in no appreciable change in the family circumstances even if successful.

The New York law providing for a legal mechanism in attempting to bring accountability into the child welfare law is a step in the right direction and should be enacted by state legislatures in the same way and with the same speed as the model child abuse reporting laws were enacted in the 1960s.

FOONOTES

1 *The Children of the State I: A Time for Change in Child Care* (Preliminary Report of the Temporary State Commission on Child Welfare, May 1975): 58.

2 76 Misc. 2d at 785, 351 N.Y.S. 2d at 606.

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C. Court Procedures When Accepting Settlements

(See Standards Relating to Abuse and Neglect No. 5.3A, in Section IV. A.)

Gerald Eaton, ***A Manual for Neglect Proceedings in New Hampshire District and Municipal Courts*** **(New Hampshire Task Force on Child Abuse, n.d.), 40-41.**

The final hearing should be conducted in an informal manner. It is at this time when the court's therapeutic role should be exercised to the fullest extent. The judge should fashion the plan of improvement and work out all the details. If the parties have made a settlement and submitted a consent decree, the court should make sure that the parents do agree to the plan and that the plan is reasonably fashioned so that it will work. For example, under a consent decree or a plan devised by the court the parents may be required to visit their child every two weeks. The court should ask the parents if they can arrange transportation. If they cannot, the court may ask

the case worker if the Division of Welfare can provide transportation. If this is agreeable the court should make even such a minute detail part of the written plan for the family.

Such a precaution will avoid problems later. For instance, at a later hearing the petitioner may charge that the parents have not visited their child in the foster home. The parents may not have a car, and they may say that it was the Division's responsibility to provide transportation. It will be impossible for the court or the parties to remember up to a year later whose responsibility it was to provide transportation for visitation unless such details are worked out at the final hearing and the agreement is recorded in a detailed written plan which remains part of the official record of the case.

New Mexico Children's Court Rules 47, 32, and 33.

Rule 47. Consent decrees.

(a) *When entered.* At any time after a petition alleging neglect has been filed, the respondent may admit sufficient facts to invoke the jurisdiction of the court by entering into a consent decree.

(b) *Definition.* The consent decree in a neglect proceeding is an order of the court which suspends the proceedings on the petition and in which under terms and conditions negotiated with the department:

(1) the parties agree that legal custody of the alleged neglected child will be transferred to the department for a period not to exceed 6 months from the date of the consent decree; or

(2) the parties agree that the alleged neglected child will remain with the respondent or other person and that the respondent will be under supervision of the department for a period not to exceed 6 months.

(c) *Advice to respondent.* The court shall not approve a consent decree without assuring that the decree is voluntary and has a factual basis in accordance with Rule 32.

(d) *Extension, termination.* Consent decrees may be extended by the department and terminated in accordance with Rule 33.

Rule 32. Admissions and consent decrees.

(a) *When entered.* At any time after the petition alleging delinquency or need of supervision has been filed and before the entry of judgment, the respondent may admit the factual allegations of the petition or may admit sufficient facts to invoke the jurisdiction of the court by entering into a consent decree.

(b) *Definition of consent decree.* A consent decree is an order of the court which suspends the proceedings on any petition and places the respondent under supervision in his own home or in the home of another person for a period not to exceed 6 months, under terms and conditions negotiated with probation services and agreed to by the parties.

(c) *Advice to respondent.* The court shall not accept an admission or approve a consent decree without first, by addressing the respondent personally in open court, determining whether:

(1) he understands the nature of the charge against him;

(2) he understands the dispositions the court may make for the offense;

(3) he understands that he has the right to deny the allegations;

(4) he understands that if he makes an admission or agrees to the entry of the consent decree there will be no further adjudicatory hearing of any kind on the allegations of the petition; and

(5) the admission or consent decree is voluntary and not the result of force or threats or of promises apart from the consent decree agreement.

(d) *Determining accuracy of admission or consent decree.* Notwithstanding the acceptance of an admission or approval of a consent decree, the court shall not enter a judgment upon such admission or consent decree without making such inquiry as shall satisfy it that there is a factual basis for the admission or consent decree.

(e) *Acceptance of consent decree.* If the court accepts a consent decree, the court shall approve the disposition provided for in the consent decree or another disposition more favorable to the respondent than that provided for in the consent decree. If the court rejects the terms and conditions in the consent decree, the decree shall be null and void.

(f) *Inadmissibility of discussions.* Evidence of agreement to a consent decree, later withdrawn, or of statements made in connection with the agreement to a consent decree is not admissible in any proceeding against the respondent.

(g) *Time limits.* If the respondent is in detention, the court shall advise the respondent, insure that the admission or consent decree is voluntary and accept or reject the admission or consent decree within 5 days after the admission is made or within 5 days after a consent decree has been submitted to the court for its approval.

Rule 33. Extension, revocation or termination of consent decree.

(a) *Extension.* The children's court attorney may move the court for an order extending the original consent decree for a period not to exceed 6 months from the expiration of the original decree. The motion for extension shall be filed prior to the expiration of the original decree. If the respondent objects to the extension, the court shall hold a hearing to determine if the extension is in the best interests of the respondent and the public.

(b) *Revocation of consent decree.* If, prior to the expiration of the consent decree, the respondent allegedly fails to fulfill the terms of the decree, the children's court attorney may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same manner as proceedings on petitions to revoke probation. If the respondent is found to have violated the terms of the consent decree, the court may:

(1) extend the period of the consent decree; or

(2) make any other disposition which would have been appropriate in the original proceeding.

(c) *Termination.* The original petition shall be dis-

missed with prejudice if the respondent completes the period under the consent decree and any extention thereof without a petition to revoke the decree being filed and the state shall not again proceed against the respondent for the same offense alleged in the original petition or for an offense based upon the same conduct alleged in the original petition.

California Juvenile Court Rules, Chapter 7, Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300, Rule 1364.

Rule 1364. Commencement of hearing—advice of trial rights; admission of allegations

(a) [Trial rights explained (§ 341; cf. §§ 349, 702.5)] After giving the advice required by rule 1353, the court shall next advise the parent or guardian of each of the following rights:

(1) The right to a trial by the court on the issues raised by the petition;

(2) The right to assert the privilege against self-incrimination;

(3) The right to confront, and to cross-examine, all witnesses that may be called to testify against the parent or guardian;

(4) The right to use the process of the court to compel the parent or guardian;

(5) The right to use the process of the court to compel the attendance of witnesses on behalf of the parent or guardian.

(b) [Admission of allegations; prerequisites to acceptance] The court shall then inquire whether the parent or guardian intends to admit or deny the truth of the allegations of the petition. If the parent or guardian neither admits nor denies the truth of the allegations, the court shall indicate for the record that the parent or guardian does not admit the truth of the allegations. Before accepting an admission that the allegations of the petition are true, the court should satisfy itself that the parent or guardian understands the trial rights enumerated in subdivision (a), and that the parent or guardian is admitting the petition because that person did in fact commit the acts alleged.

(c) [Parent or guardian must admit] An admission by the parent or guardian shall be made personally by the parent or guardian.

(d) [Findings by court (§ 356)] If the court is satisfied that the admission should be received, the court shall then ask whether the parent or guardian admits or denies the truth of the allegations in the petition. Upon admission, the court shall make findings as to each of the following, noted in the minutes of the court:

(1) That notice has been given as required by law;

(2) The birthdate and county of residence of the minor;

(3) That the parent or guardian has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross-examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian's behalf;

(4) That the parent or guardian understands the nature of the conduct alleged in the petition and the possible consequences of an admission;

(5) That the admission by the parent or guardian is freely and voluntarily made;

(6) That there is a factual basis for the parent or guardian's admission;

(7) That those allegations of the petition as admitted are true as alleged; and

(8) That the minor is a person described by either subdivision (a), (b), (c), or (d) of section 300 of the Welfare and Institutions Code.

(e) [No contest] In lieu of admitting the allegations of the petition, the parent or guardian may enter no contest concerning the truth of the allegations, subject to the approval of the court. For purposes of these rules, the procedure for and legal effect of an entry of no contest shall be the same as that of an admission, but the entry of no contest may not be used against the parent or guardian as an admission in any other action or proceeding.

Judge Homer B. Thompson, *California Juvenile Court Deskbook*, 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 8, Jurisdiction Hearing, Part II, Cases Petitioned Under Section 300, Section 8.57. Reprinted with Permission.

C. [§8.57] Oral Form: Conduct of Jurisdiction Hearing in § 300 Cases in Which Parents Are Unrepresented by Counsel and Admit the Petition

(All parties enter and sit down.)

(Probation officer introduces the parties to the court.)

(Court considers any motion to continue or other preliminary matter.)

COURT: Mr. Clerk, please read the petition and swear all persons who may wish to speak during these proceedings.

(Clerk reads the petition and swears all parties.)

COURT OR PROBATION OFFICER: Does each of you understand the petition just read, or do you have any questions about it that you would like the court to answer?

COURT: As you are aware, this is what we call a jurisdiction hearing. The purpose of the hearing is to decide whether the facts set forth in the petition just read to you are true. If the court finds they are not true, it will dismiss the case. If the court finds they are true, then it will hold a disposition hearing. The purpose of a disposition hearing is to decide what action the court should take in view of what has happened.

COURT: The court observes that you are not represented by an attorney. The court would like to explain to you that you have a right to be represented by an attorney during this jurisdiction hearing and all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so. If you want an attorney, but feel you cannot afford one, the court will refer you to the local legal aid office. If you

qualify for such assistance, legal aid will provide you with an attorney at no expense to you. This is a serious and important matter. If the court should find that the facts set forth in the petition are true, the possible consequences could be the removal of your child from your custody, and placement in a relative's home, a foster home, or a private institution. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right, and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

COURT: The court now finds that the parents have intelligently waived their right to counsel at this hearing.

COURT: You have certain additional rights at this hearing. These are:

1. The right to a trial by the court to decide whether the facts set forth in the petition are true;
2. The right to see and hear all witnesses who may be called to testify against you;
3. The right to cross-examine (that means ask questions of) any witness who may testify at this hearing; and
4. The right to compel the attendance at this hearing of any witnesses you may want to testify on your behalf.

COURT: You have heard the petition read by the clerk. Are the facts set forth in the petition true?

COURT: Based on the admission by the parents that the facts set forth in the petition are true, the court now finds that the allegations of the petition filed on [date] are true as alleged, and that [name] is found to come within the provisions and description of § 300 of the juvenile court law.

COURT: This completes the jurisdiction hearing.

(If the disposition hearing is to be continued to another date, the court should: (1) order the continuance; (2) advise the probation officer of any specific information sought; (3) order continued protective custody, other placement by agreement with the parents, or release of the minor; and (4) ask the parents whether they have any questions about the court's order or what they are expected to do.)

COURT: (If the court is going to proceed with a disposition hearing at this time.) This brings us to the second portion of these proceedings, called a disposition hearing, during which the court must decide what action, if any, to take in view of the fact that the court has found that the facts in the petition are true.

Florida Rules of Juvenile Procedure, Rule 8.130(a) (2), (3), (5) and (7).

Rule 8.130. Responsive Pleadings and Motions

(a) Pleas. No written answer to the petition, nor any other pleading need be filed.

(2) In dependency proceedings, the parent, custodian, or any other party charged with the abuse or neglect may at any hearing after the filing of the petition admit, deny, or enter a plea of nolo contendere to the allegations of the petition. The court may refuse to accept a plea of admission or nolo contendere and shall not accept either plea without first determining that the plea is made voluntarily and with a full understanding of the nature of the allegations and the possible consequences of such plea and that there is factual basis for such plea.

(3) Prior to the beginning of the adjudicatory hearing, the child or his counsel, the parent(s) or custodian(s) or their counsel, or an authorized agent of the Department of Health and Rehabilitative Services on behalf of the child may submit, in lieu of a plea, a plan of proposed treatment, training, or conduct. The appropriate agencies of the Department of Health and Rehabilitative Services shall be the supervising agencies for said plan and the terms and conditions of all such plans shall be formulated in conjunction with the supervising agency involved. The submission of a plan is not an admission of delinquency, ungovernability, or dependency.

If such a plan is submitted the procedure shall be as follows:

(i) The plan must be in writing, agreed to and signed in all cases by the parent(s) or custodian(s) and their counsel, when represented. In delinquency and ungovernability cases, the plan must also be agreed to and signed by the child and his counsel, when represented. An authorized agent of the supervising agency involved shall indicate whether the agency recommends the acceptance of the plan.

(ii) The plan shall contain a stipulation that the speedy trial rule is waived and in delinquency cases, shall include the state attorney's consent to defer the prosecution of the petition.

(iii) After hearing, which may be waived by stipulation of the parties and the supervising agency, the court may accept the plan and order compliance therewith, or may reject it.

(iv) Violations of the conditions of the plan shall be presented to the court by motion by the supervising agency or by any party. If the court, after hearing, finds a violation has occurred, it may take such action as is appropriate to enforce the plan, modify the plan by supplemental agreement, or it may set the case for hearing on the original petiton.

(v) the plan shall be effective for an indeterminate period, or for such period as is stated therein, or until the petition is dismissed.

(vi) Unless otherwise dismissed, the petiton may be dismissed on the motion of the person submitting the plan or the supervising agency, after notice of hearing and a finding of substantial compliance with the provisions and intent of the plan.

(5) In dependency cases a written answer admitting or denying the allegations of the petition may be filed by a parent or custodian or by his counsel. If the answer admits the allegations of the petition it shall include consent to a predispositional study. Upon the filing of such an answer, a hearing for adjudication or adjudication and disposition shall be set at the earliest practicable time.

(7) The court may at any time prior to the beginning of a disposition hearing permit a plea of guilty or an admission of the allegations of the petition to be withdrawn,

and if an adjudication has been entered thereon, set aside such adjudication and allow another plea to be substituted for the plea of guilty or the admission of the allegations of the petition. In the subsequent adjudicatory hearing the court shall not consider the plea which was withdrawn as an admission.

Section XII.

Court-Ordered Home Supervision

Involuntary home supervision in abuse and neglect cases is a controversial issue. This section evaluates the merits of court-ordered home supervision as an alternative disposition to removing the child from home. A topic of practical importance to judges is the range of services available when home supervision is ordered. The concluding topic is the court's role when home supervision is ordered, especially reviewing or modifying home supervision in individual cases.

A. Value of Court-Ordered Home Supervision

1. Court-ordered, involuntary home supervision can occur either after a settlement by the parties or after adjudicatory and disposition hearings.

2. There is considerable debate about whether courts should assume jurisdiction to order home-supervision.

Arguments against involuntary home supervision include:

A. it interferes with the family's rights to privacy,

B. it stigmatizes the parent as a child abuser or neglecter,

C. services voluntarily requested by parents are more likely to be effective than involuntary services, and

D. involuntary services constitute a drain on child protective agency resources, lessening its ability to provide voluntary services.

Arguments for involuntary home supervision (as opposed to no intervention) include:

A. a court order may stimulate parents to realize that a problem exists,

B. parents may in fact desire intervention but be reluctant to request it, or even admit the desire for it,

C. supervision and child protective services, if sufficiently intensive, can help families and can reduce the chance of further harm to the child, while maintaining the family unit, and

D. the court can order the child protective agency to perform services that would not otherwise be given, and

E. a new Federal Law, the *Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272)*, indicates a policy preference for use of "preventive services" to avoid placing children out of their own homes; states should be receiving increased federal funding to help finance such services.

3. The major benefit of home supervision over placement of the child is that it is in accord with the presumption that the child should remain with his/her parents.

Further arguments are that home supervision relieves overburdened foster care systems, causes less stigma to the parents and trauma to the child, and is more likely to permit treatment of the whole family.

On the other hand, home supervision may not provide adequate protection for the child, especially where child protective agencies are understaffed.

B. Types of Services Available in Home Supervision

1. There are many types of services possible when home supervision is ordered. Many services may not be available in a particular jurisdiction. Services are often classified as "soft" or "hard" according to the amount of coercion and interference with the family involved. "Soft" services are the least restrictive alternatives.

"Soft" services include counseling, homemaker support, foster grandparents, voluntary day care, legal assistance, financial assistance, and health care for parents or child.

"Hard" services include involuntary day care, mental health services, casework services, social worker supervision, and periodic medical examinations of the child.

C. Role of the Court When Home Supervision is Ordered

1. An important issue is whether the court should rely on the child protective agency to determine the adequacy of services and mode of supervision.

The agency presumably has better knowledge of the alternatives available, but it may not wish to commit itself to providing services for budgetary reasons.

The court may modify the agency's suggested home supervision plan by:

A. ordering the agency to perform certain tasks or to provide specific services (e.g., specifying the frequency of social worker visits with the parents and/or child),

B. insisting on a detailed statement of services and parent's obligations,

C. hearing objections by parents and counsel for parents or the child, and possibly adjusting the plan accordingly, and

D. periodically reviewing the agency's plan for possible *sua sponte* adjustment by the court.

2. Most courts assume no direct responsibility in providing services or supervising the family.

An exception might be the use of court mental health or probation services.

3. The court can monitor home supervision by:

A. requiring periodic reports from the child protective agency,

B. requiring periodic judicial review hearings (these may be required as a condition for continuation of home supervision); dispositional review requirements are also imposed upon the states in the *Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272),*

C. holding judicial review hearings at the request of a party, and

D. possibly using court probation staff to monitor the child protective agency's services and supervision.

4. If the court wishes to take responsibility for monitoring home supervision, one option is to place the child in the legal custody of the court, while physical custody remains with the parent(s).

Support Readings

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A. Value of Court-Ordered Home Supervision

Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 1.1-1.6, 2.1. 2.2, 6.3-6.5, & 7.1-7.4. Reprinted with Permission.

Part I: General Principles

1.1 Family autonomy.

Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a child is suffering specific harms as defined in Standard 2.1. Active state involvement in child care or extensive monitoring of each child's development should be available only on a truly voluntary basis except in situations described by these standards.

COMMENTARY

This section specifies the basic value preference underlying the proposed standards, that childrearing should be left to the discretion of parents unless they fail to protect a child from certain harms, specified by statute. This preference is consistent not only with our historic policy of giving substantial deference to parental decision making with regard to childrearing, but also with the great majority of statutory enactments and judicial decisions in this country. See, *e.g.,* Mass. Gen. Law, ch. 119, S1 (1969); *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

Coercive state intervention should be limited for a number of reasons. Our political commitments to individual freedom and privacy, diversity of views and lifestyles, and free exercise of religious beliefs are all promoted by allowing families to raise children in a wide variety of living situations and diverse childrearing patterns. Extensive intervention carries a substantial risk of intervening to "save" children of poor parents and/or minority cultures.

Moreover, a presumption in favor of parental autonomy comports with our limited knowledge regarding childrearing and ways to effect long-term change in a given child's development. See I. S. White, *Federal Programs for Young Children: Review and Recommendations* 130-367 (1973); J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* 51-52 (1973). We have not agreed upon values about the "proper" way to raise a child. The best we can do is establish certain basic harms from which all children should be protected.

In addition, there is substantial evidence that, except in cases involving very seriously harmed children, we are unable to improve a child's situation through coercive intervention. See, *e.g.,* G. Brown, *The Multi-Problem Dilemma: A Social Research Demonstration with Multi-Problem Families* (1968). In fact intervention may worsen the child's situation. See commentary to Standard 1.3, *infra.*

Adopting this preference does not mean that children will be left unprotected. The standards proposed herein define a level of minimum care that a parent must provide. Moreover, Standard 1.1 stipulates that a variety of child care services should be available to families on a genuinely voluntary basis. There is much that can and should be done to better the situation of children and families, without coercive intervention.

1.2 Purpose of intervention.

Coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer.

COMMENTARY

This standard specifies that the statutory definition of endangerment should be drafted in terms of specific harms from which children are to be protected, rather than in terms of parental conduct.

It is generally accepted that the purpose of intervention is to protect children from harm, not to punish parents for "undesirable" conduct or home conditions unrelated to the child's well-being. See Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," in M. Rosenheim, *Justice for Child* (1962). However, most state statutes define the grounds for intervention in terms of parental behavior or home conditions without requiring any showing that the child is being harmed by the behavior of the parent or conditions in the home. The statutes appear to assume that we can tell whether a child is endangered, and intervention is appropriate, solely on the basis of parental conduct.

This assumption is contrary to the available social science evidence which indicates that it is very difficult or impossible to correlate parental behavior to specific detriment to the child, especially if one is trying to predict long-term harm to the child's development. See, *e.g.,* J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* 51-52 (1973). Studies have amply demonstrated that even our most sophisticated techniques of predicting long-range harm to children on the basis of particular parental behavior are woefully inade-

quate. Summarizing the findings of his recently completed comprehensive review of existing studies, Harvard psychologist Sheldon White states:

> Neither theory nor research has specified the exact mechanisms by which a child's development and his family functioning are linked. While speculation abounds, there is little agreement about how these family functions produce variations in measures of health, learning and affect. Nor do we know the relative importance of internal (individual and family) versus external (social and economic) factors. White, *Federal Programs for Young Children: Review and Recommendations* 240 (1973).

Since prediction is so difficult, the danger of overintervention, i.e., intervention harmful to the child (see commentary to Standard 1.3), is increased by focusing solely on parental behavior. Moreover, there is substantial evidence that intervention often occurs in situations where there is no demonstrable harm to the child and no strong likelihood of harm occurring. A review of appellate cases indicates that courts still intervene, and even remove children from their homes, because they disapprove of the parent's lifestyles or childrearing practices. See, *e.g., In re Raya,* 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967) (parents not legally married); *In re Yardley,* 260 Iowa 259, 149 N.W.2d 162 (1967) (mother "frequented taverns"); *In re Anonymous,* 37 Misc. 2d 411, 238 N.Y.2d 422 (Fam. Ct. 1962) (mother had men visitors overnight); *In re Watson,* 95 N.Y.S.2d 798 (Dom. Rel. Ct. 1950) (parent adhered to "extreme" religious practices); *In re Cager,* 251 Md. 473, 248 A.2d 384 (1968) (parent was the mother of an illegitimate child). None of these cases contained evidence of harm to the children. Such intervention often harms rather than protects children. see J. Bowlby, *Child Care and the Growth of Love* 85 (1965).

If the purpose of intervention is to protect children from specific harms, the most reliable way of insuring that intervention takes place only when appropriate is to define the basis for intervention in terms of those harms we wish to prevent. See Standard 2.1.

1.3 Statutory guidelines.

The statutory grounds for coercive intervention on behalf of endangered children:

A. should be defined as specifically as possible;

B. should authorize intervention only where the child is suffering, or there is a substantial likelihood that the child will imminently suffer serious harm;

C. should permit coercive intervention only for categories of harm where intervention will, in most cases, do more good than harm.

COMMENTARY

These principles are closely related to the judgment that the grounds for intervention should be defined in terms of specific harms to the child. Together they establish the basic value premises and set forth a general philosophy regarding the appropriate scope of coercive intervention.

These standards provide that the grounds for intervention be defined specifically and that intervention be permissible only in cases of serious harm. Moreover, in determining whether intervention should be permissible for any given harm, the legislature should determine that, in general, coercive intervention on this basis will benefit more children than it will harm.

For purposes of this standard, "substantial likelihood" means real and considerable probability; "imminently" means that the harm will occur within days or weeks, not months or years. The specific harms justifying intervention are contained in Standard 2.1 *infra.*

Vagueness. At present, all state statutes define the grounds for intervention in extremely broad and vague language. Typically, they permit intervention whenever the child is in an "unsuitable" home or when a parent fails to provide for the child's physical," "mental," or "medical" needs. See, *e.g.,* Cal. Welf. & Inst'ns. Code § 600 (West 1972).

It is claimed that vague laws are necessary because the types of "neglectful" behavior vary widely and broad statutes enable judges to examine each situation on its own facts. See, *e.g.,* S. Katz, *When Parents Fail* 64 (1971); Gill, "The Legal Nature of Neglect" 6 *N.P.P.A: J.* 1, 5-6 (1960). It is assumed that judges, without legislative guidance, will make appropriate decisions on a case-by-case basis.

The present resort to vague, general statutes is unacceptable for a number of reasons. Most importantly, by failing to identify the specific harms which justify intervention, such laws increase the likelihood that decisions will be made to intervene in situations where the child will be harmed by intervention. It has become increasingly clear in recent years that coercive intervention can be harmful to children as well as helpful. See J. Bowlby, *Child Care and the Growth of Love* (1965); Mnookin, "Foster Care: In Whose Best interest," 43 *Harv. Ed. Rev.* 599 (1973); Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 *Geo. L. Rev.* 887 (1975). This is especially true when intervention leads to removal of the child from the home. See H. Stone, *Foster Care in Question* (1970). See commentary to Standard 6.5 B. below. Therefore, it is necessary to provide specific guidelines to courts and social work agencies regarding those types of harms which justify intervention and that define the situations in which intervention is likely to be beneficial to the child.

Moreover, vague laws facilitate arbitrary and even discriminatory intervention. Unless the bases for intervention are clearly defined, each social worker and judge can make his/her own value judgments about those harms which justify intervention. There is substantial evidence that such decisions sometimes involve imposing middle class values upon poor families without taking into account different cultural patterns of child rearing. Vague laws also result in unequal treatment of similarly situated persons. Again, it must be recognized that such arbitrary intervention not only is violative of basic values in our society, it may also be quite harmful to the children who are being "protected."

In addition, specific legislative definition of the grounds for intervention should compel courts to specify in each

case the harm being prevented by intervention. This should increase the chances of appropriate dispositions in each case. Making sound decisions about the appropriate dispositions, even in a case where intervention is justified, requires weighing the harms to be prevented or alleviated against the harms likely to result from that disposition. See standards 6.1-6.4 and commentary *infra*. This cannot be done where the harms to be prevented are not specified, as often happens under vague statutes. Unless the basis for intervention is specifically noted by the court, it is impossible for the decisionmaker or others to later evaluate the efficacy of such intervention, since the appropriate criteria to measure success or failure are unknown.

Finally, all intervention involves value judgments about appropriate childrearing practices and value choices about where and how a child should grow up. Considering the seriousness of the decision to intervene, intervention should be permissible only where there is a clear-cut decision, openly and deliberately made by responsible political bodies, that that type of harm involved justifies intervention. Such value judgments should not be left to the individual tastes of hundreds of nonaccountable decisionmakers.

Seriousness of Harm. Merely defining harm specifically will not insure appropriate intervention, however. A ground for intervention might be stated quite specifically, yet intervention may not be beneficial to most children. This standard reflects the judgment that coercive intervention is not appropriate merely because a child is being "harmed," regardless of the nature of the harm. It is further a rejection of the claim that the goal of state intervention should be to protect a child from a home environment which is not "optimal" for the child. Instead it calls for a statutory definition which limits intervention to situations involving "serious" harm. Basically these are defined as situations where a child is suffering or is likely to imminently suffer severe physical or emotional damage. See Standard 2.1 *infra*.

There are a number of reasons for limiting intervention to situations involving actual or potential serious harm to children. First, this limitation is consistent with the presumption of family autonomy stated in Standard 1.1. State intervention necessarily interferes with family autonomy, often to the extent of removing a child from the family. Given the magnitude of the intrusion, it should be resorted to only in cases where the child is likely to be seriously harmed absent intervention.

It cannot be assumed, moreover, that coercive intervention is generally desirable. This is especially true if intervention leads to removal of a child from his/her home. There is substantial evidence that continuity of relationships is extremely important to children. See J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* 31-34 (1973). Removing a child from his/her family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent. *Id.* at 19-20; J. Bowlby, *Child Care and the Growth of Love* 13-30 (2d ed. 1965). Moreover, we often lack the ability to insure that a child is placed in a setting superior to his/her own home. The shortcomings of foster care are now well documented. See Mnookin, "Foster Care: In Whose Best Interest," 43 *Harv. Ed. Rev.* 599 (1973); Maluccio, "Foster Family Care Revisited: Problems and Prospects," 31 *Public Welfare* 12 (1973); H. Stone, *Foster Care in Question* (1970).

Coercive action not involving removal may also be emotionally disruptive and prove harmful to the child. The presence of "outsiders" can prove threatening to the parent-child relationship. See, *e.g.*, J. Goldstein, A. Freud and A. Solnit, *supra* at 52; J. Handler, *The Coercive Social Worker* (1973). Moreover there is evidence that, except in cases involving very seriously harmed children, we are unable to improve a child's situation through coercive state intervention See, *e.g.* White, *Federal Programs for Young Children: Review and Recommendations* 238-287 (1973); *Fishcer, "Is Casework Effective? A Review," Social Work 5* (January 1973). This is particularly true in cases involving unwilling clients. See, *e.g.* G. Brown, *The Multi-Problem Dilemma: A Social Research Demonstration with Multi-Problem Families* (1968). In part this is due to factors such as inadequate resources. poorly trained personnel, and high turnover among caseworkers. See Levine, "Caveat Parens: A Demystification of the Child Protection System," 35 *U. Pitt. L. Rev.* 1, 13-15 (1973); Paulsen, "Juvenile Courts, Family Courts and the Poor Man," 54 *Cal. L. Rev.* 694, 710-711 (1966). Moreover, it must be recognized that to a large degree we face a problem of lack of knowledge as well as lack of funds.

Therefore, it is preferable to utilize coercive intervention cautiously. By limiting intervention to situations where the harm is serious, we can assume that intervention will generally do more good than harm. Furthermore, this limitation would result in a more rational use of our limited resources, by channeling the finite resources available for helping children to those children in the most danger. It is tempting to intervene more broadly, since many children and families could use more services such as day care or homemakers. Additional services clearly should be available on a voluntary basis. However, services forced upon families are less effective and more likely to harm, rather than help, children.

Finally, limiting coercive intervention to situations where there is serious harm minimizes the danger of imposing middle class values on all families and ignoring cultural differences in childrearing.

Imminence of Harm. The standard also provides that intervention should be limited to situations where the harm has already occurred or where there is a substantial likelihood of its imminent occurence. Intervention based on prediction of future harm should not be permissible.

This standard does not reject the value of state policies designed to prevent neglect and abuse or to respond when neglect or abuse has occurred. However, because our limited knowledge of childrearing practices and child development renders predictions of future harm a very difficult endeavor, coercive intervention should be restricted to situations where harm has occurred or is imminent. See J. Goldstein, A. Freud and A. Solnit, *supra* at 49-52; White, *supra* at 130-260. "In the absence of scientific certainty it must be borne in mind that the

farther back from the point of imminent danger the law draws the safety line of police regulation, so much greater is the possibility that legislative interference is unwarranted." E. Freud, *Standards of American Legislation* 83 (1917).

This standard does not require waiting until a child has actually been injured, however. If a substantial danger of imminent harm can be demonstrated, intervention would be authorized. Examples of such situations are discussed in the commentary to Standard 2.1 A.-F. *infra*. Again, more social services, available on a voluntary basis, should result in less need for coercive intervention.

1.4 Protecting cultural differences.

Standards for coercive intervention should take into account cultural differences in childrearing. All decisionmakers should examine the child's needs in light of the child's cultural background and values.

COMMENTARY

This standard further develops the value premise established in Standard 1.1 *supra*. Given the cultural pluralism and diversity of childrearing practices in our society, it is essential that any system authorizing coercive state involvement in childrearing fully take those differences into account. Moreover, failure to recognize that children can develop adequately in a range of environments and with different types of parenting may lead to intervention that disturbs a healthful situation for the child.

Thus, for example, in some cultures a major role in childrearing may be assumed by adults other than the natural parent. Sometimes this care will be provided by relatives; in other situations it may be provided by adults living in the same building or block as the parents, although there is no blood relationship involved. Where such adults are providing care intervention would not be justified, even though the parent's care of the child is inadequate in some respects.

Moreover, this standard requires that a child's need for cultural identity and continuity of cultural heritage be recognized whenever intervention is necessary. Every effort should be made to preserve such continuities if a child must be removed from the home or when a family is required to accept casework supervision.

1.5 Child's interests paramount.

State intervention should promote family autonomy and strengthen family life whenever possible. However, in cases where a child's needs, as defined in these standards conflict with his/her parents' interests, the child's needs should have priority.

COMMENTARY

This standard states that the goal of intervention, when it is necessary, should be to preserve families and to strengthen family life. However, when situations arise in which the needs of the child cannot be protected in a manner acceptable to the parents, or when a child cannot be protected while remaining with the parents, this standard provides that the child's needs be given priority.

The goal of preserving families is the prevailing ethic in social work literature, judicial decisions, and legislation. However, in many, if not all states, the child welfare system often contributes to breaking up, rather than preserving family units. Considerably more money is spent at the state and local level on services provided to children removed from their homes than on services providing support to keep families intact. Under these standards every state and agency policy, including financial policy, would be evaluated in terms of its impact on preserving and strengthening families.

Preservation of parental autonomy, or even of family units, is not always possible however. A fundamental tenet of these standards is that the child's needs receive priority. We should protect the child because he/she is a helpless party who needs state protection from a situation being created by his/her parents. Although the parents may not be in any sense morally blameworthy, they should suffer the consequences of their inadequacy rather than the child. Moreover, as Goldstein, Freud and Solnit state, by protecting a child from physical and/or emotional damage, we are increasing the probability that he/she will become an adequate parent. While it is extremely difficult to make predictions in individual cases, clearly many people demonstrate the same inadequacies as parents that their own parents displayed. For example, many abusing parents were abused children. By adopting policies that favor the child's needs, we may be helping future, as well as present, generations of children.

1.6 Continuity and stability.

When state intervention is necessary, the entire system of intervention should be designed to promote a child's need for a continuous, stable living environment.

COMMENTARY

Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments. See, *e.g.*, J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973); J. Bowlby, *Attachment and Loss*, Vol. II *Separation* (1973); M. Rutter, *Maternal Deprivation Reassessed* (1972). Because of the importance of continuity and stability to children, preservation of ongoing relationships should be a major goal of the intervention system.

The "child neglect system" cannot, of course, remove all sources of discontinuity from children's lives. For example, children will continue to be subjected to discontinuities arising out of divorces, death of parents, and illnesses. However, when coercive intervention is necessary, it should be implemented in a manner that preserves stable and continuous relationships whenever this can be done without further endangering the child. Thus, in light of this principle, we should be reluctant to remove children from homes where they have stable relationships. See Standard 6.4 C. *infra*. If a child must be removed, maximum effort should be made to maintain the child's contact with his/her parents. See Standards 6.5, 6.6 *infra*. If a child cannot be returned home, the child care system

should provide him/her with another stable environment and not a series of foster homes. See Part VIII *infra*.

Moreover, in considering a child's needs for continuity and stability, it should be recognized that there are many elements to a child's environment: his/her parents, other relatives, parent surrogates, language and culture, ethnic identity. The need for continuity in all these areas should be considered at every decision point.

Part II: Statutory Grounds for Intervention

2.1 Statutory grounds for intervention.

Courts should be authorized to assume jurisdiction in order to condition continued parental custody upon the parents' accepting supervision or to remove a child from his/her home only when a child is endangered in a manner specified in subsection A.-F.

COMMENTARY

This standard specifies that coercive state intervention may occur only if the child is endangered in a manner specified in subsections A.-F. *infra*. Subsections A.-F. are meant to provide a statutory definition of "endangerment," replacing existing laws on neglect and abuse. The fact that a child comes within one of these categories is not sufficient for a finding of jurisdiction, however. The court must also find, pursuant to Standard 2.2 *infra*, that intervention is necessary to protect the child.

The statutory grounds for intervention are critical to the structure of the entire system proposed in this volume. They provide courts with guidelines as to when they may assume jurisdiction over the family. They also inform investigating agencies when they may investigate an allegation that a child is endangered. Thus, they provide specific limits on the nature and extent of coercive state action.

The specific harms justifying intervention are drafted in accordance with the principles discussed in Standards 1.2 and 1.3 *supra*, *i.e.*, the definitions focus on the child and authorize intervention only for serious harms where, in general, the remedy of coercive intervention will be beneficial to the child. Thus, not every type of harm from which we might wish to protect children constitutes a basis for intervention. For example, we might want all children to grow up in a home where they are "loved." Ideally, each home would provide each child the best available opportunity to fulfill his/her potential in society. See D. Gil, *Violence Against Children* 202 (1973).

However, few families provide children with "ideal" environments. If intervention is permissible because parents are not sufficiently affectionate, because a home is dirty, because the parents are providing less stimulation than desirable, or because the parents are thought to be "immoral," as defined by judges and social workers, intervention would be pervasive. Yet there is every reason to believe that intervention to protect children from such "harms," especially if removal is the only alternative, would more often result in harms greater to the child than the "harm" from which he/she is being protected. We have neither the resources nor the knowledge to protect children against all harms. Finally, the broader the grounds for intervention, the greater the possibility of arbitrary or discriminatory intervention.

The proposed grounds focus primarily on the child's physical well-being, although intervention is permitted, in very limited circumstances, where a child is suffering from "emotional" damage. The standards specifically omit language authorizing intervention because the child is living in an "immoral" home environment, an "unsuitable" home, a "dirty" home, or with parents who are "inadequate." All of these terms allow overintervention, often on an arbitrary basis, without any evidence of harm to the child. As previously stated, see commentary to Standard 1.2, the only way to insure that state intervention truly helps children is to focus on them, not on their parents.

There is also no specific provision in the standard allowing intervention where a child is "abandoned." It is assumed that if a child is *truly* abandoned, *i.e.*, there is no adult caring for or willing to continue caring for the child, the child will fall under one of the other categories provided. Thus if a parent is unwilling to care for a child, it is likely that intervention will be justified to protect the child from physical danger. In other situations where there is an adult caring for the child, *e.g.*, when a child is cared for by member of an "extended" family—whether or not there is a blood relationship—intervention is not authorized.

The proposed grounds for intervention reject the positions of those who advocate limiting intervention solely to cases of physical abuse and those who would support intervention whenever a child is "deprive[d] . . . of equal rights and liberties, and/or [denied] optimal development." See D. Gil, *Violence Against Children* 202 (1973). Those advocating the narrower definition claim that we lack the knowledge and resources to protect any but the most seriously abused children, *i.e.*, those who are "battered" by their parents. They believe that intervention in nonphysical abuse cases will likely be done in a discriminatory manner and without helping the child. Therefore, according to proponents of this view, coercive intervention should not be permitted unless the parent has severely and willfully injured the child.

Commentators supporting broad definitions tend to minimize the lack of resources and to focus on the well documented fact that many children grow up in quite undesirable conditions. They argue that it is unrealistic to single out physical abuse when children can be equally damaged in other ways. To some degree these commentators recognize that the problem does not always lie with the parents, but they are willing to use neglect laws in lieu of social programs to help all families.

The proposed grounds for intervention attempt to strike a middle ground, isolating a number of harms which are considered most serious, regardless of whether they are physical or emotional, but not including so many harms, or harms so broadly defined, that we cannot hope to intervene usefully in all the cases that will be brought. Moreover, a number of procedural protections are established to limit the possibility of unwise, arbitrary, or discriminatory intervention. See Parts IV and V *infra*. These procedures, plus the standards limiting removal of

children from their homes, see Standard 6.4 C. *infra,* and providing review mechanisms for all decisions, see Part VII *infra,* should limit the possibility of unwarranted and discriminatory intervention. In seeking a middle ground, inevitably some children will be excluded who need protection, and intervention will occur in some cases where it is unwarranted. However, no system can assure intervention every time it is required, and only when, it is beneficial to a child.

Although each ground for intervention is defined specifically, all of the grounds leave some room for interpretation and expansion. Therefore, it is essential that they be read and administered in light of the central goals established for the entire system, *i.e.,* to recognize family autonomy, to limit intervention to cases where there is substantial reason to believe that intervention is both necessary to protect a child and will in fact benefit the specific child, to preserve family units whenever possible, and to recognize cultural and ethnic differences in childrearing.

It must be kept in mind that each of the grounds *authorizes but does not require a court to intervene.* Moreover, intervention may take many forms, only one of which is removal of the child from the family. The grounds for removal are strictly limited by Standard 6.4 C. *infra.*

2.2 Need for intervention in specific case.

The fact that a child is endangered in a manner specified in Standard 2.1 A-F. should be a necessary but not sufficient condition for a court to intervene. In order to assume jurisdiction, a court should also have to find that intervention is necessary to protect the child from being endangered in the future. This decision should be made in accordance with the standards proposed in Part VI.

COMMENTARY

The purpose of all coercive intervention should be to protect the child from future harm, not to punish parents or to provide ongoing supervision of families where the child is not endangered. A child who has been harmed, or is in imminent danger of being harmed in a manner specified in 2.1, usually will need some type of protection from a state agency in order to insure that the child will not be harmed in the future. However, intervention is not appropriate every time a court finds a child has been harmed in a manner specified by statute.

A court should not order coercive intervention unless such intervention is needed to protect the child from future harm. Moreover, as discussed in Standard 6.4 A. and B. *infra,* the court should not order intervention more extensive than is needed to protect the child from the specific harm justifying intervention.

There are at least three types of situations where intervention would not be appropriate although a finding has been made that the child comes within the provisions of Standard 2.1. First, there may be some cases where the child was injured by a parent, but the evidence indicates there is little danger of future harm. For example, a child may be physically injured by a parent in a moment of anger, but all evidence indicates that this was a one-time event and supervision is unnecessary to protect the child.

Second, coercive intervention may be inappropriate in cases where the parents' and child's situation has changed from the time the court petition was initially filed. For example, a very young child may not have been adequately protected because his/her parent worked and left the child without a caretaker. However, since the filing of the petition, the child has been placed in a day care center and now is adequately protected.

Third, there may be some cases where intervention will place the child in a more detrimental position. For example, in some medical care cases the court may find the proposed medical treatment too risky or the child unwilling to accept the treatment. In sexual abuse cases there may be no resources available for providing counseling to the family, and the child and parents may function best without any state supervision. If the family is dealing with the situation adequately, and there is no basis for concluding that future abuse is likely, intervention should not be ordered.

These categories are not meant to be inclusive. The basic purpose of this standard is to provide a test which requires each decisionmaker to carefully evaluate the need for intervention and to determine whether there are resources available to make intervention useful. All coercive intervention has detrimental, as well as beneficial, aspects. State supervision may be traumatic to the child as well as the parent. It may alter family relations in negative, as well as positive, ways. It is costly. Therefore, it is essential that the costs, as well as the benefits, be weighed on a case by case basis before intervention is ordered.

When intervention is needed, there are a range of intervention strategies. Standards for choosing among these strategies are presented in Part VI *infra.*

6.3 Available dispositions.

A. A court should have at least the following dispositional alternatives and resources:

1. dismissal of the case;
2. wardship with informal supervision;
3. ordering the parent to accept social work supervision;
4. ordering the parent and/or the child to accept individual or family therapy or medical treatment;
5. placement of homemaker in the home;
6. placement of the child in a day care program;
7. placement of the child with a relative, in a foster family or group home, or in a residential treatment center.

B. A court should have authority to order that the parent accept, and that the state provide, any of the above services.

COMMENTARY

One of the central defects of all current systems of intervention is that intervention takes place without adequate services being available to meet the needs of the child and parent. Because of inadequate or nonexistent

resources, courts often must utilize intervention strategies that are inappropriate. See B. Bernstein, *A Preliminary Report: Foster Care Needs and Alternatives to Placement* (N.Y. Bd. of Social Welfare, 1975). As a result, intervention is often ineffective and even harmful to the child.

It is a basic judgment in these standards that intervention is not justified unless there are adequate resources available of sufficient quality to make the intervention beneficial to the child, and to the maximum degree possible, to his/her family. It is pure hypocrisy for legislatures to authorize intervention, not provide resources, and still believe that children are being protected by neglect laws.

This standard specifies the resources that should, at the very minimum, be available to the court. It does not provide guidelines for determining when a court should make any particular disposition. Guidelines for this decision are contained in Standard 6.4 *infra*. The purpose of this standard is to delineate the *minimum types* of services needed to make the entire set of proposals contained in this volume useful. It must also be recognized that the quantity and quality of such services is critical. This volume does not address issues of quantity and quality. Minimal standards for some services have been offered by other standard-setting groups. See, *e.g.*, Child Welfare League of America, *Standards for Homemaker Services for Children;* C.W.L.A., *Standards for Day Care Services;* American Public Welfare Association, *Standards for Foster Family Services Systems.*

Dismissal of the case. Even when a child comes within one of the statutory grounds, coercive intervention may be inappropriate. See Standard 2.2 *supra*. At the dispositional hearing the court should consider carefully whether the child will be endangered unless brought under court supervision. If not, the court should be required to dismiss the petition.

Wardship with informal supervision. In some situations the court might believe there is a need for continued review of the family situation, but concludes that no regular casework or other form of supervision is necessary. For example, in a case of inadequate protection the court might want to review the situation in six months, but not require any specific casework plan. Such instances may be infrequent, but a court should have this option available.

Casework supervision. Because the option of removal is greatly restricted by these standards, see 6.4 C. *infra,* the most frequent disposition will involve provision of some type of services to the parents and/or child while the child remains in his/her home. Usually this should consist of "hard" services, such as homemakers, day care, housing. In addition, the court should be able to require the parents to accept social work services from a social work agency. These services can take a variety of forms. At a minimum, it might consist only of periodic checks on the child's well-being. In most cases the worker also should be responsible for seeing that any services ordered by the court are, in fact, provided to the parents and/or the child. The worker may also provide direct counseling, where appropriate. To make such services meaningful, there must be available to the court a sufficient number of trained workers, with manageable caseloads.

Provision of treatment. At present there is a paucity of medical and counseling services available to help parents and children under court supervision. Yet a number of studies have demonstrated that, particularly in cases of child abuse, a coordinated program of psychiatric counseling and social work help can prevent the need to remove the child and help the family function adequately without endangering the child. See, *e.g.*, B. Steele, *Working With Abusive Parents* (1975). Programs developed in a number of cities can serve as models for the provision of such treatment services. See, *e.g.*, R. Helfer, *The Diagnostic Process and Treatment Programs for Child Abuse and Neglect* (1975).

Homemakers. Homemakers are persons who come into a home to help the parents care for their children and to teach parenting skills. See *CWLA Standards for Homemaker Services, supra.* It is well documented that provision of such services can prevent the removal of children; moreover the cost of a homemaker is less than foster care. See D.Fanshel and E. Shinn, *Dollars and Sense in Foster Care* (1972); M. Burt and L. Balyeat, *Options for Improving the Care of Neglected and Dependent Children* (1971).

The provision of homemakers can be the most effective means of intervention in most cases arising under Standard 2.1 B. It is essential that adequate funds be provided for homemakers to achieve the goals established in this volume.

Day care. Some children cannot be protected solely by casework and/or various treatment services, at least until these services have been offered for a period of time. At present most of these children are placed in foster care, from which they frequently never return. See commentary to Standard 7.1 *infra.*

There is now evidence that many of these children do not have to be totally removed from their homes. Instead, they can be protected, and their parents helped, by placing them in a day care facility with the parent retaining basic custody and control. See Pavenstedt, "An Intervention Program for Infants from High Risk Homes," 63 *Am. J. Pub. Health* 393 (1973).

Such services should not be exclusively limited to endangered children, however. Unfortunately, services limited to endangered children often tend to be of lower quality. Moreover, there is substantial reason to believe that if adequate day care services, as well as other social programs, were more generally available, many children would not be neglected or abused. See, *e.g.*, Bronfenbrenner, "Is Early Intervention Effective," in *2 A Report on Longitudinal Evaluations of Preschool Programs* (HEW Monograph No. (OHD) 74-25, 1974). Therefore, day care services should be offered as part of an overall community program for all children.

Removal. Removal of a child from his or her parent to a relative's home, foster family, or residential treatment center should occur only when less drastic means are unavailable to protect the child. See Standard 6.4 C. However, foster care will continue to be necessary. Even

with better services, foster care facilities must be upgraded to make removal beneficial to the child.

Evidence from several states indicates that children are often placed in inadequate institutions or foster homes. See Gil, "Institutions for Children" in A. Schorr, *Children and Decent People* (1974). Too often we merely substitute inadequate state care for inadequate parental care. Therefore, each state should examine what out of home services are needed to develop a program to insure that the quality of alternative living situations for endangered children is sufficiently high.

In order for intervention to be successful, a court must have authority to order the parents to participate in a treatment program. In some states the court action is on behalf of the child, and it is unclear whether the court has continuing jurisdiction over the parents. This standard, specifies that a court should have such authority.

Under this standard, the court also is given authority to order state agencies, and private agencies performing any services paid for by the state, to provide services to families under court supervision. At present most courts cannot order such agencies to provide services, and as a result, dispositional orders may be rendered ineffective. If intervention is to help children, prevent their removal from their families, or facilitate return of children to their families as quickly as possible, it is essential that courts have authority to order any agency to provide needed services to the child and parents.

Again, it must be recognized that courts cannot order provision of services that do not exist. The success of these standards depends on the availability of quality services, services that not only have trained personnel, but workers who understand the culture and language of the clients they serve.

6.4 Standards for choosing a disposition.

A. General goal.

The goal of all dispositions should be to protect the child from the harm justifying intervention.

B. Dispositions other than removal of the child.

In ordering a disposition other than removal of the child from his/her home, the court should choose a program designed to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future. In selecting a program, the court should choose those services which least interfere with family autonomy, provided that the services are adequate to protect the child.

C. Removal.

A child should not be removed from his/her home unless the court finds that:

1. the child has been physically abused as defined in Standard 2.1 A. and there is a preponderance of evidence that the child cannot be protected from further physical abuse without being removed from his/her home; or

2. the child has been endangered in one of the other ways specified by statute and there is clear and convincing evidence that the child cannot be protected from further harm of the type justifying intervention unless removed from his/her home.

3. Even if a court finds subsections 1. or 2. applicable, before any child is removed from his/her home, the court must find that there is a placement in fact available in which the child will not be endangered.

4. Even if a court finds subsections 1. or 2. applicable, the court should not be authorized to remove a child when the child is endangered solely due to environmental conditions beyond the control of the parents, which the parents would be willing to remedy if they were able to do so.

5. Those advocating removal should bear the burden of proof on all these issues.

COMMENTARY

General goal. At present, virtually all state statutes direct courts to select that disposition which is "in the best interest" of the child. The standard proposed herein specifically rejects the "best interest" test. In its place, the standard provides that the goal of the disposition is to protect the child *from the specific harm justifying intervention.* In addition, removal of the child from the home is specifically forbidden unless the child cannot be protected by any other means.

The "best interest" test is rejected for a number of reasons. First, no legislature has provided statutory guidelines which spell out the factors a court should consider in determining the child's best interests. Obviously, this term may mean different things. Should a court be concerned with the child's physical well-being, intellectual development, material comforts, emotional stability? What weight should be placed on each of these? Should a court determine whether the child is more likely to become delinquent, go to college, have close, warm relationships with an adult, grow up "happy" in his/her own home or in some other placement? Should courts consider the likely impact of each possible disposition on each of these variables, or on any other variables; and compare the home to each one to see which one has the most pluses? Are they to determine the child's best interest in the short run or the long run?

In the absence of legislative definition, there is considerable variation among judges in applying the test. Decisions may reflect individual judges' views of a proper upbringing. As a result, there has been unequal treatment of parents and children, discrimination on the basis of race and social class, and judicial decisions based on value judgments not commonly held by society or approved by the legislature. See *In re Raya,* 255 Cal. App. 2d 260, 63 *Cal. Rptr.* 252 (1967); A. Shyne, E. Sherman and B. Haring, *Factors Associated with Placement Decisions in Child Welfare* 69-84 (1971).

Moreover, the "best interest" test increases the chances of inappropriate intervention, and especially of unwarranted removal of the child. Under the best interest standard, a social worker or judge may try to protect children from "evils" in the home environment even though there is no sound basis for believing that these factors will have any short- or long-term negative impact on the child. The "best interest" test allows courts to order dispositions in an effort to protect a child from harms other than those specified in Standard 2.1 A.—F. *supra.* See, *e.g., In re Cager,* 251 Md. 473, 248 A.2d

384(1968). The grounds for intervention specified in that section preclude intervention for alleged harms where there is reason to believe that in general, intervention will not benefit most children. If the initial exclusion of these "harms" is correct, they should not be relevant in the dispositional phase of neglect proceedings.

Even if a legislature were to define best interest more specifically, the test would still be unsatisfactory, especially for decisions regarding removal of a child. Any test that calls for weighing the likely impact of home versus foster care with regard to a number of different factors, however carefully defined, requires complex calculations which are impossible for judges to make. As Professor Mnookin has recently stated, under the best interest test a judge must:

> . . . . compare the probable consequences for the child of remaining in the home with the probable consequences of removal. How might a judge make this comparison? He or she would need considerable information and predictive ability. The information would include knowledge of how the parents had behaved in the past, the effect of this parental behavior on the child, and the child's present condition. Then the judge would need to predict the probable future behavior of the parents if the child were to remain in the home and to gauge the probable effects of his behavior on the child. Obviously, more than one outcome is possible, so the judge would have to assess the probability of various outcomes and evaluate the seriousness of the possible benefits and harms associated with each. Next, the judge would have to compare this set of possible consequences with those if the child were placed in a foster home. This would require predicting the effect of removing the child from home, school, friends, and familiar surroundings, as well as predicting the child's experience while in the foster care system. Such predictions involve estimates of the child's future relationship with the foster parents, the child's future contact with natural parents and siblings, the number of foster homes in which the child ultimately will have to be placed, the length of time spent in foster care, the potential for acquiring a stable home, and myriad other factors. Mnookin, "Foster Care: In Whose Best Interest," 43 *Harv, Ed. Rev.* 599 (1973).

We simply do not have sufficient data on the impact of removal, or sound clinical criteria for determining how a child will do in placement, to decide the questions Mnookin identifies, regardless of whether the factors which must be predicted are identified in advance or left to the court to choose. In the absence of adequate predictive ability, it is essential to adopt a test which is within the competence of courts and social workers to administer.

Dispositions other than removal. Dispositions involving removal entail the most serious consequences for both the child and parents. For this reason, and because of the absence of data which provide any sound evidence as to when any particular disposition short of removal is appropriate, the standards provide specific guidelines only as to the removal decision. Thus, the standards do not specify when a court should order counseling, homemaker services, day care, or any other program short of removal.

However, it must be recognized that any intervention can be harmful, rather than helpful, to the child and entails a substantial invasion of family privacy and parental autonomy. Therefore, all forms of coercive intervention should be limited to only those actions that are necessary to protect the endangered child from future harm. If the family desires other services, they can request that these services be provided on a voluntary basis.

For example, if a child is endangered because of dangerous home conditions, coercive intervention might only require helping the parent correct the conditions and providing homemaker services for a period of time to ensure that the parent is able to keep the home safe. If the parent also suffers from an alcohol problem, alcohol rehabilitation services should be offered to the parent but should not be required unless the alcoholism prevents the parent from protecting the child or maintaining the home in a safe condition.

It is certainly true that many parents who endanger their children exhibit a multitude of problems, all of which may in some way deprive the child of an ideal or even "good" environment. But given the limited resources available, our lack of knowledge about helping such families, see, *e.g.*, Fischer, "Is Casework Effective: A Review," *Social Work* 5 (Jan. 1973); G. Brown, *The Multi-Problem Dilemma: A Social Research Demonstration With Multi-Problem Families* (1968), and the resultant potential for keeping such families under court supervision for years, it is preferable to require that parents accept only those services essential to ensure that the child is protected and to continue coercive supervision only while the child remains in danger.

Removal. The proposed standard permits removal only when the child cannot be protected from the specific danger justifying removal without resorting to removal. The burden of proof is on the intervening agency to demonstrate the need for removal—by a "preponderance of the evidence" in cases arising under Standard 2.1 A. and by "clear and convincing" evidence in all other cases.

The standard places two additional limitations on the authority of a court to order removal. First, Standard 6.4 C. 3. requires the court to find that there is a placement *actually available* for the child in which the child will not be endangered. Second, Standard 6.4 C. 4. states that removal should not be authorized in any case where the child is endangered solely because of environmental conditions beyond control of his/her parents and that the parents would be willing to rectify if given the opportunity or means. To help the court in making these decisions, Standard 5.2 F., *supra* requires that the investigating agency present information on these issues whenever removal is recommended.

Many of the general reasons for adopting this test are discussed in the commentary to 6.4 A. In addition to the reasons stated there, the proposed standard on removal is consistent with the purposes of the initial intervention. We should not allow courts to find a child endangered merely because he/she might be better off living elsewhere or under state supervision. If this were the law, it might be used for a massive reallocation of children to new parents. Therefore, the standards permit intervention only where it is needed to protect a child from serious harm. Thus, the relevant question at disposition is how we can protect the child from this harm. If the child can be protected without removal, there is no reason to allow more intrusive state intervention.

Second, the proposed test avoids many of the problems caused by the best interest test. While a court still faces a difficult factual determination with regard to whether the specific harm can be avoided without removal, there is at least a precise issue to decide. The court is not required to make value judgments or to decide issues beyond its competence. The standard can generally be applied even-handedly. Of course, different courts may be more or less prone to interpret facts in a manner favoring removal or nonremoval, but this is a problem inherent in the judicial system.

Finally, the test helps minimize the possibility of unwarranted removal. The test should sharply reduce the number of children now being removed. See Mnookin, "Foster Care: In Whose Best Interest," 43 *Harv. Ed. Rev.* 699, 693 (1973). This decision reflects the generally prevailing view that removal has often done more harm than good for many children. See Mnookin, *supra;* H. Stone, *Foster Care in Question* (1969). Children often have strong psychological attachments even to unfit parents. See J. Bowlby, *Child Care and the Growth of Love* 80 (1965); J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973). When those ties are broken, the child suffers short-term trauma and possibly long-term emotional damage.

Once in foster care, the child may suffer from a number of problems, including difficulty in establishing an identity, guilt feelings over having "abandoned" his/her parents, and significant difficulties in adjusting to new "parents," "siblings," peers, and school environment. See E. Weinstein, *The Self-Image of the Foster Child* (1960).

In addition to the many problems caused by separation and the status of being a foster child, existing alternatives to the child's own home may be quite undesirable. Because of a shortage of foster parent homes, group homes, and good residential treatment facilities, children often must spend weeks or months in impersonal "holding" institutions. Many such institutions do not provide adequately for the child's emotional wellbeing. Gil, "Institutions for Children" in A. Schorr, *Children and Decent People* (1974). Some cannot even protect the child's physical wellbeing. See Oelsner, "Juvenile Justice: Failures in a System of Detention," *New York Times,* April 4, 1973, at p. 1, col. 4. In order to keep children out of institutions, placement may be made in a less than adequate foster home.

Finally, children in foster care frequently are subjected to multiple placements; each such move is thought to destroy the continuity and stability needed to help a child achieve stable emotional development. See Bowlby, *supra;* Goldstein, Freud and Solnit, *supra.* Although the standards proposed in Part VII *infra* are designed to minimize the possibility of multiple placement, it is unlikely they can be eliminated.

When a child is seriously endangered, removal may well be in his/her best interests. This may be the only way to protect the child. However, if a child can be protected from the specific harms justifying intervention without removal, he/she should not be forced to suffer the harms associated with removal in the hope that his/her overall wellbeing will be furthered thereby. This is accepting a known cost without any assurance of long run benefit for the child.

Burden of proof. The standards place the burden of proof on the agency requesting removal to demonstrate the need for removal. At present no state laws address the issue of burden of proof.

Those favoring removal should bear the burden for several reasons. First, placing the burden on those seeking removal is consistent with the value placed on family autonomy. At least in the absence of evidence showing the benefits of removal, we should continue to support notions of family autonomy and place the burden on those seeking separation.

Second, placing the burden on the intervening agency is fairer in terms of the parties' ability to present evidence. The agencies, not the parents, know about the resources which might help the parent keep the child. Even a parent with counsel may not be able to put together a plan for safeguarding the child at home, especially if state agencies are not cooperative.

Third, placing the burden on the agencies will facilitate implementation of the proposed substantive standard. In order to show that removal is necessary, the agency staff will have to examine the alternatives within their knowledge and to explain why these are not satisfactory. Faced with this burden, agency personnel might be encouraged to find ways to keep children at home rather than taking the easier road of removal. They have no incentive to do so with the burden on the parent.

Finally, removal often has a negative impact on other children in the family. If one child is removed, other children in the family may worry that they will be the next to go. This uncertainty and anxiety can be quite harmful. In addition, when services are used to keep an endangered child in his or her home, these services also may benefit other children in the home who are not legally neglected. Therefore, the overall wellbeing of all the children in the home may be promoted.

It should be recognized, moreover, that keeping children at home can achieve substantial cost savings. See D. Fanshel and E. Shinn, *Dollars and Sense in Foster Care* (1972). Many states are paying five to ten times more to support children living out of their homes than to maintain them in their homes. These cost savings could be used to provide programs to protect children at home.

Level of proof. While the burden is always on those advocating removal, the level of proof differs depending on the basis for intervention. The need for removal must be shown by clear and convincing evidence if intervention is premised on Standard 2.1 B.-F.; by a preponderance of the evidence when the child comes within 2.1 A.—physical abuse.

Physical abuse, as compared to unsafe home conditions, emotional damage, sexual abuse, or contributing to delinquency, usually involves the most substantial threat of permanent injury and even death. Such abuse can take place rapidly. Without placing someone in the home on a twenty-four-hour basis, there is no way to prevent its occurrence with certainty. While removal is by no means always necessary to protect the child, especially in cases of less serious injuries, the best available evidence

indicates that some parents are likely to reinjure their children, even if they participate in a good treatment program. Unfortunately, we cannot predict exactly which parents will abuse their children even if supervised. Given the magnitude of the harm, the relative certainty that removal will prevent further physical harm, and the substantial evidence that many parents repeatedly abuse their children, it is too risky for the child to require the higher standard of proof in abuse cases.

In all the nonphysical abuse situations justifying intervention, the possibility of protecting the child at home is higher. Therefore, Standard 6.4 C. 2. requires clear and convincing evidence before removal may be ordered to protect children in these cases.

In cases involving unsafe home conditions, prediction about the likelihood of future harm is more speculative; there are successful intervention programs such as homemaker services and in-home services that provide the opportunity to learn whether the parents can or will change the conditions. In cases involving emotional damage, the emotional problems often are so closely tied to the parent-child relationship that treatment can be given only if the child remains in the family. Also, removal may simply be substituting a different trauma for the damage in the home. Virtually all children suffer emotional trauma from separation. A court should be quite certain that removal is essential before adding this trauma to the child's problems.

In sexual abuse cases removal is often ordered because of moral outrage at the parent's act. Yet the child may not be suffering any clear harm or may be further harmed by removal. Also, as with emotional harm, family therapy may be the best, and perhaps the only really effective way to remedy whatever harm has occurred, and with such therapy protection of the child in the home is possible.

Even though all these factors make removal inappropriate in many cases, there are still situations where the child should be removed from the home. The kind of evidence used to meet the clear and convincing standard might include a failure of previous in-home services to alleviate the situation; the child's desire to leave the home; a parental condition such as drug addiction or alcoholism, which causes the inadequate care, and which cannot be treated rapidly enough to assure the child's safety; or the absence of parental desire to keep the child. Also if the extent of harm in the particular case is very severe, removal is more likely to be appropriate. On the other hand, courts should be more hesitant to order removal where the parent-child ties are strong.

Requiring any particular standard of proof or varying the test by the type of harm involved does not guarantee that courts will treat the classes of cases differently, let alone that they will utilize removal only when appropriate. We have no proof that different burdens of proof actually affect judicial decisions. However, the terms "preponderance" and "clear and convincing" do have legal meaning. See *Alsager v. District Court of Polk County,* 406 F. Supp. 11 (N.D. Iowa 1975); *In re Gibson,* 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975); *In re Simmons Children* 154 W. Va. 491, 177 S.E.2d 19 (1970). The different levels of proof required convey to a judge a difference in legislative preference with regard to removal. They provide a basis for appellate review which may result in better trial advocacy by attorneys.

Limitations on the general standard. Subsections C.3. and 4. place two additional limitations on the court's authority to remove a child: 6.4 C.3. is applicable in all cases, while 6.4 C.4. applies a special rule for cases where the child is endangered by environmental conditions beyond his/her parents' control.

Subsection C. 3. does not require a comparison of the relative merits of the parental home versus some type of foster home. It only requires that a court, after finding that a child cannot be protected in his/her own home, also must find that there is a placement, *that is in fact available,* in which the child can be protected from further harm.

At present children often are removed on the assumption that they will receive a foster home or a residential treatment placement, but these placements fail to materialize. As a result, many children spend weeks, months, or even their entire placement period in institutions which can't provide for any of their needs. In some cases the child may even be physically injured in the institution. Even when gross harm is avoided, inadequate institutions or foster homes may cause severe emotional damage to the child, damage at least as great as would have occurred if the child had been left at home.

In some instances the threat of substantial harm at home, for example, severe physical abuse, may be so great that the court will have to assume that any placement is better than leaving the child at home. However, when the nature of the harm is not as severe, a court should not order placement unless an adequate foster home or other treatment facility is actually available for that child. This requirement is especially critical for cases involving emotionally damaged or sexually abused children who are placed in order to provide them with treatment for emotional problems. The court should consider carefully whether an environment is available that will be conducive to the child's mental health.

Subsection C. 4. reflects that value judgment previously discussed, see commentary to Standard 2.1 *infra,* that the state should not use endangerment laws to protect children who are endangered only because the state has failed to provide their families with adequate food, housing, or a safe neighborhood in which to live. Although, as discussed in the commentary to Standard 2.1, coercive intervention may sometimes be needed in such situations (since it may be the only way to provide the family with services or income), subsection C. 4. specifies that regardless of the danger to the children, removal may not be utilized in such cases. This reflects the judgment that it is wrong for the law to permit thousands of dollars a year to be spent on placement of a child when that same amount, provided to his/her famiily, would enable the family to provide adequate care and protection for the child.

The type of problem to which this subsection applies has arisen, in recent years, in New York City and other larger urban areas. For example, because of housing shortages some families live in condemned buildings,

buildings sufficiently unsafe that the child comes within Standard 2.1 B. In many instances, however, the parent would like to move and provide safe housing but there is no public housing, or other affordable housing, available. The standards would allow coercive intervention—as a last resort means of providing services—but would forbid removal.

Finally, it must be stressed again that in ordering any disposition, including removal, the court should be cognizant of the child's cultural background and heritage and should choose a disposition which will allow the child to continue these identifications. Every effort should be made to place a child with relatives or other adults who have been significant in the child's life. If this is not possible, placement should be with foster parents of the same ethnic or cultural background as the child, or if this is not possible, with foster parents trained to understand, respect, and encourage the child's identification with that cultural heritage.

To accomplish such placements, each state should review its foster home licensing standards and practices to be certain that they do not discriminate against minority group applicants. In addition, relatives should be compensated at the same rate as nonrelated foster parents. At present relatives receive a much smaller amount which prevents many poorer families from taking custody even though placement with the relative would be beneficial to the child. This practice may be unconstitutional, as well as poor policy.

6.5 Initial plans.

A. Children left in their own home.

Whenever a child is left in his/her own home, the agency should develop with the parents a specific plan, detailing any changes in parental behavior or home conditions that must be made in order for the child not to be endangered. The plan should also specify the services that will be provided to the parent and/or the child to ensure that the child will not be endangered. This plan, which will be a more detailed version of the agency dispositional report, see Standards 5.2 F. and 6.2, should be developed by the time of the dispositional hearing or within two weeks thereafter. A copy of the plan should be submitted to the court if the plan is not presented at the dispositional hearing. If there is a dispute regarding any aspect of the plan, final resolution should be by the court.

B. Children removed from their homes.

Before a child is ordered removed from his/her home, the agency charged with his/her care should provide the court with a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what actions the agency will take to maintain parent-child ties. Whenever possible, this plan should be developed in consultation with the parents, who should be encouraged to help in the placement. If there is a dispute regarding any aspect of the plan, final resolution should be by the court.

1. The plan should specify what services the parents will receive in order to enable them to resume custody and what actions the parents must take in order to resume custody.

2. The plan should provide for the maximum parent-child contact possible, unless the court finds that visitation should be limited because it will be seriously detrimental to the child.

3. A child generally should be placed as close to home as possible, preferably in his/her own neighborhood, unless the court finds that placement at a greater distance is necessary to promote the child's wellbeing.

COMMENTARY

Perhaps the most consistent criticism of the present system focuses on the lack of planning about a child's future after a court assumes jurisdiction. In both cases of removal and of home supervision those plans that do exist are vague and the goals ill defined. The problem is especially acute when a child is removed from his/her home. As a recent study of one state's agencies concluded:

> The conclusion must be reached that for a substantial proportion of caseworkers foster care practice is not goal-oriented but oriented to maintenance of existing arrangements as a status quo. It is a practice of drift characterized by inertia, inactivity except in crisis, indecisiveness about goals or probable direction, discrepancy between goals and activity, and an unwillingness to make decisions and judgments about evidence that would rule out unacceptable alternatives and move toward justifiable ones. Regional Research Institute for Human Services, *Barriers to Planning for Children in Foster Care: A Summary* 15 (School of Social Work, Portland State University, Feb. 1976).

Many of the problems in planning stem from large caseloads, high worker turnover, and inadequate resources. However, inadequate funding and insufficient resources do not account for the entire problem. It is essential that agencies follow sound planning principles regardless of caseload size or available resources. See Gambrill and Wiltse, "Foster Care: Prescriptions for Change," 32 *Public Welfare* 39 (Summer 1974); Stein, Gambrill and Wiltse, "Foster Care: The Use of Contract," 32 *Public Welfare* 20 (Fall 1974); *Barriers to Planning for Children in Foster Care, supra.* The absence of adequate planning has resulted in a number of problems. When the child is left at home, failure to develop plans often delays or thwarts the effective provision of services. It can also preclude sound evaluation of the intervention effort. As a result, home situations may not improve, the child may be reinjured, and removal becomes necessary. On the other hand, in some instances casework continues for years and years, at great public cost, with little benefit to the children and a substantial invasion of family privacy.

The absence of planning is even more detrimental when a child is removed from the home, since insufficient planning often means prolonged separations. Adequate planning is critical in a system designed to provide children with stable placements. For these reasons, Standard 6.5 requires that specific plans be developed in all cases where the court assumes jurisdiction. In general, these plans should be presented to the court at the time of the dispositional hearing, although in some cases, *if a child is not removed from his/her home,* they can be presented to the court within two weeks of the dispositional hearing.

Such delay may be necessary to allow the parent to fully participate in the development of the plan.

Children left in their own home. When a child is left at home, the plan should focus on the services that will be provided to the parents and child and the measures that will be used to determine when supervision is no longer necessary. If protection of the child involves, for example, sending a homemaker or public health nurse into the home, or requires that the child be brought to a day care center each day, the plan should specify why these services are necessary, whether they are available, and who will be responsible for insuring that they are in fact provided.

The parent should be fully involved in the development of the plan. This should indicate to them that the proceedings are meant to be helpful, not punitive. It should also make them aware of what changes are needed before supervision will be terminated. The parent should also have the opportunity to object to any aspect of the proposed plan, such as a requirement that they engage in any specific type of therapy. The court is empowered to make the final determination in such instances.

Children removed from their homes. If the agency is recommending that a child be removed from the home, the initial plan should be required at the time of the dispositional hearing. This is essential since part of the plan will focus on the availability of a suitable placement for the child. No child should be removed unless an adequate placement, as defined in Standard 6.4 C., is available.

The central focus of the plan should be on the steps that will be taken to facilitate the return of the child as quickly as possible and on the means that will be utilized to maintain parent-child contact.

Too often, under current practice, there is no direction or incentive for parents or agency to work towards return of the child. The court rarely, if ever, requires a plan and does not review the case to see what is being done. The pressures of agency workload, aggravated by inadequate staffing and financing, are such that as long as a child in placement raises no problems, he/she will not get any attention. Dealing with the parents may be time-consuming and, according to the agency's priorities, unproductive. If a child is not having difficulty in placement, the agency may consider it to be in the child's "best interest" to remain in placement, even if the child would now be safe in his/her own home. Therefore, no effort is made to work towards return. To be consistent with the underlying goals of these standards—that children's interests are generally best served by assuring them a continuous safe home with their parents—it is imperative that any plan for removal include clear commitments by parents and agency to take the necessary action to return the child to a safe home. See *Barriers to Planning for Children in Foster Care, supra.*

To accomplish the goal of returning children whenever possible, the standard requires that the plan contain at least three features. First, the plan itself should identify those changes in parental behavior, home conditions, or child's condition which must occur in order for the child to be returned. In this way the parents will know what they are expected to do and the social worker in charge of the case will know the goals of casework in the specific case.

Equally important, the plan should identify the specific services that will be provided to the parents to help them regain custody. In this way the parents are informed of what services they may expect, so that they can complain to the court if these services are not in fact being provided. Moreover, the court should know what services are in fact available and will be provided before it decides whether to place a child. The court should not abdicate its responsibility to see that the purposes of placement are served. Judges must be forced to realistically assess the likelihood that removal will accomplish its goals.

Whenever possible, the parents should be encouraged to participate in the placement plans. Of course, many parents will be contesting placement and may not be cooperative. However, if the parents do participate, they may be able to identify special needs of the child and may even be able to suggest nearby relatives or friends with whom the child can be placed. Again, requesting their participation will demonstrate that this procedure is designed to be supportive and therapeutic, not punitive. In addition, the parents are more likely to wholeheartedly participate in a program that incorporates some of their wishes.

Second, the standard requires agencies to encourage and facilitate maximum parent-child contact following removal, unless the court finds that contact should be limited because it will be seriously detrimental to the child. At present, parental visitation of children in foster care is often minimal, averaging less than one contact per month. In some cases this reflects parental disinterest. More often, however, parents are either forbidden to visit or they are discouragd from doing so by agency policies limiting time and place of visits, or by social workers. See A. Gruber, *Foster Home Care in Massachusetts* 50 (1973), Rarely are parents encouraged to visit and aided in doing so.

Policies forbidding or restricting visitation are extremely detrimental. Visitation serves a number of important functions. It minimizes the child's feelings of abandonment, maintains parent-child attachments, maximizes continuity, and provides an opportunity for the foster parents to obtain information that will help them deal with the inevitable hardships of foster care on the child. See J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* 40-41 (1973); American Public Welfare Association, *Standards for Foster Family Service Systems* 64, 67-75 (1975).

Most importantly, an extensive program of visitation forces parents to decide whether they really want to retain contact with and resume custody of the child. A recent study of 624 children placed in New York City found that the amount of parental visiting was the best predictor of whether the child eventually returned home. Fanshel, "Parental Visiting of Child in Foster Care: Key to Discharge?" 49 *Soc. Serv. Rev.* 493 (1975). Some parents do not want to resume custody, although they may be unable to face this reality. Agency staff workers may be reluctant to force the parents to face this decision. In some instan-

ces, the staff may sympathize with the parents and keep believing unrealistically that they eventually will resume custody. If the agency were to encourage and facilitate visitation, this would enable both the parents and the staff to assess realistically, and as quickly as possible, the likelihood of return.

Parental participation should not be limited to visiting. After placement, they should be encouraged to participate in the child's care by, for example, buying him/her clothing, taking him/her to doctor's appointments, and participating in school affairs. This would help maintain parent-child ties, keep up parental interest, and allow the supervising agency to assess the parents' competence to resume custody. Adoption of such procedures would be a drastic change for most agencies. But only through such changes can agency policy be reoriented toward reuniting families.

Finally, the standard provides that the child should generally be placed as close to home as possible. This proposal also is contrary to established practice in many agencies. Children are often placed out of county and even out of state. This is sometimes necessary because of the shortage of foster homes or the special needs of the child. However, absent such considerations, the child should be placed in his/her own neighborhood, since this will help limit the trauma of removal by assuring continuity and stability of some aspects of the child's life. Moreover, proximity to the parents will increase their opportunity to visit and to participate meaningfully in the child's care and development.

In order to make such placements, it may be necessary to change foster home licensing laws, which often discriminate against applicants because their housing is considered "inadequate," to provide higher compensation and status to foster parents so that more people will apply, and to provide the same compensation to relatives who become foster parents as to nonrelatives.

Part VII: Monitoring of Children Under Court Supervision and Termination of Supervision

7.1 Periodic court reviews.

The status of all children under court supervision should be reviewed by the court in a formal hearing held at least once every six months following the initial dispositional hearing. The court may also review a case, upon request of any party, at any time prior to the six-month review. At least fourteen days prior to a review hearing, the agency workers in charge of providing services to the child and parents should submit to the court a supplemental report indicating the services offered to the parents and child, the impact of such services, and should make a dispositional recommendation. Copies of this report should go to all parties and their counsel. The parents, unless they are physically unable to do so, and a representative of the supervising agency, should be required to attend each six-month review hearing. The court may also require or permit the attendance of any other necessary persons.

COMMENTARY

Virtually all experts agree that the present system of intervention is marked by a lack of planning and by a failure to provide services to parents and children following intervention. See commentary to Standard 6.3 *supra*. It is essential that this problem, especially critical when children are in foster care, be remedied. The intervention process must be designed to provide children with stable living situations within a reasonable time, from the child's perspective.

Currently, in most states the evaluation of the effects of intervention is left pretty much to the social welfare agency. Though parents or agency can request a court hearing, they rarely do. Only eighteen states require regular review but do not specify the purpose of the review. When hearings do occur, they are often ex parte, *pro forma* proceedings that rarely result in any changes. They may last only a few minutes or even seconds, with neither a caseworker nor parents present.

Standard 7.1 reflects the judgment that systematic planning and the achievement of the goals of intervention are best insured by requiring periodic court review of the status of all children under court supervision. The court retains ultimate responsibility for insuring the wellbeing of all children for whom it has ordered intervention.

It is clear that in order to ensure the effective implementation of the plans established at the time of intervention, some means of checking both agency and parental performance is needed. Review must be ongoing and begin as soon as intervention occurs. The longer the agency delays in working with the parents, the less likely the parents will be to respond to agency efforts. Moreover, it is necessary to discover inadequate casework as quickly as possible in order to minimize the length of the child's stay in foster care when he/she is placed.

Review could be done either administratively or by the court. Proposals for periodic court reviews have been strongly opposed by some social workers, who believe that administrative review within the supervising agency is preferable. They claim that court reviews are unnecessary, time consuming, and threatening to the parents. They would eliminate such hearings or hold them only yearly or biennially.

However, internal agency review does not provide an adequate check on agency procedures. See Festinger, "The New York Court Review of Children in Foster Care," 54 *Child Welfare* 211, 243-44 (1975); Chappell, "Organizing Periodic Review in Foster Care: The South Carolina Story," 54 *Child Welfare* 477 (1975). When the parents are not receiving adequate services, court hearings provide a forum in which they and the child through his/her attorney can challenge the agency's inaction. A Court review is superior to lodging a complaint with the agency, since parents likely will assume that the authorities within the agency will support the caseworker. Moreover, the presence of counsel at a court hearing may make it easier for parents to raise complaints about the agency.

Court review is particularly important if the child is in foster care. The hearing provides a mechanism for reviewing parental performance so that it can be determined whether they have shown an interest in resuming custody. At such hearings both the supervising agency and the child's attorney can document the parents' failure to work toward resuming custody. It is essential that parental noncooperation be documented as quickly as possible. Otherwise it will be difficult to obtain termination if and when this is necessary. In a number of cases, courts have refused to order termination because the judge sympathized with the claim that the agency had not provided parents with services, had discouraged visitation, or had made return difficult. See *Juvenile Department of Marion County v. Mack,* 12 Ore. App. 570, 507 P.2d 161 (1973).

The parents' perception in these cases may have been totally accurate. Even when the parents' claims are false, however, most agencies lack adequate records to prove that services were offered and refused. Rapid staff turnover often makes it impossible to find the social workers who can testify about their activities to help the parent.

A policy that denies termination because the parents were not offered services penalizes the child in order to protect the parent. The child has already been in care for some time before the termination hearing and may have become strongly attached to his/her foster parents. If, in fact, the parents have refused services, return is unlikely. Unfortunately, under the current system the case will be continued while the child remains in an uncertain placement. Regular court reviews would prevent such occurrences.

Third, court review may serve as an incentive to both the agency and the parents. Social workers will attempt to conform their behavior to the court's expectations in order to avoid criticism at review hearings. The realization that the court will review their conduct, and possibly terminate their parental rights, may induce parents to show greater interest in their children.

While annual reviews would be less costly and time consuming, a year is too long to leave a child in foster care without review. From the child's perspective, six months is a very long period away from home. Yet, agencies become accustomed to leaving children in care until the next court review. Therefore, quicker review is needed.

Moreover, in some cases termination of parental rights is appropriate after six months of placement. Standards for termination after six months are proposed in Part VIII. Review hearings are needed in order to identify these cases. In most other cases terminations should occur after one year if the child cannot be returned home. The six month review puts the parents on notice of this possibility and may induce greater parental efforts to resume custody.

For all these reasons the standards strongly recommend requiring court hearings. The six month time frame established by Standard 7.1 sets the maximum allowable interval between judicial reviews. Any party may petition the court for earlier review. If the child in foster care can be safely returned home within a shorter period of time, for example, three months, such action is to be strongly encouraged. Review hearings should not be *pro forma* reviews. The standard directs that the status of each child in placement be carefully and thoroughly examined in a judicial hearing. All interested parties should be accorded the right to counsel and the admission of evidence should be governed by the rules applicable to civil cases. Standards 7.4 and 7.5 detail specific findings the court must make at the hearing.

The supervising agency should prepare a report detailing the actions it has taken and the current situation. If the child is in placement, and continued placement or termination of parental rights is being recommended, the report should specify the reason for the recommendation. To insure that all parties have adequate time to consider the recommendation and to prepare a response when desired, these reports should be sent to all parties at least two weeks prior to the hearing.

In reviewing the progress made in each case, the court should be guided by the goals established in the initial plan. See Standard 6.5 *supra.*

7.2 Interim reports.

The agency charged with supervising a child in placement should be responsible for ensuring that all ordered services are provided. It should report to the court if it is unable to provide such services, for whatever reasons. The agency may perform services other than those ordered, as necessitated by the case situation.

COMMENTARY

This standard is designed to assure that the program developed to insure that a child will not be endangered again, or to facilitate returning a child from foster care, will be carried out as nearly as possible the way the court ordered, by placing specific responsibility on the agency to either do what it proposed or inform the court if it cannot. It requires the agency to report any major problems it is having in implementing the court-ordered plan.

If the agency is unsuccessful in implementing the plan, either because of inadequate resources or noncooperation by the parents or other agencies, reporting this to the court may generate court action to find additional resources, to order other agencies to provide services, or to resolve any problems with the parents. Moreover, outside review may push each worker into maximum effort on each case. In this way, progress towards the goal of terminating supervision or reuniting families will be disrupted as little as possible.

The agency should be required to assign a specific person to supervise the case. This will make it easier for the court to monitor the family's progress and will tell parents exactly who is responsible for helping them. Evidence from several states indicates that in many instances there is no worker assigned to a case, especially when the child is in foster care. The child may have a worker assigned to him/her, but no one may be providing services to the parent. In such situations the chances of reunion are minimal. See A. Gruber, *Foster Home Care in Massachusetts* 28-29, 50-52 (1973).

7.3 Grievance Officers.

There should be available in every community, either within the agency supervising a child found endangered or in a separate agency, a position of grievance officer. This person should be available to receive complaints from any parent or child who feels he/she is not receiving the services ordered by the court. The court should inform the parents and the child and/or the child's counsel of the name of such officer, how to contact him/her, and the services the grievance officer can provide.

COMMENTARY

While the adequacy of agency and parental actions will be reviewed at each review hearing, six months is too long to wait to remedy problems. Particularly if a child is in foster care, six months delay in remedying inadequate efforts to reunite the family will prolong the length of foster care and its attendant harms.

Therefore, some type of administrative review should be developed so that parents and children can receive help if they believe that they are not receiving the services ordered by the court or if there are any major problems regarding the foster care arrangement which cannot be satisfactorily resolved by the supervising agency. Standard 7.3 provides that each community establish some type of review body to perform this function.

The standard does not provide any details regarding the exact structure or functions of this review agency. A number of jurisdictions have been experimenting with different types of review boards—ombudsmen, grievance officers, community boards, child advocacy centers. See Rodham, "Children Under Law," 43 *Harv. Ed. Rev.* 487 (1973); Chappell, "Organizing Periodic Review in Foster Care: The South Carolina Story," 54 *Child Welfare* 477; Report of the Joint Commission on Mental Health of Children, "Crisis in Mental Health: Challenge for the 1970s," ch. 1 (1970). There are not enough data about the operation of any given system to justify mandating or recommending any one structure. Communities should experiment with different types of review bodies and evaluate their efficacy in promoting the overall goals of the intervention system.

7.4 Standard for termination of services when child not removed from home.

A. At each six-month review hearing of a case where the child has not been removed from his or her home, the court should establish on record whether the conditions still exist that required initial intervention. If not, the court should terminate jurisdiction.

B. If the conditions that require continued supervision still exist, the court should establish:

1. what services have been provided to or offered to the parents;
2. whether the parents are satisfied with the delivery of services;
3. whether the agency is satisfied with the cooperation given to it by the parents;
4. whether additional services should be ordered and when termination of supervision can be expected.

C. Court jurisdiction should terminate automatically eighteen months after the initial finding of jurisdiction, unless, pursuant to motion by any party, the court finds, following a formal hearing, that there is clear and convincing evidence that the child is still endangered or would be endangered if services are withdrawn.

COMMENTARY

Standard 7.4 A. provides the substantive test for determining when court supervision should cease. Basically it requires that coercive intervention terminate when the reason for the initial intervention is no longer present, *i.e.,* the child is no longer endangered.

Under this standard, the court should not just routinely continue cases, but should require specific evidence that intervention is still required. While formal testimony is not mandated in every case, the court should ask the parents whether they believe services are still needed. If they do not, the agency should have to justify the need for continued intervention.

In showing the need for continued services, the agency or counsel for any of the parties should have to demonstrate that the conditions or factors that justified initial intervention still exist or that there is a substantial likelihood that the conditions or factors would reappear if the supervision or services being provided by the agency were withdrawn. While it is certainly true that in some cases a family will need continued support and/or therapy if it is to remain a viable unit, the court should make certain that services are not being extended solely because they would be useful, when they are not necessary to protect the child. In such cases, if the parents want services to continue, they can be provided on a voluntary basis.

Standard 7.4 B. is designed to insure that if supervision is continued, the court is fully aware of whether its order regarding provision of services has been carried out. In addition, requiring specific findings on the parents' attitude toward the services affords the parents the opportunity to raise any complaints or problems they might be having. At present, court hearings are often very perfunctory and the parties may be afraid to discuss issues not brought up by the judge.

The specific questions will also give the agency the opportunity to confront the parents with any deficiencies in cooperation with the agency. Finally, the court should make certain that all parties are agreed to the future steps that will be taken so that supervision can terminate.

Requiring these specific findings will undoubtedly increase the length of these hearings and add to the court's burdens. Sufficient judicial personnel is essential if these standards are to become operational. The added expense should be offset by a decrease in the length of time families remain under supervision. Hopefully, the hearings will result in more effective provision of services, thereby strengthening the families and limiting the need for future state involvement.

Under present law in the great majority of states, there is no maximum period of supervision once a court assumes jurisdiction. Generally, the case will remain "open" until the supervising agency requests that supervision be terminated.

Standard 7.4 C. provides that court jurisdiction terminate automatically after eighteen months unless one of the parties requests continued supervision and shows, at a formal hearing, that the child is still endangered or will be endangered if services stop. There is little reason to believe that services for a longer period are necessary in the vast majority of cases. Yet, in some places, agencies keep open cases for years. This may divert resources from more exigent cases, or may result in "inflated" caseload statistics where no services are in fact provided. Since supervision can constitute a substantial burden on the family, as well as a substantial public cost, there should be a maximum time limit after which it should automatically terminate.

However, there may be a small percent of cases where withdrawal of services would substantially endanger the child. Rather than requiring filing of a new petition, and invoking all the procedures connected with an initial adjudication, 7.4 C. provides that supervision can be continued beyond eighteen months if the agency files a formal request for continued supervision and demonstrates at the eighteen month review hearing that there is a clear and convincing need for continued services. However, the burden here is a higher one than at the six or twelve month review. At those hearings the agency only need show that there are substantial reasons for continued supervision. Standard 7.4 C. envisions a court finding essentially equivalent to an initial finding of endangerment for supervision to be continued.

Richard Bourne and Eli Newberger *'Family Autonomy' or 'Coercive Intervention' Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect,* 57 Boston U. L. Rev. 670, 670-683, 687-689 (1977).

I. Introduction

Perhaps the strongest and most universal human feeling is the love of a parent for his or her child. Not surprisingly, reaction to the tragedy of a child harmed in the home is equally strong and universal. More subtle, however, is the ambivalent nature of that reaction.[1] Shared notions of parental love and care are deeply offended by a parent who appears not to want his child. The public is puzzled by the parent who loves his child but nevertheless intentionally harms him or fails to protect the child from harm. Public outrage has led the state to intervene in dangerous family situations to guarantee the child's safety. However, American society regards the relationship between parent and child as so precious and so beneficial to the child's growth that the family is protected against all unnecessary state intervention. The specter of unjustified state intrusion into or destruction of this relationship affronts fundamental notions of parenthood.

This ambivalence toward state intervention in harmful family situations clearly influenced the drafters of the *Standards Relating to Abuse and Neglect* (Standards), promulgated by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association.[2] The drafters attempted to accommodate both protection of the child and family independence in the design of every provision of the Standards' comprehensive scheme for state intervention. The Standards suggest model substantive and procedural law concerning reporting of child abuse,[3] emergency temporary custody of endangered children,[4] court-ordered provision of services within the home, removal of a child,[5] criminal prosecution of parents,[6] and voluntary placement of an endangered child.[7] The drafters fashioned the scheme upon three basic principles that underlie the central dilemma of state intervention: deference to parental autonomy, the paramount nature of the child's interests when in conflict with the parents', and the limitation upon state intervention to remedy only specific harms.

The first principle announced in the Standards codifies a reverence for the family into "a strong presumption for parental autonomy in child rearing."[8] Parental autonomy refers not only to the maintenance of the family unit but also to the insulation from state interference of all parental decisions regarding child management.[9] One purpose of the presumption is to safeguard the parents' traditional right to care, custody and control of his child.[10] Fundamentally, however, the Standards insist upon deference to parental control because it "is most likely to lead to decisions that help children."[11] The Standards assume that a child is most apt to thrive in the custody of those who have cared for him since birth.[12] The bonds of that relationship frequently cannot be fully duplicated by a court-ordered substitute.[13] Thus, the Standards urge proper legal recognition[14] of this long-standing assumption of child development scholarship and practice.[15]

The Standards also acknowledge that deference to parental autonomy may not always be in a particular child's best interests. In that case, the Standards expressly commit the state to protection of the child despite the resulting destruction of and intrusion upon the parents' right to care, custody and control.[16] Thus, the Standards continue the role of the state as *parens patriae.* [17] The commentary to the Standards reiterates the traditional justification that the child's comparatively helpless condition warrants state intervention and protection. [18] In addition, intervention may disrupt the cycle of the abused or neglected child's becoming the abusing or neglecting parent.[19]

The Standards' most innovative precept is the general restriction of the court's power to intervene to only those cases in which the child has suffered *specific* harm.[20] In the past, courts have intervened based upon highly subjective judgments concerning parental unfitness or unpleasant home conditions without any showing that this behavior or these conditions resulted in specific harm to the child.[21] The Standards reflect the widespread disapproval of such overreaching by experts[22] and appellate courts.[23] In effect, the Standards have established a *per se* rule that the presumption in favor of parental autonomy is rebutted only by a showing of specific harm to the child.

Although these principles provide a sound theoretical basis for a scheme of state intervention, their accommodation and practical application in the Standards are

sometimes unsatisfactory. In this article, we will set forth both our criticisms of the present provisions and our suggested revisions. Generally, we conclude that the Standards continually fail to refine the scheme to reflect the different degrees of intrusion upon parental autonomy caused by reporting, court-ordered provision of services in the home and removal. We suggest that legislatures considering reform in child protection laws modify the Standards in order to increase the availability of less intrusive means of state intervention. Accordingly, we believe that the grounds for reporting and for court-ordered provision of services should be significantly expanded. Our experience indicates that the prophylactic and therapeutic nature of early, limited intervention can minimize the instances in which a child must be removed from his parents.[24]

Our criticism generates from our work at Children's Hospital Medical Center in Boston with children who suffer from abuse or neglect as a result of their parents' problems. Our concern in this article will focus upon the impact of the proposed model not only upon children and parents but also upon the professionals who work with them. Throughout the article, we have drawn specific cases from our clinical experience to illustrate the painful choices professionals must make and the inadequacies of the present and proposed systems of child protection.

II. A Grant of Jurisdiction to Order Services

Despite our agreement with the Standards' three basic tenets—deference to parental autonomy, the paramount nature of the child's interests, and the limitation upon state intervention to cases involving specific harm—we fundamentally disagree with the Standards' undifferentiating distrust of all unrequested state intervention into the family.[25] To minimize state intervention, the Standards limit court jurisdiction to only those cases involving *serious* harm to a child.[26] Thus, a flat ban is imposed upon intervention in cases of *nonserious* harm. Moreover, this jurisdictional grant operates without regard to the nature of the intervention sought; it applies equally to courts' power to order removal of the child from the parents and to the power to order less intrusive and potentially less destructive dispositions, such as homemaker services or therapy. To obtain any intervention, the petitioner must show by clear and convincing evidence that the child is "endangered";[27] the child must have suffered, or "there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury,"[28] or the child must be suffering "serious emotional damage."[29] Additionally, the petitioner must convincingly demonstrate that intervention is necessary to protect the child from future endangerment.[30] Thus, the same grave level of harm that would justify the removal of a child constitutes the exclusive occasion for all unrequested state intervention.

Two aspects of this jurisdictional scheme are objectionable. First, we disagree with the flat ban upon intervention for nonserious harm. Second, we disagree with the Standards' failure to distinguish between removal and court-ordered provision of services in the threshold requirements for state intervention.[31] Both provisions ignore the difference between the intrusive and potentially harmful effects of removal and the less drastic effects of providing services in the home. Moreover, inherent in this jurisdictional grant is a negative appraisal of the value of services. In denying jurisdiction over cases involving nonserious harm, the Standards have adopted a per se rule that the benefits of services never outweigh the intrusion upon parental autonomy and the risk of harm from intervention.[32] In specifying the prima facie requirements for state intervention in cases of serious harm, the Standards give equal weight to the intrusive effects of the removal of a child from his parents and the unrequested provision of social services.

We urge major revision of this jurisdiction provision. Jurisdiction should be divided into two separate categories: the first, to order services; the second, to order removal.[33] To establish jurisdiction to order services, the petitioner should have to show by clear and convincing evidence that the child has suffered or will imminently suffer physical or emotional harm, serious or nonserious.[34] Once this requirement is satisfied, the burden of proof concerning future harm should shift to the parents. The parents, assisted by counsel, would have to demonstrate that, because future harm is unlikely, intervention is unnecessary. Moreover, we suggest that, if the evidence concerning future harm is inconclusive, the court should be given discretion to consider the therapeutic value of services, presently impermissible under the Standards.

A. Providing Services in Cases of Nonserious Harm

The family situation in which a child suffers nonserious harm is not only not "ideal,"[35] it is quite oppressive, albeit without danger to life and limb of the child. The child will consistently suffer specific, demonstrable physical or emotional harm, even though such harm does not rise to the gravity required by the Standards nor present a "substantial risk that the child will imminently suffer" such severe harm. An example of parental abuse constituting nonserious harm would be a child who regularly receives painful bruises in the course of parental discipline.[36] Nonserious harm attributable to parental neglect would include some "failure to thrive" cases.[37] Commentary accompanying the Standards suggests that court intervention would be permissible if the child suffered "severe malnutrition, extremely low physical growth rate, delayed bone maturation, and significant retardation of motor development."[38] By implication, less extreme manifestations of the same or similar symptoms of "failure to thrive" would be outside the court's jurisdiction unless those agencies seeking intervention could prove that more severe harms were imminent.

The Standards' ban upon provision of services in cases of nonserious harm represents one instance of the Standards' deference to the right of parents to rear their children free from state intervention. Several assumptions underlie the prohibition. First, the Standards assume that a meaningful distinction can be made between voluntary and coercive state intervention in

abuse and neglect case. Second, it is assumed that, because parents of children suffering nonserious harm can voluntarily request services, some of these children will be helped. Finally, the Standards assume that coercive provision of services to families in which the child has suffered nonserious harm is more often harmful than beneficial.

1. *Voluntary Versus Coercive Intervention.* The Standards' reliance upon the distinction between a parent's voluntary request for services and state-coerced intervention is unsound because the distinction is often meaningless or blurred in the context of neglect and abuse cases. An apparently voluntary request, in reality, may be a product of external pressures.[39] For example, the parents may make a "voluntary" request for services because their welfare worker has either expressly or impliedly conditioned continued benefits upon such a request.[40] Conversely, parents may loudly protest intervention while simultaneously making indirect pleas for help.[41] Resistance and denial of guilt are typical reactions of parents when confronted by a social worker's allegations.[42] Yet clinical experience indicates that a parent who harms his child has ambivalent feelings.[43] He wants to hide from the shame and stigma but also wants to stop his abuse or neglect.[44] He is often actually relieved when state authorities have finally concerned themselves with the family's difficulties.[45]

For example, a mother brought her daughter, aged three, to Children's Hospital Medical Center with multiple broken ribs and leg fractures. The mother denied that the injuries were intentionally inflicted and, instead, claimed that they had resulted from her daughter's accidental fall from a bed onto a concrete floor. However, based upon x-rays that revealed varying ages of the fractures, the physicians concluded that the mother's explanation of the cause was inadequate. The mother persisted in her denials and offered arguments and proof in support of her explanation. She displayed a health clinic schedule card to verify that she had taken the child for examinations every few months since birth. She maintained that her evident concern for the child's medical care was inconsistent with a desire to harm her child. She further insisted that the presence of old injuries was impossible because no physician had brought any injuries to her attention at the prior exams. Because of the perceived risk to the child, the Hospital initiated a care and protection petition in juvenile court. Shortly thereafter, the mother admitted her long-term physical abuse of her child. She stated that, for the first time, she was able to verbalize a need for help. Evidently, the petition had provided the structure necessary for such communication. In addition, she explained that her frequent visits to medical clinics had, in fact, been an unstated search for detection and support. Thus, despite her vigorous denials and her failure to request help prior to the court action, the mother apparently desired intervention. However, under the Standards, if this mother had caused only nonserious harm, the Hospital and the court would be forced to ignore urgent but indirectly expressed needs of the family. This case illustrates an additional fallacy in the Standards' distinction between voluntary and coercive intervention. In cases of nonserious harm, the Standards condition the provision of services upon an express request by the parent and forbid any court action. However, in this case, court action was the necessary precondition for the mother's expression of need.

Even if the parent does try to obtain assistance by express request, our experience indicates that this request may go unheeded.[46] For example, a thirteen-month-old infant from a middle-class family was diagnosed by professionals at Children's Hospital as severely retarded with slim developmental prospects. The infant's mother revealed that she was so embarrassed by the infant's condition that she kept him in a back room of the house. She also expressed homicidal tendencies toward the infant. She told the professional staff that, while on a boating excursion with the family, she had held the baby over the side and had actually considered letting go. She sought a voluntary placement of the child through the Department of Public Welfare but was told that no placements were available. Similarly, the Department of Mental Health refused to assist her. Thus, the Hospital physician and protective service social worker were forced to file a care and protection petition in court. Attorneys on behalf of both state agencies argued in court against the petition. Nevertheless, the court granted the petition and placed the child in a hospital for retarded children.

This case starkly illustrates the present practice of both private and public agencies of refusing to expend precious resources unless a court mandates the provision of services.[47] Frequently, the agency will even request a court order simply to justify expenditures to a budget manager. The commentary to the Standards notes, with disapproval, that some state statutes condition financial aid on court supervision of the child. The authors lament the fact that the availability of public housing, for example, will often turn on the issuance of a court order.[48]

Yet, despite this express condemnation, the Standards implicitly give legal sanction to this practice. Because of the scarcity of social services, the Standards effectively legislate their exclusive distribution to cases of serious harm. The commentary justifies the narrow scope of state intervention on the ground that it will channel services to the cases of greatest need and, this, maximize their effectiveness.[49] However, the Standards and the commentary fail to recognize that, as a result, provision of services at the request of a parent who has caused only nonserious harm may be nothing more than a comforting fiction.[50]

The scarcity of services is further aggravated by the new procedural burdens the Standards impose upon agencies. Under the present draft, a single agency could be called upon to perform an initial investigation of a report of abuse[51] and, if court action ensues, the agency must submit an investigative plan, conduct a detailed investigation, analyze the services available and their possible impact, and submit specific treatment or placement plans and periodic post-disposition reports.[52] Moreover, agency personnel may be required to attend hearings at as many as four stages of the initial proceedings,[53] as well as at periodic reviews of agency provision of services or placement.[54] These procedures are designed

to make the agency more accountable to courts.[55] The net result, however, is to so burden the agency that it will be less capable of offering quality services to needy families than it is at present. Unfortunately, the scarcity of services puts even more pressure on both the agency and the court to select less time-consuming, less thoughtful treatment options. For example, the simplicity of removal, although often more costly to the state in the long run, [56] will be more attractive in cases of serious harm than the protracted provision of treatment in the home.[57] Because the processing of each case will exhaust judicial and agency time, the drafters of the Standards evidently felt compelled to narrow the scope of courts' jurisdiction.

The wisdom of drafting the Standards predicated upon the unfortunate present reality of scarce resources[58] is questionable;[59] rather, the Standards should provide for court-ordered services to all families who could benefit from such assistance without regard to the degree of harm or present agency budgets. It would then be incumbent upon any state legislature enacting the Standards into law also to guarantee adequate funding to meet the new state intervention scheme. However, the present draft actually reduces the pressure upon legislatures to expand social service agency budgets to meet the needs and express requests of families.

The Standards' assumption that a sharp distinction exists between voluntary and coercive state intervention underlies the ban upon the provision of services in cases of nonserious harm. Yet our experience indicates that the presence or absence of an express request rarely reflects parents' feelings toward state intrusion into their homes. More importantly, when coupled with the Standards' increased procedural requirements on agencies, the ban may result in the elimination of any assistance to nonseriously harmed children; on the one hand, agencies cannot initiate court action, but, on the other, they often will not expend resources without court approval.

2. *The Value of Unrequested Assistance.* By conditioning assistance in the home upon parental request, the Standards replace an evaluation of the value of the services to the child and family with an inquiry into whether the parent has requested the state intrusion. If the parent has not waived his right to autonomy, the nonseriously harmed child will be denied access to services.[60] This arrangement appears contrary to the express commitment of the Standards to protect the child's needs in any conflict of interests between parent and child.[61] Additionally, it seems contrary to the Standards' commitment to "strengthen family life"[62] because state-ordered assistance to the family is eliminated. The Standards negate these criticisms by minimizing the value of unrequested assistance. In most cases, court-ordered provision of services to families in which the child has suffered only serious harm is assumed not to be in the child's best interests. The commentary suggests that such intervention, at best, would be minimally helpful and, in fact, could even be harmful to the child.[63] The Standards apparently conclude that any minor benefits are outweighed by the loss of parental autonomy.

In another forum, a reporter on the Standards, Professor Michael Wald, has elaborated the bases for this conclusion.[64] He suggests that the effectiveness of any assistance may be significantly reduced if provided on a coercive, as opposed to voluntary, basis. Among the potential dangers of assistance cited, mandatory day care, for example, might weaken the close attachment between parents and child crucial to healthy development. However, as Professor Wald acknowledges, this attachment may already be weak in harmful family situations.[65] Professor Wald also distinguishes between the value of "hard" and "soft" services. He admits that provision of "hard" services—financial aid, medical care and homemakers—would be helpful but adds that such assistance is not usually forthcoming.[66] However, he notes that the effectiveness of the more common "soft" services—such as counseling and parent education—has been disproven.[67] Moreover, Professor Wald maintains that such services can often be harmful if the social worker is inept or injects his middle-class bias into the decisions regarding child care and housekeeping. He fears that the social worker's intervention may result in inconsistent parental behavior that will confuse the child and disturb the child's adjustment to the unhealthy situation. In addition, he postulates that the parent may direct his resentment of the intervention toward the child as the cause of the intrusion.

Studies measuring the effectiveness of services have produced inconclusive results. Some studies have drawn negative conclusions; [68] others, positive. [69] Furthermore, it is generally agreed that measuring the outcome of services on an objective scale is very difficult. [70] It is particularly difficult to design research projects to measure significant improvements in family behavior. Because the Standards maintain the presumption in favor of parental autonomy, failure to prove that services will improve the family situation is dispositive against intervention.[71] This conclusion ignores that the presumption has, to some extent, been rebutted by proof that the parent has caused harm, although not serious. Significantly, Professor Wald has failed to cite studies supporting his thesis that the effectiveness of services turns on whether they are provided on a voluntary or coercive basis.[72] In fact, the intervention of legal authority can enhance a parent's respect for the treatment program and thus increase its effectiveness.[73]

Our experience has been that services provided on an involuntary basis can be helpful. For example, a mother brought her eleven-year-old daughter to Children's Hospital and reported that the child had told her that the father had masturbated in front of the daughter and invited her into his bed. In addition, the mother revealed that three months earlier, fearing her husband's temper, she had fled home and left the child behind with the father. The child denied having mentioned her father's sexual advances. Emergency room physicians were unable or unwilling to make a thorough medical examination because of the child's uncooperativeness and anxiety. The child was admitted for "social reasons" to permit a further evaluation of the family situation and the child's needs. A psychological consultation and social service interview revealed that the child had recently lost bladder and bowel control at night, performed poorly in school,

experienced nightmares, gained excessive weight and become increasingly tense. The conclusion drawn from this initial evaluation was that the child was "troubled," even though no clear evidence of serious emotional damage emerged. However, the diagnostic team interpreted the facts that she spoke of a "secret" with her father and mentioned that he had brought her candy during school recess as soft signs of possible sexual abuse. The mother desired help for her daughter but seemed incapable of obtaining assistance herself. She did not know what services were available nor how to use them. However, she did not wish to leave her child in the Hospital for the time required to conduct a full psychiatric examination. Once she even attempted to remove the youngster because of her own fears and loneliness. When the father was interviewed, he denied that any problems existed and expressed strong hostility toward his wife and the Hospital personnel. The Hospital staff attempted, without success, to involve various child protection agencies. The agencies all refused because they either were overcrowded or considered the case "inappropriate." The Trauma-X Group at Children's Hospital—a multi-disciplinary team for treatment of neglect and abuse crises—decided to seek court intervention in this case. At the preliminary hearing, the judge entered a temporary order granting physical custody of the child to a treatment center to conduct further evaluation. The center began diagnosis and therapy and also enrolled the child in a special education program. The mother began weekly counseling with a psychiatric social worker from the same facility. The father, after a court-ordered psychiatric evaluation, agreed to seek help for his depression and drinking problem. Thereafter, the mother and father resumed living together.

This petition would not satisfy either of the relevant grounds for court intervention proposed by the Standards. The commentary indicates that intervention is authorized only when the sexual abuse constitutes a violation of the state penal code.[74] The only hard evidence at the time of the petition had related to the father's exhibitionism and propositions at home, which alone might not constitute criminal violations. The Standards also permit the court to intervene when the child is presently suffering "serious emotional damage"[75] The Trauma-X Group had sought court action before the development of strong manifestations of serious emotional harm because of legitimate concerns about the child's mental status and the adequacy of the mother's caretaking. Additionally, the Group had hoped that early action could prevent the need to remove the child in the future. Although the court would have been forced to dismiss the petition under the Standards, in the actual case the entire family very clearly benefited from the court's intervention. This case and the case of the mother who admitted her abuse only after the court petition was filed also illustrate the therapeutic value of court action itself. In both cases, the court action was the catalyst or vehicle enabling the parents to confront their problems.

Professor Wald's segregation of "hard" and "soft" services, and his respective approval and disapproval, ignores the evolving clinical model and practice of a combined approach to treatment.[76] Based upon evidence indicating that external stress is substantially related to neglect, abuse and other pediatric social illnesses, the treatment of families now focuses upon relieving the external stresses of inadequate housing, health and child care by directly supplying these needs. However, equally important components of this new treatment include "soft" services, such as counseling and education, specifically designed to enable parents to secure resources in the future. A systematic study measuring the effectiveness of this combined approach has not been undertaken. However, the data demonstrating the connection between these external stresses and the incidence of neglect and abuse warrant the inference that treatment directed at relieving these stresses can effectively prevent individual cases of future neglect and abuse and can improve the family's ability to utilize services for the child. Our clinical experience supports this conclusion.[77] Obviously, success on an individual level cannot substitute for efforts to change institutions and correct the inadequacy of resources that affect large numbers of the population.

The fact that this and other novel approaches may not yet be prevalent does not support the narrow grounds for court-ordered services adopted by the Standards. The criticism that was previously leveled with regard to limiting these grounds based upon the present dismal quantity of services applies equally when based upon the present *quality* of services. If enlightened treatment methods would benefit a troubled family, the Standards should permit a court to order such assistance.[78] Concomitantly, professionals must pressure agencies and state legislatures to improve the quality of services through training in modern approaches to treatment of child neglect and abuse. The Standards themselves could be drafted to promote such new approaches to treatment. For example, the Standards could establish citizen-based councils to place continuing pressure on professional groups, agencies and legislatures to increase the quality, as well as quantity, of services.[79] The councils could supply the input of local values, traditions, needs and priorities into the design of treatment models.[80] In addition, the Standards could establish a mechanism to coordinate state departments of child health, mental health, welfare services[81] and employment opportunities for the parents.[82] Through this coordinating mechanism, the Standards would further the goal of a coherent, embracive approach to family problems.[83]

Were we to agree with the Standards' assumption that most nonseriously harmed children are not benefited by court-ordered provision of services, we would nevertheless be unable to support the flat ban upon state intervention. To prohibit all intervention and thus deny assistance to even those children who could be helped does not seem to us the proper resolution of the conflicting interests. The acknowledged trade-off in adopting the ban on intervention for nonserious harm is that cases that warrant intervention must be dismissed in order to prevent unjustified or unproductive intrusions upon parental control in other cases.[84] We are unconvinced that judicial discretion has been so unwisely exercised in the past. Moreover, the instances of useless or harmful intrusions

will be reduced by the Standards' limitation upon intervention to cases of specific harm. Courts can thus ensure that the services ordered will closely relate to the nature of the specific harm.[85] Finally, rather than abandoning any attempt to aid the nonseriously harmed child, legislatures should consider proposals, in addition to those suggested in this article, to improve the quality and availability of services.[86]

* * * * *

2. *Termination of Services.* The Standards mandate review every six months regarding "whether the conditions still exist that required initial intervention."[102] Unless the conditions still exist, the court must terminate jurisdiction. If the parents state at the six-month hearing that intervention is no longer necessary, the agency must demonstrate a need to continue.[103] Moreover, at the end of eighteen months of court supervision, the court must terminate jurisdiction unless "there is clear and convincing evidence that the child is still endangered or would be endangered if services were withdrawn."[104] This call for careful, periodic review of the necessity for intervention will help prevent continuances that are based upon perfunctory hearings or that result from forgetfulness of the court or agency.[105] However, by conditioning assistance beyond eighteen months upon "clear proof" of a necessarily uncertain prediction, court jurisdiction may often end before the family situation has stabilized.

The termination provisions retain the unfortunate, narrow focus of the jurisdictional grant for initial intervention. In doing so, the Standards fail to distinguish between the significantly different potential harms caused by initial and continuing intervention. The benefits of continued services in the home will more often outweigh the intrusive effects. The benefits of services often multiply over time as relationships with social workers are strengthened and initial hostility is overcome. As parents develop confidence in their child-caring abilities, their progress will advance more rapidly. Moreover, the intrusive effect of continued supervision is not a multiple of the harm to parental autonomy caused by the initial intervention. The initial outside intervention into the home causes the stigma and most severely undermines parental authority over the child. This shift in the balance justifies a broadened inquiry into the therapeutic value of continued intervention. In fact, therapeutic value is entitled to more weight in the context of termination than was appropriate in the decision whether to intervene initially. Although no intrusion should continue longer than necessary, the determination of necessity in termination hearings should not turn solely upon proof by the intruding party that the child will suffer physical or emotional harm. The mere fact that a child will not be reinjured at the particular moment does not suggest that the family no longer requires judicial monitoring or social welfare intervention. Once the court intervention has begun, jurisdiction should continue until the family can no longer benefit from support and until they have confronted basic problems. [106] In effect, we suggest that the goal of continuing intervention is broader than that of initial intervention. Initial intervention should be primarily, although not exclusively, directed toward protecting against future harm. After the initial intrusion has occurred, continued intervention should be directed toward giving the family the tools to deal with their problems in the remote as well as in the immediate future. Unfortunately, the commentary specifically rejects this broader purpose; the court is directed to continue services only if necessary to protect the child and not solely because services are "useful."[107]

We also disagree with the timing of court review under the Standards. In our clinical experience, we have found that eighteen months is insufficient to cement short-term prophylactic gains into long-term prophylactic and therapeutic benefits for the entire family.[108] For example, the clinic at Children's Hospital examined a girl, aged five for gross developmental delays and scattered bruises. Her mother had seemed anxious and depressed. Her father had acknowledged enormous rage at his daughter and uncontrollable impulses to harm her. Pursuant to statutory mandate, the Hospital filed a child abuse case report. The report effected neither change in the family's behavior nor advancement in the child's developmental progress. New bruises were evident upon subsequent examiniations. The Hospital filed a court complaint, requesting that physical custody remain with the parents while the state was acting to acquire legal custody. The Hospital staff hoped that court supervision would assure that the parents would follow through with a treatment program designed to resolve many of the family conflicts that had apparently culminated in the father's anger toward his child. The court granted the petition. Now, two years after the initial hearing, the parents participate—although somewhat reluctantly—in a family treatment program in the local court clinic. The father receives regular doses of a major tranquilizer. There have been no further incidents of injury to the child. The daughter is making excellent developmental progress with the support of a specially designed academic program. Without court monitoring and services, family decompensation and reinjury might well occur. Moreover, the parents probably would not voluntarily request continued services. For these reasons, and because the family appears to benefit generally from the treatment, the state has recently urged a six-month continuance of the case. Under the Standards, however, the state might well fail to demonstrate by clear and convincing evidence that future harm would occur if court supervision terminated.

FOOTNOTES

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1 *Cf.* J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 106 (1973). Public responses to a survey evinced this contradictory reaction: 36 percent of those surveyed favored removal of the child after the first incident of abuse, 53.9 percent of those surveyed

favored nonremoval to give the parent a second chance. D. Gil, Violence Against Children 65 (1973).

2 Institute of Judicial Administration & American Bar Association, Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect (tent. ed. 1977) (R. Burt & M. Wald, Reporters) [hereinafter cited as IJA/ABA Standards].

3 IJA/ABA Standards pt. III.

4 *Id.* pt. IV.

5 *Id.* pts. II, V-VIII.

6 *Id.* pt. IX.

7 *Id.* pt. X.

8 *Id.* pt. 1.1

9 Indeed, the Standards refuse to mandate affirmative duties of child care. Instead, the Standards specify only those harms that parents must not cause or permit. Thus, the child has no right to an "ideal" family that will furnish the best opportunity for growth. *See* IJA/ABA Standards, Commentary, pt. I, at 37, 38, 42; *id.*, Commentary, pt. 2.1, at 49 [herein-after cited as Commentary]. In fact, under the Standards, the child's rights to adequate care and protection are realized only when the parents have committed gross acts of abuse or neglect. *Contra,* IJA/ABA Standards 182 (Nuernberger, dissenting). *See generally* S. Katz, When Parents Fail 55-57 (1971); Fraser, The Child and His Parents: A Delicate Balance of Rights, *in* Child Abuse and Neglect: The Child and His Parents: A 324-29 (R. Helfer & C. Kempe eds. 1976). The Standards refuse to go any further because of a lack of consensus on what constitutes adequate child care and a fear that any consensus would ignore healthy cultural biases. IJA/ABA Standards pt. 1.4; Commentary 44.

10 *See* Stanley v. Illinois, 405 U. S. 645, 658 (1972); Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Fraser, *supra* note 9 at 326.

11 IJA/ABA Standards, Introduction at 3.

12 In some cases, this may not be the "biological parent" but rather the "psychological parent." J. Goldstein, A. Freud & A. Solnit, *supra* note 1, at 19.

13 *See* J. Bowlby, Child Care and the Growth of Love 8 (2nd ed. 1965); Burt, Developing Constitutional Rights of, in and for Children, 39 Law & Contemp. Prob. 118, 127 (1975).

14 For a list of state statutes explicitly adopting this preference for the home, see Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Prob. 226, 243 n. 83 (1975).

15 *See* A. Kadushin, Child Welfare Services 257 (2d ed. 1974); S. Katz, *supra* note 9, at 52.

16 IJA/ABA Standards pt. 1.5; *accord,* J. Goldstein, A. Freud & A. Solnit, *supra* note 1, at 7.

17 *See* S. Katz, *supra* note 9, at 4; Mnookin, Foster Care: In Whose Best Interest? 43 Harv. Ed. Rev. 599, 603 (1973).

18 Commentary 45.

19 *Id.;* J. Goldstein, A. Freud & A. Solnit, *supra* note 1, at 7.

20 IJA/ABA Standards pt. 1.2.

21 Commentary 38-39.

22 *See,e.g.,* J. Bowlby, *supra* note 13, at 85.

23 *See, e.g., In re* Roya, 255 Col. App. 2d 260, 267-68, 63 Cal. Rptr. 252, 256-57 (Ct. App. 1967); *In re* Cager, 251 Md. 473, 479, 284 A.2d 384, 388 (1968); State v. Geer, 311 S.W. 2d 49, 52 (Mo. Ct. App. 1958).

24 *See* Burt & Balyeat, A. New System for Improving the Care of Neglected and Abused Children, 53 Child Welfare 167 (1974); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, Reducing the Literal and Human Cost of Child Abuse: Impact of a New Hospital Management System, 51 Pediatrics 840 (1973).

25 IJA/ABA Standards 184 (Polier, dissenting).

26 *Id.* pt. 2.1

27 *Id.*

28 *Id.* pt. 2.1 (B); *accord, id.* pts. 2.1 (A) & (E).

29 *id.* pt. 2.1(C)

30 *Id.* pt. 2.2

31 *See id.* at 181 (Nuernberger, dissenting).

32 *See* Commentary 38, 43.

33 One of the co-reporters for the Standards, Professor Robert Burt, has similarly suggested that adjudication and disposition alternatives should not be considered separately. *See* Burt, Forcing Protection on Children and Their Parents: The Impact of *Wyman v. James,* 69 Mich. L. Rev. 1259, 1286 (1971).

34 *See* Daly, Willful Child Abuse and State Reporting Statutes, 23 U. Miami L. Rev. 283, 318, 343 (1969) (favors reporting of nonserious harm).

35 Commentary 49.

36 *Id.* at 53-54. Recent data has shown that, of reported incidents of physical injuries allegedly caused by abuse, 51.3 percent were considered minor and only 2.4 percent constituted major physical abuse. American Humane Ass'n National Study on Child Neglect and Abuse Reporting 4 (1977).

37 *See generally* Sussman, Reporting Child Abuse: A Review of the Literature, 8 Fam. L.Q. 245, 268 (1974).

38 Commentary 55.

39 Based on clinical experience, some experts have suggested that the parent's voluntary acceptance of intervention may actually represent an unhealthy submissiveness manifested as a psychiatric ego defense. Steele & Pollock, A Psychiatric Study of Parents Who Abuse Infants and Small Children, *in* The Battered Child 125 (2d ed. R. Helfer & C. Kempe 1974).

40 *See* Commentary 167; Levine, *Caveat Parens:* A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 11-13 (1973).

41 Parents rarely make direct, voluntary requests. Alexander, The Social Worker and the Family, *in* Helping the Battered Child and His Family 22-23 (C. Kempe & R. Helfer eds. 1972); DeFrancis, Child Protection—A Comprehensive Coordinated Process, Fourth National Symposium on Child Abuse, October, 1973, at 8 (The American Humane Ass'n, Children's Div. 1975).

42 *See* Steele & Pollock, *supra* note 39, at 125.

43 Davoren, The Role of the Social Worker, *in* The Battered Child, *supra* note 39, at 138, 144.

44 A. Kadushin, *supra* note 15, at 242.

45 *Id.* at 251, 265, *quoting* C. Hancock, Digest of a Study of Protective Services and the Problem of Neglect of Children in New Jersey 8 (1958).

46 *Accord,* IJA/ABA Standards 185 (Polier, dissenting); Polier & McDonald, The Family Court in an Urban Setting, *in* Helping the Battered Child and His Family, *supra* note 41, at 208, 221; Terr & Watson, The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion, 124 Am. J. Psych. 1432, 1438 (1968); Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 1000 (1975).

47 Additionally, experts state that the social worker may resist dealing with the abusive side of the parent/patient. Holmes, Barnhart, Contoni & Reymer, Working with the Parent in Child-Abuse Cases, 56 Social Casework 3, 5-6 (1975). This refusal based on the social worker's own make-up suggests another reason why a court order may be a prerequisite for provision of services.

48 Commentary 54-55.

49 IJA/ABA Standards, Introduction at 4, Commentary 43.

50 The Standards' assumption that services will be provided on a voluntary basis is clear. IJA/ABA Standards pt. 1.1; Commentary 38, 43. In situations in which the services of social workers are in fact only available through court intervention, one distinguished commentator urged early intervention. Paulsen, Law and Abused Children, *in* The Battered Child, *supra* note 39, at 153, 169.

51 IJA/ABA Standards pt. 3.3 (A).

52 *Id.* pts. 5.2(C), (F), 6.2, 6.5, 7.1.

53 *Id.* pts. 5.2 (authorization of investigation); *id.* pt. 5.2 (C) (approval of investigation plan); *id.* pt. 5.3 (report); *id.* pt. 6.1 (disposition).

54 *Id.* pt. 7.1.

55 *Id.* pt. 1.8; Commentary 47.

56 Select Comm. on Child Abuse, N.Y. State Assembly, Report, April 1972, *reprinted in* The Battered Child, *supra* note 39, at 229, 246 (app. c.).

57 DeFrancis, *supra* note 41, at 13.

58 *See generally* DeFrancis, The Status of Child Protective Services, A National Dilemma, *in* Helping the Battered Child and His Family, *supra* note 41, at 127, 131-36.

59 IJA/ABA Standards 184 (Polier, dissenting). *Contra,* 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, 642 (1976) (supporting "realist's" approach).

60 *See* IJA/ABA Standards 186 (Polier, dissenting) ("benign neglect" by state).

61 *Id.* pt. 1.5
62 *Id.*
63 Commentary 42-43.
64 Wald, *supra* note 46, at 996-1000. The author expressly disclaims that the views expressed there are those of the Juvenile Justice Standards Commission. *Id.* at 985.
65 *Id.* at 996-97.
66 *Id.* at 999.
67 *Id.* at 998 n.73.
68 *See, e.g.,* N. Polansky & N. Polansky, The Current Status of Child Abuse and Child Neglect in this Country, Report to the Joint Comm'n on Mental Health for Children (1968), *quoted in* D. Gil, *supra* note 1, at 43-47; The Multi-Problem Dilemma; A Social Research Demonstration with Multi-Problem Families (G. Brown ed. 1968); Fischer, Is Casework Effective? A Review, 18 Social Work 5 (1973); Geismar, Implications of a Family Life Improvement Project, 52 Social Casework 455 (1971).
69 *See, e.g.,* A. Kadushin, *supra* note 15, at 106-15, 269-71; 2 S. White, Federal Programs for Young Children; Review and Recommendations 275-76 (1973); Burt & Balyeat, *supra* note 24; Mose, Hyde, Newberger & Reed, Environmental Correlates of Pediatric Social Illness: Preventive Implications of an Advocacy Approach, 67 Am. J. Pub. Health 612 (1977); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, *supra* note 24; Steele & Pollock, *supra* note 39, at 131.
70 *See* Wald, *supra* note 46, at 978 n. 73.
71 *See* Buet, *supra* note 13, at 127-28; *cf.* Wald, *supra* note 46, at 999 n.86.
72 Professor Wald even concedes that social services are successful despite initial hostility. Wald, *supra* note 59, at 658.
73 Polansky, DeSaix & Sharlin, Child Neglect: Understanding and Reaching the Parent 58 (1972).
74 Commentary 69.
75 IJA/ABA Standards pt. 2.1(C). The Standards further define the specific manifestations consituting serious harm as "severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others." We share one expert's hesitancy to freeze the definition into a statute because of the present state of our knowledge about development. S. Katz, *supra* note 9, at 68. In addition, as the commentary also suggests, the definition must be read in the context of the different stages of development at different ages. Commentary 57. However, fixing specific attributes in the statute may produce static rather than developmental interpretations. For example, courts working with the definition may ignore the fact that what constitutes "untoward aggressive behavior" at one age may be quite normal at another.
76 *See generally* Newberger & Hyde, Child Abuse, Principles and Implications of Current Pediatric Practice, 22 Pediatric Clinics of North America 695 (1975); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, *supra* note 24.
77 Morse, Hyde, Newberger & Reed, *supra* note 69.
78 *Cf* Burt, *supra* note 33, at 1285.
79 *See* Select Comm. on Child Abuse, N.Y. State Assembly, *supra* note 56, at 251-52; Edelman, The Massachusetts Task Force Reports: Advocacy for Children, 43 Harv. Ed. Rev. 639 (1973).
80 *See* D. Gil, *supra* note 1, at 147; DeFrancis, *supra* note 58, at 138-39; Holmes, Bernhart, Cantoni & Reymer, *supra* note 47, at 12. *See generally* Joint Committee on the Mental Health of Children, Crisis in Child Mental Health; Challenge for the 1970's, at 9-21 (1970).
81 *See* Newberger, Newberger & Richmond, Child Health in America; Toward a Rational Public Policy, 54 Milbank Memorial Fund Q./Health & Soc'y 249 (1976).
82 *See* National Research Council, National Academy of Sciences, Toward a National Policy for Children and Families (1976).
83 Another reason for broadened court intervention to effectuate the coordinated approach to treatment has been suggested by clinicians. Terr & Watson, *supra* note 46, at 1439.
84 IJA/ABA Standards, Introduction at 6; Commentary 50; *cf.* S. Katz, *supra* note 9, at 63-67.
85 D. Gil, *supra* note 1, at 5-6; S. Katz, *supra* note 9, at 64.
86 IJA/ABA Standards 185-86 (Polier, dissenting).
87 *Id.* pt. 2.2. In part 5.3 (E) (2), the Standards place the burden on the petitioner to prove by clear and convincing evidence allegations sufficient to support the petition. Presumably, this includes the jurisdictional requirement of future endangerment.

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102 IJA/ABA Standards pt. 7.4(A).
103 Commentary 141.
104 IJA/ABA Standards pt. 7.4(C).
105 *See id.* pt. 7.1; Commentary 136.
106 *See* Pollock & Steele, A Therapeutic Approach to the Parents, *in* Helping the Battered Child and His Family, *supra* note 41, at 20.
107 Commentary 141.
108 *See* Pollock & Steele, *supra* note 106; Roth, A Practice Regimen for Diagnosis and Treatment of Child Abuse, 54 Child Welfare 268, 273 (1975), *See also* Kempe & Helfer, Innovative Therapeutic Approaches, *in* Helping the Battered Child and His Family, *supra* note 41, at 46 (success of treatment by visiting nurses never realized before eighth or ninth month).

Randall McCathren, *Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect,* **57 Boston U.L. Rev. 707, 709-722, 725 (1977).**

II. Limited Versus Expanded Coercive Intervention

The primary issue in evaluating the proposals continued in the Standards is whether the expected benefits from their adoption outweigh the potential harms. Resolution of this issue depends in large part upon particular effects commonly experienced by categories of children. Admittedly, the Standards might prevent courts from ordering protective services in individual cases in which a benefit would result. Yet the majority of children excluded from juvenile court jurisdiction under the proposed scheme, as well as those included, will realize tangible benefits as a result of limiting state intervention. Accordingly, the sum of the benefits to be enjoyed by all children outweighs the harm that may result in individual cases.

A. Children Excluded from the Proposed Scheme of Coercive Intervention

The Standards spare all children excluded from the scheme the disruption of family life that inevitably accompanies coercive intervention. Usually, the short-term benefits that might result from intervention in nonserious cases cannot justify the long-term consequences of the state's forced intervention between parent and child. Rather than rely upon coercion, the Standards encourage parents with child-rearing problems to seek assistance voluntarily and thus avoid the harms incident to state coercion. Moreover, permanent resolution of nonserious problems is more likely to occur when the parents request assistance than when it is imposed upon them by the state.

1. *Detrimental Effects of Coercive Intervention.* The risks of injury to children and parents from coercive intervention cannot be dismissed as unimportant. The injuries are real and substantial. They argue persuasively for restraint of the state's power to intervene even when intervention is intended to be therapeutic. In addition to the injuries from unnecessary reporting, court jurisdiction and ordering of services that the Critique notes—weakened parent-child attachment, inconsistent parental behavior and parental resentment[8]—there are other detrimental effects on parents and children. Although all of the implications for the child are not readily apparent, the

most important effect may result simply from the formal court pronouncement and labeling of a parent as a child abuser or neglecter.[9] Even more than conviction as a felon, the appellation "child abuser" evokes rage, disgust and hatred toward the parent both from the public and from child protection professionals [10] Public response to child abuse is generally severely revengeful and has included calls for life imprisonment or even execution of child abusers.[11]

The adjudication and public labeling of a parent as a child abuser or neglecter risks psychological devastation of the parent and serious consequences for the child. The label may demolish a parent's self-concept and engender guilt and anxiety.[12] The formal labeling may cause or exacerbate mental or physical illnesses that diminish child nurturing or further reduce the abusive parent's already low self-image so as to render the person totally unable to function as a parent.[13] Alternatively, the guilt and anger at being labeled an abuser may compound the stresses of child rearing, increase frustration with and hostility toward children, and even precipitate abuse if the child is involved in accusing the parent.[14] These risks are increased when the parent is of a lower socioeconomic class,[15] as is often the case.[16]

Examination of the negative effects of some available voluntary services illustrates well the risks to the family of uninvited intervention.[17] Researchers have identified a long list of specific negative effects of voluntary psychotherapy.[18] These effects fall into three catregories: exacerbation of existing symptoms, appearance of new symptoms and patient misuse of therapy.[19] The manifestation and severity of any one effect depends upon particular therapist and patient characteristics. Of most importance for this analysis is the poor prognosis for patients with low motivation—especially those who feel "sentenced to treatment"—and for patients with "low ego-strength or deficient psychic resources."[20] These characteristics are common in abusive and neglectful parents.[21]

Services for handicapped children illustrate other risks to the parent-child relationship from voluntary intervention. The number of treatment agencies, their varying procedures to obtain assistance and the multiple prescriptions for treating the child present a "scattered and bewildering picture" that may convince the parent of the "enormity, complexity and hopelessness of his child's problem."[22] When confronted by the specialized knowledge of professionals, parents may feel that they are not "qualified" to care for their child.[23] Parental anxiety and a reduction in the parents' willingness to participate in solving the child's problems may negatively affect the long-term development of the child. Researchers have discovered similar feelings in participants in early education programs.[24] If these negative effects may result from voluntary services offered without intent to stigmatize or deprecate parents, they are almost certain to result when the intervention is coercive and has been ordered after a quasi-criminal adjudication.[25]

Even if the parent is later found to be without fault for the child's condition, the reporting, investigation and court determination of suspected abuse or neglect is nonetheless traumatic and may be destructive to the parent.[26] Investigation alone may substantially disrupt family life even before a court resolution of the suspicions.[27] Finally, requests for assistance by parents before the child is injured will be reduced by the fear of a punitive government response. These risks to children and families require extreme caution in defining the circumstances in which coercive intervention, even to provide services in the home, will do more good than harm.

2. *Benefits of Voluntary Services.* The child protection system can avoid stigmatizing families that it intends to help by providing services upon request rather than upon its own initiative. In fact, evidence suggests that assistance is more likely to end abuse or neglect when requested than when imposed.[28] Providing services upon request will also reduce nontreatment expenditures; court hearings and all the attendant administrative functions required to prepare reports and recommendations for court action will be unnecessary. Thus, the aggregate effects of the activities of the child protection system will be more positive as voluntary services replace coercive services. Furthermore, the ability of the child protection system to provide assistance that is accepted by the families it is designed to help may be a good measure of the success of the intervention in helping parents improve the care of their children.

Basic to the argument that voluntary services will be more successful than coercive services are two assumptions: (1) that troubled parents can and will agree to intervention when they want services and refuse services when they do not; and (2) that agencies and practitioners will provide services upon request. The Critique argues that the first assumption is untenable in that even services not ordered by a court may be accepted only because of threats of court action; and further, that parents will seldom request services and may verbally refuse services while nonverbally requesting state intervention.[29] The first objection now has validity for two reasons. First, present legal standards are ambiguous. Parents are unable to determine whether their behavior has met the jurisdictional standard of "improper care."[30] and thus a mere threat of court action will coerce acceptance of state assistance. Second, harsh consequences that currently accompany assistance[31] dissuade parents from requesting help unless threatened by court action.

Neither of these situations that explain the perceived coerciveness of voluntary services are unchangeable. When the likelihood of success of threatened court action can be predicted with some certainty by parents or their attorneys, threats of court actions generally will not coerce acceptance of "voluntary" services, except in cases in which the narrower jurisdictional grounds are satisfied. Adoption of the relatively objective criteria of the Standards should establish the necessary predictability.[32]

More importantly, the consequences of assistance need not be as harsh as they now are. By conforming services to the needs and desires of the recipients and foregoing a superior and coercive posture toward the parent, the state could enhance the attractiveness of voluntary services.[33]

That a woman, the mother of an ailing four-month-old infant for example, refuses to accept training from a state welfare agency is understandable; such training implies

that she is an inadequate mother.[34] She is likely to be resistant to the services and the service-provider and not gain much from the experience. Counseling, domestic skills training and other soft services may frequently be requested, however, when families are approached in a noncoercive posture. In a recent study of 549 protective service families in New York City, ninety-seven percent of the parents asked for at least one service, and counseling was specifically requested by seventy-seven percent of the parents, over twice as frequently as any other service requested.[35] Thus, the mother of the four-month-old infant, although refusing training, is likely to accept some specific support of her own choosing when asked if she would like assistance in the form of counseling or needed additional resources such as clothing, transportation, or respite day care.[36] These services will directly benefit the entire family and, if offered in a manner that is not demeaning or degrading, will establish rapport with the social service caseworker.[37] When sufficient trust has been established, the client may be receptive to training that imparts specific information about child rearing and teaches new responses to stress, enabling her to care more adequately for her child.[38]

The Critique's second objection is well taken: abusive parents now are reluctant to ask for help directly from a punitive system, although they do sometimes make behavioral requests for intervention. However, no criteria yet exist by which to judge whether a parent's refusal of services is justificable indignation at the accusation of being a child abuser or actually camouflages a nonverbal request for help. Until there are reliable criteria to distinguish these cases, the harm to innocent parents and their children form unfounded accusations and unnecessary intervention requires the state to respect refusals of offered services until grounds for court jurisdiction exist.

The Critique argues that the second assumption basic to a preference for voluntary services—that the child protection system will provide services upon request—is also untenable.[39] While adoption of the Standards would not change the policies or attitudes of treatment facilities and providers, it would serve to free treatment resources that could be used for voluntary services in cases of nonserious harm.[40] Moreover, the Standards would substantially increase funds available for both voluntary and coercive treatment by reducing nontreatment costs in three areas: (1) the reporting system, (2) the adjudication and supervision of cases of nonserious harm, and (3) the foster care system. In the first two categories, the Standards would reduce significantly the total number of cases undertaken for investigation of suspected abuse or neglect and for treatment after court adjudication. In the third category, foster care, substantial cost savings should be accrued in three ways: fewer children will be placed; children placed will be returned home faster; and more children will be adopted out of foster care.[41]

Reducing foster care costs is critical if the child protection system is to meet its goal of rehabilitating parents. Payments to foster parents and boarding institutions, in order to maintain removed children, consume the bulk of child protection resources and leave little for actual treatment.[42] Nationally, over eight times as much is spent on foster care as on all other soft and hard services provided without removing children from their homes.[43] Thus, reducing foster care costs offers the greatest opportunity to redirect resources.[44] These cost savings could be kept as permanent reductions in expenditures for abusive and neglectful families. In order, however, to enhance treatment of each court-ordered case and to extend treatment to families that request services, maintenance or even an increase in expenditure levels would be preferable. Rather than having their staff and budgets reduced, most agencies would agree to provide services on a voluntary basis.

In sum, parents who are not seriously endangering their children, yet are in need of child protection assistance, are more likely to be injured than helped by coercive intervention. Thus, only voluntary services can improve the parental care of these children. Although some families will resist voluntary assistance, most will request it if the services correspond to their stated needs and are given in a supportive rather than degrading manner.[45] Finally, reducing administrative and foster care costs will free resources for treatment, thus allowing an increase in the availablity of voluntary services. Children excluded from the proposed scheme of coercive intervention will thus be spared the harmful consequences of intervention, yet will be eligible for the full benefit of increased state resources.

B. Children Included Within the Proposed Scheme of Coercive Intervention

An obvious effect of limiting the grounds for coercive intervention is the reduction of nontreatment costs and the increase of treatment resources. As discussed, a portion of these resources could be used to improve voluntary services for cases of nonserious harm. The primary target of these increased treatment resources, however, is the class of children included within the proposed scheme of coercive intervention—those seriously endangered. For them, adoption of the Standards will result in definite benefits.

Presently, resources available for allocation among the components of the child protection system are almost negligible when compared with the scope of the problem.[46] Caseloads of protective-service workers may be as high as seventy-five to 150 families with the national average about forty-five or fifty.[47] Each case usually involves two adults, *i.e.,* two parents, or a parent and one or more ongoing consorts; an average of more than two children per family; two or more sets of foster parents and siblings if custody of the children has been taken from the parents, and a network of family, relatives and significant persons collateral to the family. In contrast, successful treatment centers for abusive families usually have caseloads of four or fewer families per social worker.[48] With even thirty or forty families, the majority of a social worker's time is spent telephoning, arranging appointments, keeping records, preparing reports, appearing in court, attending in-house staff meetings and assisting clients seeking welfare, medicare, job training, day care, or similar services from child protection or other government or private agencies.[49] Thus, a social worker's task is a frustrating one with many dead ends for the

client. In the few hours that are available for face-to-face contact with families, social workers can only respond to crises and work intermittently with one or two cases in which improvement seems possible.

Reducing caseloads alone would not significantly increase the success of treatment. The social worker also needs support from intensive psychiatric and psychological services and from a broad range of other hard services and from a broad range of other hard services to meet the physical and emotional needs of the parents.[50] These services are woefully inadequate. [51] Resources are now spread so thinly that little treatment is accomplished except for an exceptional family that becomes a special concern of someone willing to spend evenings and weekends with the parents.

Various demonstration projects and treatment centers have shown that *intensive* treatment can achieve results: seventy to seventy-five percent of abused children can be safely returned home within six months if ongoing support is given to the families. [52] The Standards offer reforms that, within the constraints of available resources, will create opportunities to work intensively with families and thus approach this goal. By adopting the Standards, resources currently spent on the administrative and legal processing of such cases and on the boarding of nonseriously endangered children in foster care [53] would be freed for provision of hard services such as jobs or job training, housing, household appliances, clothing, transportation, homemakers and day care.[54] If more resources were available for the soft and hard services that families need, parents would have a realistic opportunity to fulfill mandated responsibilities.[55]

The Critique, too, favors intensive treatment. [56] However, its authors propose that protection system advocates increase the pressure on state legislatures to appropriate additional funds. Moreover, they predict that, rather than increasing resources for treatment, narrowing the jurisdictional grounds of intervention will discourage legislators from increasing or even maintaining current funding. [57] They thus encourage expansion of jurisdiction. Forcing parents in nonserious harm cases to be adjudicated child abusers or neglecters in order to obtain services, and generating a large number of abuse and neglect reports, are not, however, the most humanistic methods of obtaining increased funding. [58] Moreover, to a state legislature the unmet need for child protection services is a bottomless pit, which could readily consume almost any additional amount of resources allocated with little or no measurable results.[59] With other strong interest groups competing for scarce public funds, an increase in present state funding for child abuse and neglect is unlikely.[60] Under such circumstances, showing the efficacy of treatment and the continued need for voluntary as well as court-ordered services seems preferable as a lobbying strategy.[61]

In sum, until such time as society is willing to expand treatment resources ten or twenty fold, spending resources on cases of proven danger to children will have the maximum effect on eliminating abuse and neglect. Otherwise, "treatment" amounts to a holding action in which child protection staff professionals in other agencies can do little more than converse and correspond with other and process families through the system to the mutual frustration of both the professionals and the families.

III. The Critique's Scheme of Coercive Intervention

Unlike the arguments that support adoption of the Standards, those offered in criticism by Professor Bourne and Dr. Newberger focus upon individual cases. The authors of the Critique do not sufficiently consider the aggregate effects of coercive intervention on children as a class. In this regard, the reasoning of the authors is very much like the reasoning used to justify the present child protection system. Accordingly, although the system favored by the authors would depend more upon in-home services and less upon removal than the present system, it would employ coercion to remedy nonoptimal child rearing to the same degree. Because of the similarities between the present protection system and the system apparently favored by Professor Bourne and Dr. Newberger, many of the arguments already presented in support of the changes proposed by the Standards also rebut the major counterproposals offered in the Critique. A further examination of each of these proposals follows.

A. Jurisdiction to Order Services

1. *Cases of Nonserious Harm.* Two arguments rebut the Critique's suggestion that, contrary to the Standards, court jurisdiction to order services should extend to cases of nonserious harm. First, in the majority of cases of nonserious harm, the expected psychological and physical harm due to coercive intervention outweighs the expected benefits of that intervention. Second, the expenditure of all treatment resources on the most seriously endangered children will have a more positive impact on the overall problem of abuse and neglect than the expenditure of some resources on every allegedly threatened child. Because the effects of intervention in nonserious cases are mixed and often negative, a case-by-case inquiry would be necessary to attempt to identify cases in which intervention would, on balance, be beneficial. The effects of intervention are, however, simply impossible to predict in individual cases.[62] Permitting courts to make individual findings of expected benefits would result in the continuation of present unnecessary intervention; courts have no incentive to change their present practice of intervention and thus could treat in a pro forma fashion any requirement to make additional findings.[63] Therefore, the Standards reject the case-by-case approach.

Even if there were a predictable net benefit for some nonserious harm cases, use of all available resources on children suffering serious harm still would be appropriate. Resources available for treatment are scarce, and the therapeutic tasks of transforming the child-rearing behavior of abusive or neglectful parents is immense. [64] Spreading resources thinly over a broad range of cases substantially reduces the opportunity to help *any* family improve child-rearing patterns while it increases the number of families that must endure the stigmatizing and other negative effectrs of intervention.

* * * * *

(b) *Termination of Services.* The Critique argues that, once court-supervised intervention begins, it should continue until the family can no longer benefit from supervision and services, even though the original problem has been resolved. [78] Parents giving their children identical care would thus be distinguished on the basis of their past conduct. Proof at a prior hearing of a single incident that permitted original jurisdiction—rather than the care that is presently being given to children—would then determine the permissibility of continued intervention. The Critique's proposal parallels present practice and demonstrates why, for the poor, "once a social worker gets in your life, you'll always have a social worker in your life."[79]

When a child is no longer seriously endangered, the arguments for eliminating jurisdiction for nonserious harm prevail. If the parent is unconvinced of the benefit of the services after eighteen months, such that he or she would not accept voluntary services and the child is no longer endangered, continued coercive intervention is unlikely to provide benefits that justify continued intrusion upon the family. Although sometimes insufficient for permanent change, eighteen months is an adequate period for the service deliverer to establish a trust relationship with the parents and demonstrate the utility of the services rendered.[80]

Even if benefits were expected after the initial condition was corrected, it is irrational to expend resources on unwilling parents to make incremental gains toward optimal child rearing while seriously endangered children and their parents are not provided the intensive services they need. It is also irrational to expend resources on unwilling parents when there are few resources available for the large number of poor families who want services. Finally, continuing jurisdiction beyond eighteen months would keep caseloads unrealistically high. The opportunity to work intensively with a few serious cases in which dramatic change is needed would be lost.

FOOTNOTES

8 *Id.* at 679 & nn. 65-68.

9 The adjudication and labeling of parents for child abuse and neglect varies with state legal definitions, court and agency policy, and media practices. Although neither category of parents is homogeneous, *See* D. Walters, Physical and Sexual Abuse of Children 33-55, 62 (1975), certain characterisitics of abusive parents distinguish them from neglecting parents. *See generally* A. Kadushin, Child Welfare Services 15-16 (1967); Steele & Pollock, A Psychiatric Study of Parents Who Abuse Infants and Small Children, *in* The Battered Child 89, 99 (2d ed. R. Helfer & C. Kempe 1974). Both groups, however, evidence low self-esteem and are highly vulnerable to the negative effects of labeling. *See* notes 12 & 15 *infra.*

10 The horror of a senseless attack on and injury of a helpless infant or child may be unmatched in emotional intensity. Adults who confront or merely consider the act of child abuse generally evince two psychological responses to such horror: (1) denial that child abuse exists or that adults, including oneself, could do such a thing and (2) projection of all rage and inner fears onto the other who has been adjudicated a child abuser. B. Steele, Working with Abusive Parents from a Psychiatric Point of View 4 (DHEW Pub. No. (OHO) 75-70, 1975), *See generally* D. Bakan, Slaughter of the Innocents: A Study of the Battered Child Phenomenon (1971).

11 *See, e.g.,* The Tennessean, Oct. 21, 1976, at 4, col. 4. The emergence of a punitive approach to child abuse may be due in part to the focus of the media on the "sensational and outrageous" incidents of abuse. A. Schuchter, *supra* note 2, at 10.

12 *See* Davoren, Working with Abusive Parents: A Social Worker's View, 4 Children Today 2, 39 (May-June 1975). *See also* E. Goffman, Stigma 7-12 (1963); Erikson, Notes on the Sociology of Deviance, *in* The Other Side 9 (H. Becker ed. 1964); Garfinkle, Conditions of Successful Degradation Ceremonies, 61 Am. J. of Soc. 420 (1956). Even before court adjudication and labeling, abusive parents have an "unbearably low sense of self-value, resulting in a desperate need of reassurance and nurturing from the environment." Pollock & Steele, A Therapeutic Approach to the Parents, *in* Helping the Battered Child and His Family 3, 7 (C. Kempe & R. Helfer eds. 1972); *see* Goldberg, Breaking the Communication Barrier: The Initial Interview with an Abusing Parent, 54 Child Welfare 274, 274-75 (1975); Kempe & Helfer, Innovative Therapeutic Approaches, *in* Helping the Battered Child and His Family, *supra* at 52.

13 *See, e.g.,* Elmer, Hazards in Determining Child Abuse, 45 Child Welfare 28, 32-33 (1966). The self-fulfilling-prophecy effect of negative labels is well established. *See* E. Goffman, *supra* note 12, at 7, 105-25; R. Rosenthal & L. Jacobson, Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development (1968); Cromwell, Blashfield & Strauss, Criteria for Classification Systems, *in* 1 Issues in the Classification of Children 1, 20 (N. Hobbs gen. ed. 1975); Guskin, Bartel & MacMillan, Perspective of the Labeled Child, *in* 2 Issues in the Classification of Children 189, 189-93 (N. Hobbs gen. ed. 1975); Orlando & Black, The Juvenile Court, *in* 1 Issues in the Classification of Children, *supra* at 349, 362-68. In addition to the stigmatizing label, coercive intervention creates a hierarchical parent-caseworker relationship. The resistance of the abusive parent to the superiority asserted by the professional furthers the resistance of the parent to the need for change and thus poses risks to the child of continued abuse. *See* D. Walters, *supra* note 9, at 56-61.

14 *See* Hopkins, The Nurse and the Abused Child, 5 Nursing Clinics of North America 589 (1970). *See also* Davoren, *supra* note 12, at 39-40.

15 The poor suffer from feelings of low self-esteem, depression and helplessness as a result of their monetary failure in an achievement-and status-conscious society. Child attachments are often the sole source of feelings of competence and self-worth. Destruction of this last thread of ego runs serious risks to the psychological health of the parent and to the maintenance of a nurturing parent-child relationship. *See generally* A. Hollingshead & F. Redlich, Social Class and Mental Illness (1958); The Drifters: Children of Disorganized Lower-Class Families (E. Pavenstedt. ed. 1967); Poverty in America (L. Ferman ed. 1961).

Polansky found that Appalachian blacks had high feelings of powerlessness regardless of socioeconomic status. N. Polansky, R. Borgman & C. DeSaix, Roots of Futility 90-92 (1972). This evidence suggests that minority groups may be more vulnerable to the negative effects of coercive intervention than are whites.

16 Nationwide data on the income of families of children placed in foster care do not exist but statewide studies indicate that at least eighty to ninety percent of such families are below the poverty line and the majority receive public assistance. In a 1973 study of foster child in California, the Joint Legislative Audit Committee conducted a census of all children in placement in Sacramento County and found that 1,289 of 1,431 foster children, or over ninety percent, were recipients of Aid to Families with Dependent Children (AFDC). Joint Legislative Audit Comm., Cal. Legislature, Report on Foster Care in California No. 148.1, at 39 (1973). After a subsequent statewide survey, the Audit Committee estimated that eighty-eight percent of the 48,460 nondisabled children in foster care statewide were AFDC claimants. Joint Legislative Audit Comm., Cal. Legislature, An Evaluation of Accountability for Foster Care at the State Level, No. 148.3, at 9 (1974). Because not all poverty level families are AFDC recipients, these figures underestimate the number of poor represented in the foster care population.

In Tennessee, ninety-four percent of the urban families and ninety-seven percent of the nonurban families of abused and neglected children had annual incomes of less than $6,000, and seventy-six percent of the urban and seventy-two percent of the nonurban families had annual incomes of less that $3,000. Tenn. State Dep't of Pub. Welfare, Study on Child Abuse and Child Neglect in Tennessee 36 (1975) (Study). [These percentages equal the total number of urban (fifty-two percent of all cases) and nonurban (forth-eight percent) protective and general service cases in each income range divided by the total number of cases (7,370 protective service cases, 19,388 general services cases) less those cases in which the income range was unknown (unknown cases were

assumed to be equally distributed among all income ranges).] The Study concluded:

> This does not mean that only low income individuals abuse or neglect their children, but that reported cases which are carried...by the Department of Public Welfare are most likely financially deprived families. It is suspected that higher income families do not request [*sic*] Departmental assistance when confronted with problems of child abuse and neglect.

Id. at 37.

17 The failure of researchers to identify and define the multiple perspectives of client, professional and society has seriously hampered the quest for a clear understanding of the outcome of psychotherapy or other services intended to change behavior. These perspectives are largely independent, but they are not mutually exclusive. Thus, there are areas in which the different goals and values of the three groups overlap. The client's goal is gratification of needs; the professional's goal is conformity to health in the way in which the professional defines it; and society's goal is conformity to rules and mores. Strupp & Hadley, A Tripartite Model of Mental Health and Therapeutic Outcome with Special Reference to Negative Effects in Psychotherapy, 32 Am. Psychologist 187, 188-90 (1977). For evaluation of services ordered because of parental abuse or neglect, the client's and professional's perspectives are less important than society's goal of improving parental rearing of the child. The client's goals of increased well-being and self-esteem are, however, highly correlative with society's behavioral goals of improved child rearing. Thus, I shall discuss the effects that services have upon parents' subjective feelings and, consequently, upon their behavior toward the child.

18 *See* Hadley & Strupp, Contemporary Views of Negative Effects in Psychotherapy, 33 Arch. Gen. Psych. 1291 (1976).

19 *Id.* at 1298. For a more complete discussion of the negative effects of psychotherapy, see H. Strupp, S. Hadley & B. Gomes-Schwartz, Psychotherapy for Better or Worse: An Analysis of Negative Effects (to be published by Jason Aronson, Inc., Oct. 1977).

20 Hadley & Strupp, *supra* note 18,. at 1296.

21 *See* notes 12 & 15 *supra.*

22 Gorham, Des Jardins, Page, Pettis & Scheiber, Effect on Parents, *in* 2 Issues in the Classification of Children, *supra* note 13, at 154, 159.

23 *Id.*

24 *See* U. Bronfenbrenner, Is Early Intervention Effective? 52-55 (2 Report on Longitudinal Evaluations of Preschool Programs, DHEW Pub. No. (OHD) 74-25, 1974).

25 Involvement with a child protection professional who is more competent or successful than the parent may engender reliance on the professional and feelings of reduced ability to function without the professional's assistance. Parents may even ask for criticism or manipulate the professional to accept their low sense of self-worth. *See* 2 National Center on Child Abuse and Neglect, Child Abuse and Neglect: the Problem and Its Management 3-5 (DHEW Pub. No. (OHD) 75-30074, 1976).

26 *See* Elmer, *supra* note 13.

27 Questions asked of neighbors, relatives and others about the suspected abuse or neglect often infuriate the parents, whose reputations in the community are affected. *See generally* The Battered Child (J. Leavitt ed. 1974).

28 *See, e.g.*, D. Walters, *supra* note 9, at 95-96 (1975).

29 Critique at 675-79.

30 *See, e.g.*, Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10, 21 (S.D. Iowa 1975) (parent-child termination statute is unconstitutionally vague). The child protection professionals themselves admit the ambiguity of judging even abuse. In a Florida survey, sixty-four percent of police and higher proportions of judges and physicians agreed with the statement that "[i]t is difficult to say what is not mistreatment." Nagi, Child Abuse and Neglect Programs: A National Overview, 4 Children Today 13, 16 (May-June 1975). In a simulation study with actual case files, three judges agreed in only forty-eight percent of the cases whether to remove a child or leave the child at home under supervision. M. Phillips, A. Shyne, E. Sherman & B. Having, Factors Associated with Placement Decisions in Child Welfare 69-84 (1971).

31 *See* notes 18-25 and accompanying text *supra.*

32 IJA/ABA Standards, Commentary, pt. 1.3. at 40.

33 Beyond the increased effectiveness of treatment, creating nonhierarchical relationships with abusing or neglecting parents—in which the parent is accepted and valued without condoning harmful behavior—is central to humanistic principles. *See* J. Rawls, A Theory of Justice 7-16 (1971).

34 *See* Critique at 686-87; note 12 *supra.*

35 *See* M. Jones, R. Newman & A. Shyne, A Second Chance for Families: Evaluation of a Program to Reduce Foster Care 44 (1976). The other frequently requested services were: financial assistance (34%), foster care (31%), day care (20%) and homemaker service (15%). *Id.*

36 Evidence suggests that court-ordered hard services—clothing, transportation, etc.—have a beneficial effect on child-caring crises while court-ordered soft services—counseling—do not. *See id.;* Burt & Balyeat, A New System for Improving the Care of Neglected and Abused Children, 53 Child Welfare 167 (1974). For a review of the effects of family intervention projects, see 2 S. White, Federal Programs for Young Children: Review and Recommendation 238-87 (DHEW Pub. No. (OS) 74-103 1973). Impressionistic evidence of the limited success of soft services indicates that a trust relationship with the client is required. A trust relationship is usually very difficult to construct when the client is complying unwillingly with a court order.

37 *See* Davoren, *supra* note 12, at 39.

38 *Id.* An added benefit of increased availability of voluntary services may be a decrease in voluntary placements of children in foster care. Families are often faced with the choice of voluntary placement or weathering a crisis without state assistance. If voluntary services were available to protect children at home, many families would choose this method of resolving the crisis.

39 Critique at 678.

40 The reason for the refusal of agencies to provide services on a voluntary basis may not be solely that agencies are so overworked in providing court-ordered services that no resources are left for noncourt-ordered clients. Justification of agency expenditures may simply be easier when services are ordered by the court than when requested by clients. Or, agency antipathy toward the multiproblemed poor may inhibit affirmative responses to client requests for assistance. *See* De Francis, The Status of Child Protective Services, *in* Helping the Battered Child and His Family, *supra* note 12, at 127, 127-30.

41 *Cf.* R. Mnookin, Projected Cost Savings from the Passage of S.B. 30 (1976) (unpublished memorandum on file with the author) (estimates of cost savings due to adoption of Standards-like provisions in California). Based on data from experimental programs around the country, Professor Mnookin estimates conservatively that approximately fifteen to twenty percent of foster care costs could be saved annually. *Id.* at 1,6. The California Joint Legislative Audit Committee makes a higher estimate of savings. *See* note 44 *infra.*

42 According to the Community Services Administration, eighty-nine percent of child welfare expenditures are for foster care. U.S. Gov't Accounting Office, More Can Be Learned and Done About the Well-Being of Children 35 (1976).

43 *Id. See also* Consultants to Subcomm. on Children and Youth, *supra* note 2, at 18.

44 Estimates of the number of children in foster care in the United States range from 350,000 to 400,000. *See* Foster Care: Problems and Issues, Hearing Before the Subcomm. on Select Education & Welfare of the House Comm. on Education & Labor, 94th Cong., 2d Sess., pt. 2, at 3 (statement of Rep. Mario Biaggi); S. Vasaly, *supra* note 2, at 12. The average boarding cost per child receiving federal funds for AFDC foster care was $289.39 per month in December 1976. National Center for Social Statistics, Public Assistance Statistics December 1976, at 13 (DHEW Pub. No. (SRS) 77-03100, 1977). Administration and other services add at least an additional $50 to $60 per month. [California's service and administrative cost per child were $93 per month in 1973. Joint Legislative Audit Comm., Cal. Legislature, Report on the State's Role in Foster Care in California No. 148.2, at 31 (1974).] Thus, a minimum average cost for federally funded foster children is $350 per month, or $4,200 per year. Assuming that foster care for nonfederally eligible children costs about the same, at least $1.47 billion are now spent annually for the 350,000 children in foster care nationwide. National reduction of foster care placement by twenty percent would thus save about $284 million. *See* note 42 *supra.*

45 *See* note 35 and accompanying text *supra.*

46 Although there is little agreement about what constitutes neglect or abuse, *see* Mnookin, Foster Care—In Whose Best Interest?, 43 Harv. Educ. Rev. 599,604 (1973), and no accurate data on the frequency of occurrence, it appears that the general conditions that child protection professionals perceive to be abuse or neglect are extremely common. In the view of the Department of Health, Education and Welfare's (HEW)

Community Services Administration (CSA), all of the 14.4 million children in families whose incomes are at or below 125 percent of the poverty level "might, in fact, benefit from child welfare services". U.S. Gov't Accounting Office, *supra* note 42, at 34 (GAO Report). Because eighty-five percent of the children in foster care are placed for reasons other than parental abuse or neglect, state intervention and foster care placement appear primarily to be responses to many different kinds of crises that occur in families too poor to pay for private treatment. *See* M. Jones, R. Neuman & A. Shyne, *supra* note 35, at 33. There is evidence from a recent survey of all Tennessee child protection caseworkers that the number of children now removed from parents is limited by the availability of foster homes, not by the perceived need to place children in foster care. Tenn. Dep't of Pub. Welfare, Services Needed and Services Available to Tennessee Children and Their Families 18 (1975). Caseworkers reported that only fifty-one percent of the children who need to be removed have been placed in foster care. *Id.*

Even if neglect were omitted and jurisdiction limited to present definitions of abuse, the number of cases is overwhelming. The widespread occurrence of abuse is clearly shown by a 1975 nationwide survey of 2,143 families in which parents were asked to report violence used on their children. R. Gelles, Violence Towards Children in the United States (Apr. 1977) (unpublished paper presented to the American Association for the Advancement of Science). Gelles estimates that in 1975, of the approximately forty-six million children between the ages of three and seventeen who lived with both parents, 3.1 to 4.0 million had been kicked, bitten, or punched at some time during their childhood, 1.4 to 2.3 million had been "beat-up," and 0.9 to 1.8 million had been subjected to their parents' use of a gun or knife on them at some time. *Id.* at 16-17.

For a general discussion of the inadequacy of child protection resources, see De Francis, *supra* note 40, at 131-36.

47 *See* Foster Care: Problems and Issues, Hearing Before the Subcomm. on Select Education and Welfare, *supra* note 44, at 87 (statement of Beverly Stubbee, Foster Family Service Consultant and Project Director, American Public Welfare Association) [Foster Care Hearing]; *id.* at 27 (statement of Gregory J. Ahart, Director, Human Resources Division, General Accounting Office). Published state surveys illustrate the existence of high caseloads. In Vermont, protective service workers had fifty or more cases; in Arizona, the average caseload was sixty or more containing as many as 150-200 children; and in California, the average caseload in each county varied between twenty-five and sixty-eight families. S. Vasaly, *supra* note 2, at 83.

48 For example, the Extended Family Center, established in San Francisco in 1973 with funds from the Office of Child Development, employed fourteen professional staff persons in addition to volunteers and students to treat twenty-five abusing families. For a full description of the intensive treatment scheme used successfully there, see Ten Broeck, The Extended Family Center, 3 Children Today 2 (Mar.-Apr. 1974). Recognizing the severe emotional and time demands on caseworkers, some state child protection agencies "limit the number of child abuse families each worker may carry to one, two, or three, with less demanding cases rounding out their loads." Devoren, *supra* note 12, at 40.

49 *See* S. Vasaly, *supra* note 2. at 89. A study of three child abuse and neglect demonstration projects funded by HEW revealed the following allocation of social workers' time: casework activities (case management and liaison to other institutions), 41%; project operations (planning and training), 21%; treatment services to parents (provided or arranged), 11%; support services to parents (arrangement for homemakers, childcare, etc.), 9%; community activities (prevention, education), 8%; and treatment services to children (provided or arranged), 5%. Letters from Linda Barrett, Berkeley Planning Associates, to the author (Aug. 9 & 16, 1977) (on file at Boston University Law Review).

50 *See* notes 35-38 and accompanying text *supra*. For a discussion of the intensive treatment required to stimulate the positive growth of abusive parents—often called reparenting—see National Center on Child Abuse and Neglect, *supra* note 25. *See also* Steele & Pollock, *supra* note 9, at 124-31.

51 *See* note 49 *supra*.

52 R. Helfer, The Diagnostic Process and Treatment Programs 40-41 (DHEW Pub. No. (OHD) 69-75, 1975).

53 *See* note 41 and accompanying text *supra*.

54 *See* note 48 and accompanying text *supra*.

55 An increase in resources for treatment might heighten job satisfaction and thus reduce staff turnover. As a result, training costs for new staff would be less and the average experience and expertise of the old staff would increase.

56 Critique at 678.

57 *Id.*

58 Some practicing child protection clinicians have been very critical of the attempt to increase agency budgets absent a substantial change in the focus of activities from punitive and authoritative manipulation to humanistic treatment. *See, e.g.*, D. Walters, *supra* note 9, at 56-58 (1975).

59 If a state spending $10 million per year on child protective service caseworker salaries increased expenditures for new caseworkers fifty percent to $15 million, the decrease in an average caseload of forty-five families, assuming the agency did not respond by taking more cases, would still leave each caseworker with thirty families. Intensive therapeutic involvement with each family would still be impossible. *See* note 47 & 48 and accompanying text *supra*.

60 U.S. Gov't Accounting Office, *supra* note 42, at 15. A significant increase in federal funds, however, will occur if the Public Assistance Amendments of 1977, H.R. 7200, 95th Cong., 1st Sess. (1977), become law. Title IV of the bill, modeled after the California Family Protection Act, *see* note 61 *infra*, would increase professional accountability, encourage provision of hard services and reduce the incidence of foster care placement. The Bill has passed both the House and the Senate and is in joint committee as this article goes to press.

61 The California Family Protection Act of 1974 (S.B. 1485), vetoed by Governor Reagan, would have appropriated $25 million for additional child protective services. The money was to be expended under controls similar to the Standards on cases in which the child had been or would be placed in foster care. Because of a perceived ineffectiveness of providing counseling and soft social work services absent the tangible resources families requested, the legislature had further required that the funds not be used primarily for new caseworkers. The legislature had authorized only twenty percent of the funds for salaries of additional social workers and required that the other eighty percent be spent on hard services. Enacted into law over Governor Brown's signature, the Family Protection Act of 1976, 1976 Cal. Stats. c. 977 (codified in scattered sections of Divisions 1 and 9, Cal. Welf. & Inst. Code (West Supp. 1977)) appropriates $1,825,000 for services for two demonstration counties with the same twenty percent limitation on caseworker salaries. Cal. Welf. & Inst. Code. § 16512.5 (West Supp. 1977).

62 *See* Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy, 39 Law & Contemp. Prob. 266, 258-60 (1975).

63 *Id.* at 268-72.

64 *See* notes 48-50 and accompanying text *supra*.

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78 Critique at 688.

79 It is crucial that services be terminated within a specified time period as provided by the Standards. Without a restriction on the length of jurisdiction and treatment, social workers are likely to hold cases open to avoid getting new cases that require more time and effort. *See* Mnookin, *supra* note 62, at 275-77. Additionally, if the number of new cases decreases, there is a strong incentive to the child protection administrators to lengthen treatment in order to keep agency caseloads high and thus avoid funding reductions. This system response of expanding the length of treatment when the number of new cases declines has been documented in the juvenile corrections field, in which reduction of the number of commitments to correctional facilities resulted in longer confinement of those committed. P. Lerman, Community Treatment and Social Control, 131, 172-74 (1975).

80 *See* notes 34-38 and accompanying text *supra*.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 9, Disposition Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Sections 9.34 and 9.35. Reprinted with Permission.

5. [§9.34] Incest and Sexual Molestation Cases

These cases, by their nature, pose special problems. Often the mother is a good and loving mother and the

court desires to return the child to her care, but she may not be depended upon to prevent contact of the child with the father, stepfather, or other person who has been molesting the child. Sometimes the child is left in the home at the time of the detention hearing, and the mother permits contact with the molesting adult during the intervening period prior to the disposition hearing.

Aside from battered child cases, more children are permanently damaged by contact with a molesting adult than in any other kind of §300 case. By his conduct, the molesting adult has made reconstruction of the home as a suitable living unit almost impossible. Few judges are willing to risk resumption of a normal parent-child relationship between the molesting adult and the minor.

Some, but perhaps all too few, mothers are willing to separate themselves from the molesting adult in order that the child may return home and resume a normal relationship with the mother. When the mother will truly protect the child from any further contact with the molesting adult, the best solution is usually the return of the child to the mother.

The mothers of children in child-molestation cases often fall into a common pattern. They are usually very dependent women, who lack self-confidence in their ability to fulfill the role of wife. They are generally thoroughly domineered by the molesting adult. This latter quality is what makes return to the home, unless the molesting adult is absolutely removed from the home, such a grave risk. In many cases, the mother is consciously aware of what is going on or, suspecting what is happening, closes her eyes to the realities of the situation. She would rather face damage to the child than possible loss of her spouse. For the molesting adult, the very availability of a young child is sometimes keeping him in the home situation.

One such case was referred to the probation department as a physical abuse case. Neighbors observed the mother physically abusing a child that originally came into the home for adoption. Adoption had never occurred because the mother did not want it. Investigation revealed a prior history of child molestation by the husband. Yet the wife literally kept the child in the home to please her husband, abusing the child during the husband's absences.

These cases are bitterly fought at the jurisdiction hearing, the mother normally siding with and supporting the molesting adult.

Undoubtedly, there are teenage girls who use such allegations as a form of manipulation to remove a stepfather from the home. However, it is a rare case in which the true stituation is not revealed before the jurisdiction hearing is compeleted, or at some date thereafter. When criminal charges are made, the pressures are such that a manipulative child will normally recant. The danger here is that almost all girls in this situation are subjected to tremendous pressure by the family to change their story. That is why placement in a neutral situation, pending the hearing, is so important at the time of the detention hearing.

The battered child syndrome is discussed at length in §8.48. In these cases, as with sexual molestation, the abusing parent or stepparent has, by his or her conduct, made reconstruction of the home as a suitable living unit almost impossible. Few judges are willing to risk resumption of a normal parent-child relationship between the abusing adult and the minor, at least not immediately.

Many of these situations are brought to court as failure-to-thrive cases. This form of child abuse can take the form of malnutrition or other physical deprivation. Once removed from the home the children immediately gain weight and thrive in the new environment, even though that environment may be the hospital or shelter.

Often it is not possible to determine which parent is doing the abusing. Sometimes the abusing parent attempts to shift the blame to a babysitter of other relative with whom the child is in contact. Fortunately, grandparents will normally not condone the abuse and will not only bring the situation to the attention of the probation department, but will assist the department in establishing jurisdiction. Intervention by adult relatives causes an immediate rift between the relatives and the parents. The last person the parents will want to see supervise the child is the one who was interested enough to initiate the action, yet often that relative is the very one with whom the child should be placed.

The unfortunate situation here is that often placement with one parent would be safe and suitable for the child, but that parent normally sides with the abusing parent and is unwilling to face up to the problem.

Some probation departments have therapy classes available for such parents. Most judges believe the battering parent is going to have to seek and obtain therapy, and solve the underlying problems, before it is safe to return the child.

Some judges do return the battered child home, but protect the child by frequent and unannounced spot checks of the child and periodic examinations by a nurse and/or doctor. The difficulty with this solution is that when the underlying causes have not been removed, the child abuse may continue, but in a more subtle form. This has been observed in some of the rare cases of teenagers (abused children usually do not survive infancy) who are returned home. The physical abuse stops, but other forms of mental and emotional abuse continue. This is as damaging as the physical abuse, and makes a decision to return the child home a grave risk. The provision of §362, discussed in §9.25, will be of assistance if home placement is ordered.

Here again, social workers sometimes approach this problem differently from their counterparts in the probation department. Some social workers view the family unit as the all-important social need, and they would force the abused child back into that context. For this reason, some courts refuse to permit either sex-molestation or battered child cases to be supervised by the welfare department, insisting that all such cases be supervised by the probation department, even though a social worker is active in the home.

B. Types of Services Available in Home Supervision

National Center on Child Abuse and Neglect, *Protective Services for Abused and Neglected Children and Their Families* **67-77.**

2.0 Support Services

2.1 Homemaker

Homemaker service can provide vital support to parents who are unable to care for their children because of absence from the home, because of immaturity or retardation-related lack of child care and home management skills, or because of apathy and depression. In many instances, use of a homemaker can eliminate the need for temporary placement of a child when a parent is absent due to illness or desertion. Especially in neglectful families in which the parent is still present in the home but is unable to manage the home and child, a homemaker can instruct the parent in caring for the child; can assist with budget planning, shopping, and meal preparation; can establish a daily routine for the parent and help to alleviate personal and social isolation; and, at the same time, can serve as a maternal figure for the child.

Because of close contact with the family, the trained homemaker can provide the protective services worker with an ongoing assessment of the family and its capacity to mobilize its resources, and she can act as an advocate on behalf of the client. When planning for homemaker services, the protective services worker should develop a clear understanding with the parents as to what will be expected of them. Parents should understand that they are entering into a collaborative relationship with the homemaker in which they will work together to improve the home situation and their capacity for planning and organizing the activities of daily living.

Resources capable of providing this type of service include the public social services department and private homemaker agencies. Regardless of provider, two types of homemaker service should be available:

(1) teaching homemakers who are experienced in teaching home management skills to parents and (2) homemakers who replace the parent during an absence. Because parental absence or desertion can occur at any time, the agency must be capable of providing the second type of service on a 24-hour emergency basis.

As already discussed, it is essential that some homemakers receive specific training so that they can work with clients in a supportive but goal-oriented fashion. Close collaboration with the protective services worker and ongoing sharing of information about how the partnership is working are critical.

2.2 Day care

The abusive parent may need time away from the child in order to have the opportunity to develop new ways of meeting her/his own personal needs. The use of the child as a need-gratifying object can be greatly diminished if, through day care, an actual separation can be effected between parent and child. In most abuse cases, parental willingness to allow the child to enter day care is a major therapeutic achievement, requiring considerable support and validation by the worker. For the neglectful mother who is simply overwhelmed with the demands of parenting, especially if she has several preschool children, day care can be a major resource for keeping the family intact. The children in many marginal families can be assured a minimum acceptable level of care only if the mother is relieved of having to provide this care 24 hours a day. In such families, day care may provide children with at least two nutritious meals a day, good physical care, attention to emotional needs, and the cognitive and motor stimulation which will help to overcome deficits borne of environmental meagerness. Such use of day care can, by protecting the continuity of the parent-child relationship, often prevent foster care placement.

Day care services can be obtained from licensed or approved family day care homes or from day care centers in the community. Private preschool programs, Head Start centers, church-sponsored nurseries, and community centers are all good potential resources.

Recognizing that abused and neglected children may not be tolerated in day care settings designed for children who do not have severe emotional and developmental problems, special programs may be established by contract. Training for day care staff, a low staff/child ratio, a parent discussion group with concomitant emphasis on parent participation in the program, and client transportation are essential to the development and operation of a good day care program for protective services clients.

2.3 Foster grandparents

Retired persons and senior citizens can offer much to abused and neglected children who are in need of nurture and support. They can take children for recreational outings, or they can provide babysitting services a few hours a week so that parents can have some respite. Two advantages of using foster grandparents are their time and their experience. Many retired or older persons have time available during which they can become involved in community activities. They also have valuable life-long experience, having reared families of their own.

Working through local senior citizen centers, as well as through the area agency on aging, it may be possible to develop a foster grandparents program for clients receiving protective services.

2.4 Parent education

Many abusive and neglectful parents have little or no realistic understanding of what can be expected from children at different developmental stages. Many have little or no idea as to how children can be disciplined and limits can be set in a constructive manner. Many parents have virtually no idea as to how they can play and have a good time with children. Parent education —defined as helping the parent to learn basic elements of child development — alternative methods of discipline, and appropriate parent-child play can be provided by the protective services worker as part of individual casework, if the protective services staff have been given training in this area. An additional resource can be parent education or

effectiveness sessions where groups of parents meet to increase their social interaction.

Parent education groups can be developed by educational facilities such as community colleges, by mental health centers, and through private social service agencies.

2.5 Family planning

Family planning information and counseling should be provided to parents so that, if desired, they can control the size of their family and the spacing of their children. Staff should discuss the importance of family planning with parents, informing them of such services as may exist in the community and encouraging them to accept or seek referral to a family planning service.

Agencies equipped to provide these services include public health clinics, planned parenthood organizations, and social service agencies.

2.6 Recreational activities

Recreational activities for parents and children provide a convenient means of reducing the family's sense of isolation. Many immature and/or mildly retarded young women can benefit from an activities group designed to provide satisfaction and to increase self-esteem through such activities as planning and cooking a group meal, participating in crafts projects, making things for the home, sewing clothes.

Agencies such as the Boy Scouts, Girl Scouts, YM and YWCAs, and local community centers should be approached in order to obtain an understanding of the programs they already have and to explore possibilities for program development.

2.7 Housing and relocation assistance

In situations where the family's housing is substandard or insufficient, the family should be assisted in finding new housing. This may mean obtaining a list of apartments within the family's financial means, as well as accompanying the parents to see the apartments. Once a suitable location is found, arrangements can be made for moving. This assistance can be provided by the protective services worker as part of her/his case management functions.

Relationships with the local housing authority and with private realtors can greatly facilitate the work of this protective services worker in the area.

2.8 Transportation

Transportation to and from resource agencies is essential if a family is to receive necessary services. Transportation should be arranged either by the public social services department or by a specialized transportation agency in the community. In the latter case, contract between protective services and the transportation agency would help to ensure prompt and efficient service.

2.9 Legal services

Since many people feel that the interests of parent and child may be in conflict, it is recommended that the worker providing case management ensure that legal services are provided for the parent as well as separate legal services for the child, if indicated. Many public social service agencies have contracts for legal services. Legal aid societies represent an important resource for protective services clients.

2.10 Employment training and placement

The protective services worker should be aware of community programs which train and place clients for employment. Referrals to such programs should be part of the worker's efforts to assist the family through concrete services. Smooth referral and feedback procedures should be established.

2.11 Financial counseling and assistance.

Inability to budget and manage finances is a frequent problem among clients receiving protective services. In some programs, teaching homemakers can provide financial counseling, including budget planning, economical shopping, and food planning. In addition, the family may be eligible for financial assistance; this avenue should be explored with the income maintenance agency.

2.12 Speech/hearing testing and therapy

Protective services should maintain a referral relationship with professionals or clinics providing speech and hearing testing and therapy, so that if problems are discovered they can be diagnosed and treated.

3.0 Therapeutic Services

Many clients who receive protective services can benefit considerably from a therapeutic approach that goes beyond the provision of basic casework services. In many cases, the need to explore and alter maladaptive patterns of behavior requires specific therapeutic techniques. Individual pathology, maladaptive and destructive couple relationships, and disturbed family systems require and deserve intervention which is goal-oriented. Techniques that help parents develop new problem-solving approaches are most valuable. Abusive and neglectful parents need time to develop a relationship of trust; they need to experience the worker as a source of gratification. However, this phase should be the beginning rather than the end of treatment. "Reparenting" means far more than providing dependent gratification; it also means setting limits and altering the balance between maladaptive and adaptive ways of thinking and behaving.

In the discussion that follows, a variety of therapeutic approaches and providers are discussed, all of which have considerable merit. The public social service agency should have a commitment to the development of a broad range of treatment services. Where such services cannot be delivered directly, arrangements must be made with other community agencies that can make these services available. However, unless providers can meet certain conditions, their services to protective services clients are likely to be only minimally useful. This is particularly true in the case of mental health centers which should be viewed as part of the broader services in their community,

and which should not dissociate themselves from the treatment of protective services clients. In order to ensure a treatment program that has relevance to clients receiving protective services, a mental health center should meet the following criteria:

> The availability of staff who have received specialized training and who work with clients receiving protective services. These staff may treat other kinds of clients, but, without training and an understanding of the dynamics of abuse, it is unlikely that mental health staff will be able to establish a therapeutic alliance with the abusive parent.
>
> These special staff should hold weekly case conferences in order to review client progress and to serve as a training resource for other mental health staff.
>
> The repertoire of staff members should include couple and group therapy; staff should be willing to use protective services workers as cotherapists in these cases.
>
> At least one member of the staff should have training in child and adolescent therapy; this person should have major responsibility for the treatment of these children.
>
> Members of the treatment staff should be willing to make home visits; they should also actively follow up missed appointments. All too often, unmotivated clients can be traced to unmotivated therapists who are simply unwilling to put forth the extra effort which may be required by a family.

3.1 Casework services

Casework services are provided by the protective services agency or by other social service agencies, by social workers in mental health agencies, or by caseworkers in private practice.

An abusive parent is typically a person who has intense, unmet dependency needs, who has experienced significant rejection, who lacks the means for obtaining dependency gratification or emotional support from others because of a lack of self-esteem and trust in others, and who uses her/his child as a need-gratifying object. As already discussed, the worker should respond to these needs by seeking to develop a close but firm and limit-setting relationship with the parent. The worker should also serve as a role model and behavior modifier, providing problem-focused, goal-oriented casework addressed to changes in behavior. For example, parents can be taught to look for alternative means of discipline if a worker models this kind of problem-solving behavior in interactions with the parent and child.

Neglectful parents who are depressed or overwhelmed by their day-to-day responsibilities can benefit greatly from a casework relationship. The caseworker, acting in a supportive fashion, can slowly help the parent to more adequately meet the needs of the children.

In many cases, casework services should constitute only one aspect of a treatment plan. Unless a parent is living only with very young children and cannot, because of limitations discussed in the section on group therapy, make use of a group experience, then group, family, or couple therapy should accompany the one-to-one relationship in casework services.

3.2 Lay therapy

Lay therapists or parent aides may be persons from the community who are committed to working with abusive and neglectful families. They do not operate within the client-worker framework, but seek to establish a relationship of trust in which the therapist is seen as a surrogate parent. Lay therapists seek to provide information and to meet concrete needs, working within a trusting relationship to change parents' self-concept and isolation. They can spend more time with clients than can the protective services worker who has other caseload responsibilities. Parent aides must be committed to spending a large amount of time with the abusive parent, to be available whenever necessary, and to receive training and ongoing supervision.

The public social service agency, a mental health center, a family or children's social services agency, or a group of private citizens can be approached to develop a lay therapy program. Studies have shown that a community group which is primarily organized for the purpose of developing and maintaining a lay therapy program is more likely to develop a sound program than is an agency with other service priorities. Once the program has been developed and the first group of volunteers has been trained, protective services may well develop a contract with the volunteer agency to provide services.

Where lay therapists are working within an already existing agency, every effort should be made to make them feel like full members of the protective services unit. Ongoing recruitment, training, and supervision of lay therapists are likely to suffer if these activities have to compete with other responsibilities. Attention should be given to see that this does not happen.

3.3 Group therapy

Following an initial period of casework services, group therapy can be of great benefit to many clients receiving protective services. The group encourages socialization among members and the development of a mutual support system. A group approach is helpful because it is often easier to identify and understand destructive interactions and behaviors in others than it is to recognize these characteristics in one's self; moreover, a group approach allows for the possibility of ignoring or bypassing a client who, in a given session, is not in a working frame of mind. Criteria for group therapy include: ability to share the therapist (s) with others, adequate intellectual ability that enables the person in therapy to verbalize and communicate with others, absence of acute psychosis, and a lack of resistance as manifested by explosive behavior which is so strong that it disrupts the group process. Groups can be established for couples, for single parents, or they can be mixed. Optimal group size seems to be between 8 and 10 clients; groups should meet weekly.

The group should be led by an individual who has had training and experience in group therapy. Protective services workers who have had this kind of training should be encouraged to develop a group for parents. As already discussed, regardless of the auspice under which the group meets, a cotherapy approach is extremely helpful, given the difficulty of the clients and the dynamics they present. Cotherapy between a protective services worker and a mental health professional is especially effective.

3.4 Parents Anonymous

Parents Anonymous (PA) is a self-help group which provides a supportive network for abusive parents, acts as a vehicle for socialization, and provides a wide range of information about parenting. PA groups vary; some may be confrontive and may therefore not be suitable for parents who tend to be withdrawn and easily frightened by an aggressive approach.

The national organization of Parents Anonymous can be contacted for assistance in developing a PA chapter where one does not already exist. A strongly collaborative relationship between protective services and PA may be of great value. PA represents not only an important resource in terms of referral to group meeting, but PA members can be of major assistance in the early investigation of abuse and in serving an advocacy function for parents in their dealings with various authorities. Hostile and overtly aggressive clients who, in some cases, may be unwilling to open the door to a protective services worker can sometimes be approached much more readily by a PA member. An introduction by the PA worker helps to give the protective services worker an aura of legitimacy in the eyes of the family. Such an initial meeting with a formerly abusive parent can serve to change the entire attitude of a new client.

While the professional sponsors of PA may be mandated by law to report incidents of abuse, protective services should identify the local PA position on members reporting. The national PA Policy is that anonymity does not apply to members of PA organizations where a child is in danger of abuse or neglect.

3.5 Couple therapy

Husbands/wives or boyfriends/girlfriends should not be excluded from therapeutic treatment. Because stress in a man/woman relationship is frequently a major dynamic of child abuse, every effort should be made to include both partners in the treatment. The boyfriend or husband should be included from the beginning of treatment so that he does not feel that the therapist is allied with his partner against him.

Couple therapy gives couples an opportunity to work on their relationship. The therapist interprets and points out those aspects of the interaction which are destructive, as contrasted with those which are positive. The couple are taught to listen to each other, to communicate their needs in a reasonable manner, and to engage in pleasurable recreational activities, as a couple and as a family.

Working with a couple requires specific skills; protective services workers can be trained in this treatment modality, or it can be provided by the team at the mental health center. Couple therapy sessions should be scheduled weekly.

3.6 Family therapy

Family therapy should be developed so that the entire family group can be involved in the treatment process. Conflicts between parents and grandparents and between parents and children, particularly older children and adolescents, can be worked through if the aim of the participants is to change a destructive interrelationship to a constructive one. Because child abuse is often the result of an intergenerational maladaptive system of destructive criticism, the goal of family therapy is to turn the family system into one of support and maintanance for all of its members. Family therapy sessions should be scheduled weekly.

3.7 Adolescent groups

Adolescent abuse and neglect is a special problem since the teenager is an active party to her/his own situation and, in many instances, may be reporting her/his own case.

Adolescent youths who have been abused, or who live in a home in which their siblings are abused, should be offered a special weekly group experience in which the focus is on undoing the effects of the experience and on providing appropriate models for later parenting. This approach could include supervised work experience in day care or Head Start programs, or activities in Big Brother or Big Sister organizations. A group experience should also be provided to adolescent parents.

3.8 Treatment for children

Many abused and neglected children need to see a worker on a regular weekly basis in order to work through their concerns and anxieties; this is accomplished through play therapy or discussion. The worker should have training in child counseling/therapy and, if she/he is not the protective services worker, should remain in close contact with that worker in order to avoid being removed from the total family picture.

3.9 Psychological testing

When psychological testing is required and the agency does not have this service, protective services should be able either to call in a consultant or to refer the client to a community agency for such testing. Referral procedures must be established and clearly understood so that referral can be effected with a minimum of waiting time.

3.10 Other counseling

Other counseling services which may be required in particular cases include counseling for unmarried mothers, for drug and alcohol abusers, and for those who need weight/grooming counseling. In some agencies, these can be provided by the protective services worker or by other specialists within social services. In other agencies, referral procedures and a collaborative working relationship should be established with appropriate community agencies.

4.0 Medical Services

4.1 Examinations

Medical examinations for parent and child should be available on an as needed basis. Many clients receiving protective services are themselves in poor health and, if they have not had a checkup in the past year, the worker should do everything to encourage such a checkup, as well as followup treatment and health care maintenance.

As discussed in Chapter III (p.51), it is essential that abused children and their siblings be seen by a physician and that they be seen for continuing health care.

Protective services should establish referral arrangements with local hospitals and with the local health department and its satellite clinics. It is important that the medical facilities have a followup capacity to enable them to maintain close contact with the protective services worker; thus, if a client misses a medical appointment, she/he can be visited or contacted and new appointment made.

It is essential that doctors and nurses in these facilities receive special training and develop a Suspected Child Abuse and Neglect (SCAN) team that can provide consultation to the hospital/clinic staff regarding all aspects of the management and treatment of such cases.

4.2 Visiting nurse/public health nurse

The local public health agency and the visiting nurse contribute an invaluable, special resource in terms of providing followup care for abused — especially failure-to-thrive — or physically neglected infants and children. The capacity of these agencies to make home visits, and thereby to closely follow a family, is of immense assistance to the protective services worker. Their special skills include monitoring the progress and development of young children, providing a relationship of friendly support and guidance in adequate child and health care, and sharing with families their knowledge of nutrition.

A collaborative relationship with public health nurses association — which includes training and the development of a special abuse/neglect unit within the public health department—is especially important.

Section XIII.

Removal From Home and Termination of Parental Rights

The final section looks to the problems of removing abused or neglected children from their homes and the frequent lack of finality when such action is taken. Initial topics are the range of placement alternatives and how judges select the most suitable alternative in the particular case. The court's role in monitoring children in placement and providing a permanent home for the child is then discussed. Included are the various criteria and court procedures used in terminating parental rights.

A. Placement Alternatives

1. Removal of the child from his/her home is usually considered the alternative of last resort.

2. If placement is required, the least restrictive alternative is considered preferable. This typically means foster home care.

Efforts should be made to place the child with a relative or friend of the family (Note: Relatives should now be eligible for foster care payments from the state. *See, Miller* v. *Youakim,* 99 S. Ct. 957 (1979).

The more common alternative is placement with a foster family or group foster home.

Placement in a private or public institution is preferable in only restricted circumstances, when the child has physical or mental problems that need treatment which can be provided in no other setting.

3. The initial court placement order should, whenever possible, include a treatment plan under which the return of the child to the natural parent is anticipated. During the separation, the parents should ideally be receiving social services necessary to help them overcome the problems which caused the child to be placed in foster care. (Treatment plans are discussed, in reference to home supervision, in Section XII.)

A major problem in treatment plans when placement is ordered is designating the visitation rights and obligations of the parents. The court should encourage continued parental involvement with the child during the placement. This will often make the child's return home easier to achieve.

The rights and obligations of the parent to visit the child may be spelled out, or visitation may be left to the discretion of the child's custodian.

The plan may state that the child will be returned if the parent complies with specified conditions, such as completion of alcoholic treatment.

4. Courts sometimes take an active role in selecting the placement alternative and forming the treatment plan. At other times courts rely on the recommendations of the child protective agency and the attorneys.

Judges may rely on the agency because they lack sufficient information about the suitability and availability of various types of out-of-home placements. Judges can obtain this information in various ways:

A. the attorney for the child can search for placement alternatives in addition to those suggested by the agency,

B. the court can develop a list of homes and services, to be used when the agency's recommendations are not satisfactory, and

C. in some courts the probation staff will help select alternatives.

Standards for selecting placement include:

A. least restrictive alternative,

B. placement in the same religious and cultural setting as the child's original home,

C. separation from delinquents and status offenders, and

D. proximity to parents (if visitation is encouraged).

5. Many of the above placement factors are included in the *Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272).* Judges should obtain a copy of this law and become familiar with it.

B. Court Review of Ordered Placement

1. A problem receiving much attention in recent years is that neglected or abused children often remain in placement for long periods, going from one foster home to another, with no certainty about the duration of such foster care, and with no hope that they will be returned to their parents who have been unable to resolve their problems.

Many child protective agencies lack the resources to ensure that children receive proper care and that they return to their parents as soon as possible.

2. Juvenile courts are becoming increasingly active in monitoring children in placement. Programs include:

Court review of placement after a specific period, typically one year.

The review may be required by statute, by court rule, or by order in individual cases.

The court review may be only a quick study of the agency's report, or it may be a complete disposition hearing.

Review of children in placement by court staff.

In a few courts the probation staff may have a role in monitoring children in placement, but this is not a common practice.

Several courts use lay volunteers to screen old cases to make sure children do not needlessly remain in placement.

3. Again, the new federal law (P.L. 96-272) will have a significant impact on the court review process, mandating a dispositional hearing no later than eighteen months after a child's placement, with further reviews no later than annually thereafter. The law permits the hearing to be conducted by the court or some administrative body appointed or approved by the court.

C. Termination of Parental Rights

1. One answer to the problem of long and unstable foster placement is termination of parental rights, thus freeing the child for adoption.

Involuntary termination of parental rights is the most drastic form of coercive intervention into the parent-child relationship.

2. The criteria and standards of proof for termination of parental rights vary among the states. In general, strict criteria and standards reflect an interest in parents' rights, while more permissive criteria and standards reflect concern for the child's need for permanent placement. Most authorities on child development agree that a child should be raised with a sense of permanence about his or her environment and be allowed to develop a psychological bond with a family and a sense of security.

In many states, the standard of proof for termination of parental rights is "clear and convincing evidence". The use of a "beyond a reasonable doubt" standard would result in fewer petitions for termination and more children being kept in "limbo" of foster care for years. However, it would force agencies to take greater care in marshalling evidence in termination cases.

The statutory criteria for termination are typically vague, permitting extensive judicial discretion. Recent standards call for definite, complex criteria; some criteria would differ according to the child's age or length of time in placement.

The primary test for termination may be "the best interest of the child," or there may be an additional requirement of parental unfitness at the time of the termination proceedings.

When termination is being urged because of a failure of parents to fulfill their obligations under a previous court order or agreement, the court should assure itself that the parents were given every opportunity to carry out the order or their promises, that the appropriate agencies actually made services available, and that parental contacts and visits with the child were encouraged and facilitated.

3. Termination proceedings present several issues concerning court procedures.

Should termination be permitted only in separate termination proceedings, or should it be permitted at disposition hearings in an abuse and neglect case?

Should the termination procedure include separate preliminary and disposition hearings, in addition to the fact-finding hearing?

Should counsel be appointed for parents and children?

Should the court order psychiatric examination of the parents or separate social investigations in addition to those conducted by the child protective agency?

Should the judge require the agency to present an adoption plan for the child?

What steps should be taken to serve notice on a missing parent? (*See, Stanley* v. *Illinois,* 405 U.S. 645 (1972).)

Support Readings

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A. Placement Alternatives

National Center on Child Abuse and Neglect, *Standards Relating to Abuse and Neglect, Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects,* **Standards for Courts and the Judicial System, I-7,** *DRAFT.*

Standard I-7

Judges, attorneys, guardians *ad litem,* and the courts should ensure that the dispositional order contains the least restrictive provisions consistent with the best interests of the child, and that the order is reviewed automatically for modification or enforcement.

GUIDELINES

Require that treatment services be provided for the family so that the child can remain in his own home or be returned home soon.

Require that when placement is consistent with the child's best interest, that the least restrictive placement options be considered first for the child such as:

(1) a foster family home;

(2) a group home;

(3) the home of a relative.

Determine whether the placement proposed for the child is the best alternative, making the decision after a comprehensive professional assessment is performed by the child-placing agency; and taking the following into account:

(1) the child's personality and development needs, as determined through interviews and appropriate psychometric and other tests;

(2) the child's family relationships, the family's current situation, and information regarding the child's siblings;

(3) placement alternatives with consideration for the child's unique capacities, needs, interests, and rights, while also providing a setting that approximates a positive home life and is located near the child's family.

Mandate, when the court orders placement of the child, that:

(1) the child and his parents be included in the development of the placement plan and decisions concerning the child as fully as possible;

(2) an individualized treatment plan be developed for the child and the family;

(3) the child's treatment plan be coordinated, to the extent feasible, with the parents' treatment plan so that the overall needs and timing of treatment can be regularly reviewed and assessed;

(4) treatment services be provided for the family to aid in reuniting the family;

(5) specific short- and long-term goals and steps in reaching those goals be included in the treatment plan;

(6) subsequent review reports which address the child's: physical, emotional, educational, and recreational needs; social skills; and the family's involvement in treatment be presented to the court.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* **2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 9, Disposition Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Section 9.32 and 9.33. Reprinted with Permission.**

3. [§9.32] Placement in Home of Relative or in Foster Home

If placement in the home is not possible, a relative's home is, of course, the next best solution. Relatives will normally give the child the time, attention, and genuine love that is so badly needed by these children. Assuming the relationship between the relative and parents has not become strained, the parents will usually remain in closer contact with children who have been placed with a relative.

Sometimes relatives bear the cost of such placement. However, it is often a financial burden for them to do so. In such cases, rather than to rely on reimbursement directly from the parents to the relative (although this may be suggested) most judges feel it is better practice for the county to pay the support at the usual relative rate, and then seek reimbursement to the county from the parents. This removes financial friction between the relative and parents.

Visitation rights are always a problem in out-of-home placement. Here again, relatives are better able to adjust to this problem and are more likely to promote visitation than are foster parents. The probation officer is usually given wide discretion in working out these problems, which provides far greater flexibility and better adjustment to the various circumstances of the parties. So far as possible, the court should avoid becoming embroiled in these kinds of problems, and should not attempt to set rigid visitation schedules. (In this connection, the juvenile court is far better equipped to deal with these problems than is the adult domestic relations court.)

Assuming no relative's home is available, and often there is none, the only remaining resource for a minor who must be removed from his home is foster home placement. Many of these are excellent homes and foster children thrive in them. On the other hand, there is no

really satisfactory substitute for a relative or natural home.

Many probation departments rely entirely upon the welfare department to recruit and provide adequate foster homes for all dependent children. Some welfare departments meet this responsibility adequately and others do not. It is always the fundamental responsibility of the court to insist upon prompt and suitable placement of these children.

Some courts have found long delays on the part of the welfare department in effecting placement. To meet this problem some judges require, at least once a month, a report on the shelter population, which indicates the time spent awaiting placement. Some judges have made a general order that, in all cases where the child has not been placed within 60 days, the responsible social worker in the welfare department must appear before the court (normally on an ex parte calendar) and explain why placement has not been made. If there is no adequate excuse for the delay, these judges remove responsibility for placement from the welfare department and lodge it with the probation department. Removal of supervision is a blow to the welfare department, and it does not require many such removals before that department straightens out its problems and effects timely placement. If left without court supervision, placements have been known to be delayed as long as six months, to the great detriment of the children involved.

The problems of delay in placement previously experienced should now be removed by the periodic reviews required by §367.

The entire question of probation department versus welfare department supervision is examined in §9.36.

4. [§9.33] Placement in Private Institution

Placement in private institutions is normally not necessary. There are, however, some severely emotionally disturbed dependent children or others with special problems who require such treatment. Some of the considerations discussed in §9.17 are applicable here.

Paul M. Lewis, et al., "Dispositions," in Support Center for Child Advocates, Inc., *How to Handle a Child Abuse Case; A Manual for Attorneys Representing Children* (1978), Chapt. VIII.

4. *Placement of Child.* If child is to be removed from his family, consideration should be given to:

(a) Probable duration: many foster homes are designated "emergency" (up to 30 days) while others are for more long-term care;

(b) The adequacy of the foster home for meeting the special needs of the child, such as proximity to special education or counseling services; and

(c) Plan for monitoring and evaluating programs and court review for termination of court proceedings to avoid indefinite placements.

5. *Visiting of Children Who are Placed.* If visiting rights of a parent are not specifically stated in the disposition order visiting may be as infrequent as monthly. This is not usually in the best interest of the child thus it is recommended that if a child is placed in a foster home or instituion, the disposition order stipulate that visiting be permitted at a minimum of 4 hours a week. The burden should be on the agency to indicate why less frequent visits are in the *child's best interest.* It should be noted that some agencies such as Children's Aid Society require visits to be held in their office while other agencies such as the Department of Public Welfare allow visiting to occur in the foster homes. The place of the visit should be specified.

6. *Mandatory Review.* If mandatory review of services (whether a child is placed or not) is not included in the order, review may not take place. An informal hearing could be held to receive reports or a full hearing may be necessary.

7. *Provision for a Treatment Plan and/or "Contract".* Professionals working in the area of child abuse and neglect are beginning to utilize contracts to stipulate specific services to be provided to a family, the agencies to provide that service, the expectations of the parent, etc.

Such a treatment plan will serve a two-fold purpose. First, it will provide a program by which, hopefully, the family's problems can be remedied so that it can be preserved and offer the best possible environment for the child. Second, to the extent that the parents fail to satisfy their obligations under the plan, a record will be established based upon which a request for more dramatic relief, possibly including termination of parental rights, where warranted, can be sustained. The treatment plan which is agreed upon should be approved by the court and made part of its order. A specific treatment plan is the best insurance that a child will not slip between the bureaucratic cracks and be left in limbo indefinitely.

The court order should require those agencies that have delivered services in the past as well as those anticipated to deliver services to the family to meet with the parent and/or his or her attorney within 10 days of the hearing to develop a specific treatment plan or contract. (See Form 1 and 2)

E. Follow-up

The guardian *ad litem* is permitted under the CPSA to petition the court for establishment and/or implementation of appropriate services and to terminate or alter conditions of placement. 11 P.S. § 2223 (b). Since § 2223 (a) requires the guardian *ad litem* to represent the child's best interest, *at every stage of the proceeding,* it is incumbent upon the guardian *ad litem* to petition the court to order such services as are in the child's best interests. To carry out this duty, the child advocate must be aware of the progress, or lack thereof, of services rendered to the child and his family.

At a minimum, monthly contacts should be made with all agencies responsible for delivering services to the child and parents. Monthly contacts should also be made with the child, especially if he or she is articulate.

In order to assure continuity of representation, attorneys should try to do follow-up themselves. If this is impossible, a paralegal who has volunteered to work for the Support Center may be assigned to the case.

In the more difficult cases, the Support Center social worker will assume responsibility for follow-up.

The attorney and Support Center should determine who will assume follow-up responsibility as soon as the disposition order is made, with monthly reports shared between the two offices.

In the matter of , a minor } COURT OF COMMON PLEAS
FAMILY COURT DIVISION

ORDER

AND NOW, this 13th day of January, 1978 pursuant to an agreement entered into by [name of attorney], counsel for [name of mother], [name of attorney], Esquire, Court-appointed advocate for [name of child] and [name of attorney], Esquire, Assistant City Solicitor, counsel for Philadelphia Department of Public Welfare, it is hereby ORDERED and DECREED that:

1. [Name of child] be committed temporarily to the Department of Public Welfare.

2. [Name of mother] and [name of child] be referred to the Child Guidance Clinic for appropriate evaluations and treatment, including but not limited to, medical, psychological, psychiatric, educational, developmental, neurological evaluations and treatment.

4. All attorneys involved shall submit to Child Guidance issues which they desire to be evaluated including, but not limited to:

(a) What are the specific medical, psychological, psychiatric, educational, developmental and neurological needs of [name of child];

(b) To what degree is [name of mother] able to meet these needs;

(c) What intervention is needed both with [name of child] and her mother, [name of mother], in order to meet the needs of [name of child]; and

(d) What is the capability of [name of mother] to respond to such intervention.

5. Department of Public Welfare, Children's Hospital, Little Sisters of the Assumption and Child Guidance Clinic develop within 10 days a contract or treatment plan with [name of mother] outlining the stated goals of the evaluation and treatment program, the services to be offered, expectations of [name of mother], other family members as well as of the agencies involved.

6. Review by the Court in 2 months, March 10.

J.

In the matter of , a minor } COURT OF COMMON PLEAS
FAMILY OF COURT DIVISION

Pursuant to a Court Order dated January 13, 1978, signed by Judge , the various parties in this action met to determine a treatment plan concerning [name of mother] and her daughter [name of child]. Present at the meeting were [name of attorney], Esquire and Carol Schrier, Esquire, court appointed advocates for [name of child]; of the Children's Hospital; of the Department of Public Welfare; of the Child's Guidance Clinic; and of Little Sisters of the Assumption. At this meeting, the following treatment plan was agreed to by all parties.

1. [Name of mother] should attend therapy sessions with of the Child's Guidance Clinic at least once a week. In this therapy, should cover the following areas:

(a) An evaluation of the relationship between [name of mother] and [name of child];

(b) An analysis of [name of mother] attitude towards her son [name];

(c) An analysis of [name of mother] attitude towards her expected child;

(d) A psychological or psychiatric study of [name of mother], if determined by [name of person from Child Guidance] to be necessary;

(e) An evaluation of [name of mother] ability to handle anger as it relates to [name of child] and of the appropriateness of her reality testing;

(f) An analysis of the parental attachments of [name of child] and any other discussions of her needs; and

(g) A developmental study of [name of child].

It is expected that [name of person from Child Guidance] will issue an evaluation with a recommendation as to [name of mother] and [name of child] prior to the Court hearing scheduled on March 10, 1978.

It is understood that Child Guidance shall be the single agency delivering mental health services to [name of mother].

2. [Name of mother] shall attend a program at a hospital or a medical facility to obtain necessary pre-natal care. It is expected that [name of mother] will arrange placement in this program on her own and that she will continue attending this program as scheduled by the hospital or other medical facility. [Name of the person from Department of Public Welfare] will monitor this activity to insure that the visits are made as required.

3. St. Vincent's shall assess [name of child] as well as the mother-child interaction as observed by them during their custody of [name of child]. It is expected that [name of mother] will be allowed to take therapy session if approved by [name of person from St. Vincents] and [name of person from Child Guidance]. In addition, [name of mother] will be allowed to take [name of child] at additional appropriate times so long as the child is returned to St. Vincent as expected. St. Vincent's action with regard to [name of child] and [name of mother] shall be monitored by Carol Schrier to insure their actions are consistent with the actions of the various other parties.

4. [Name of child] shall receive a full physical and developmental examination at the Children's Hospital. This examination can then be compared with the physical examination done earlier at Children's Hospital to note any progress being made by the child. This activity shall be monitored by [child advocate] and Children's Hospital.

5. [Name of mother] is expected to make efforts to obtain suitable housing for herself and her child prior to return of the child to her. Her search for housing shall be aided by a family worker at the Child Guidance Clinic and by [attorney for mother], who will offer [name of mother] advice as to Section 8 and other subsidized housing. In addition, [Department of Welfare worker] will explore the possibility of [name of mother] living with any relatives, where that might be suitable.

6. At this time, [name of person from Little Sisters of Assumption] will have no direct responsibility concerning [name of mother]. However, [name of person from Little Sisters of Assumption] will be available if [name of mother] wishes to communicate with her.

7. The various parties expect that [name of mother] will make reasonable efforts to keep all appointments and perform the various tasks described in this agreement.

8. It is the understanding of the various parties involved that a recommendation that the mother and child be reunited is contingent upon: (1) [name of mother] completing the various tasks described here and (2) a recommendation by [name of person from Child Guidance] that [name of mother] is capable of adequately caring for [name of child]. It is understood this arrangement can then be reviewed by the court at some later date.

B. Court Review of Ordered Placement

(See STANDARDS RELATING TO ABUSE AND NEGLECT *No. 7.1-7.3, in Section XII. A.)*

National Center on Child Abuse and Neglect, *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects,* Standards for Courts and the Judicial System, Guidelines to I-7, *DRAFT.*

Require and oversee a review of the child's placement every 12 months, using the following criteria:

(1) Unless substantial progress is made within 12 months toward adjustments which would facilitate the return of the child to his family, termination of parental rights and adoption, or a permanent foster home, should be considered in the best interests of the child;

(2) the child should be protected against temporary foster placement which extends beyond 18 months, and from placement in a succession of different foster homes.

Require, when a formal court hearing is held regarding review of a child's placement, that:

(1) a formal record of such hearing be made;

(2) all parties receive notice of the time, location, and nature of such hearing;

(3) all parties be informed of their right to counsel;

(4) all parties may present evidence in conformance with standard rules of civil procedure;

(5) all parties be notified of decisions made as a result of such hearings, and receive a copy of the final court order.

Commence a court proceeding to enforce a dispositional order whenever there is a substantial violation of the treatment plan by the parent or other person or agency responsible for the care of the child; either the court or any other interested party may cause such proceeding to be commenced.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 7.5, 10.7. Reprinted with Permission.

7.5 Standard for return of children in placement.

A. Whenever a child is in foster care, the court should determine at each six-month review hearing whether the child can be returned home, and if not, whether parental rights should be terminated under the standards in Part VIII.

B. A child should be returned home when the court finds by a preponderance of the evidence that the child will not be endangered, in the manner specified in Part II, if returned home. When a child is returned, casework supervision should continue for a period of six months, at which point there should be a hearing on the need for continued intervention as specified in Standard 7.4 A.

C. At each review hearing where the child is not returned home and parental rights are not terminated, the court should establish on the record:

1. what services have been provided to or offered to the parents to facilitate reunion;

2. whether the parents are satisfied with the services offered;

3. the extent to which the parents have visited the child and any reasons why visitation has not occurred or been infrequent;

4. whether the agency is satisfied with the cooperation given to it by the parents;

5. whether additional services are needed to facilitate the return of the child to his/her parents or guardians; if so, the court should order such services;

6. when return of the child can be expected.

D. If a child is not returned to his/her parents at such review hearing, and parental rights are not terminated, the court should advise the parents that termination of parental rights may occur at the next review hearing.

COMMENTARY

Standard for return. As specified in Standard 7.1, the central goal of periodic court review is to return children home or to assure them another permanent placement, within a reasonable time period, from the child's perspective. Therefore, the possibility of return, and of termination, should be considered at each hearing. Standard 7.5 focuses on the substantive test for when to return a child. Standards for termination are proposed in Part VIII.

Most jurisdictions apply the "best interest" test to determine whether or not to return a child in placement. These standards provide a new test, making the test for return the same as that for removal, *i.e.*, whether the child can be protected adequately from the specific harm(s) justifying removal.

The issue is a close one, since a balancing test has more merit at this point than at initial disposition hearings, especially when a child is doing well in foster care. Despite the attractiveness of the "best interst" approach, the proposed test is preferable. First, if children are not returned because they are doing "well" in foster care, this may encourage foster parents and child care agencies to resist helping the natural parents resume custody. A foster parent who wanted to adopt would have great incentive to discourage efforts by the parents to retain contact with the child. They might also encourage the child to reject the parents, which can create conflict for the child resulting in emotional harm. In addition, social workers may have less incentive to work with the natural parents, especially if they believe that return home would be detrimental to the child, even if the home were "safe."

Second, choosing this standard enables parents who have demonstrated the willingness and capability to improve themselves and the home conditions to regain custody of their children. Even though foster care may be "better" than a poor but safe home, the standard set in 7.5 B. is more appropriate considering the goals of ensuring continuity, stability, and autonomy of families whenever possible and the limited purposes for which coercive intervention is justified.

Finally, no legislature has defined the specific factors a court should consider in measuring the child's well-being. The vagueness of current law may reflect legislative unwillingness to resolve the value judgments involved in defining "best interest." Even if a number of factors were specified, it might still be extremely difficult to determine whether improvement had occurred or whether the improvement was attributable to being in foster care. For some possible factors, like emotional wellbeing, there are no agreed upon measures. Other factors, like school performance, may be inapplicable in a given case if a child is too young to be in school. Moreover, the fact that a child's school performance or physical health improves while in placement does not necessarily mean that remaining in placement is in the child's best interest. Even if it is assumed that the improvement is attributable to the foster home, it would be impossible to tell how the child would perform with regard to any of these measures if returned home. While there is more information available after six months than at the time of initial placement, we still do not have the ability to assess the likely impact of one environment versus the other.

Application of the proposed standard also requires predictions. However, the determinations required are

within the skills of courts and social welfare agencies. Persons who have treated the parents can provide their evaluation of the parents' readiness to resume custody. Safety of the home environment can be tested by returning the child gradually with observation during the visits. On the basis of this and other information, the judge can decide if the child will be safe in the home, and if so, order his or her return.

Comparing this determination with the problems of deciding whether return is in an individual child's best interest demonstrates the improvement these standards would be over the current system.

Some courts have been attracted to the best interest test by cases in which the issue of return arose after the child had been in care many years, usually in the same foster home. See *Stapleton v. Dauphin County Child Care Service,* 228 Pa. Super. 371, 324 A.2d 562 (1974). Not surprisingly, judges are reluctant to return a child to natural parents who have not had custody for many years just because the child will not be physicially beaten or sexually abused if returned. They recognize that in most such situations the foster parents are the child's "psychological parents." See J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of Child* (1973).

These cases were undoubtedly correctly decided. It is rarely in a child's interest to be taken out of a family where he/she has lived for years and returned to another home merely on the basis of biological parenthood. However, the problem lies in the failure of present laws to require that a child be returned home or parental rights terminated within a shorter time period, not in the standard for return. Under the system proposed in these standards, foster care would be temporary and such cases would not arise.

Adopting the same standard for return as for initial removal will result in returning some children who are doing well in foster care. Even though their well-being may deteriorate at home, that cost is outweighed by the benefit of making foster care truly temporary. As a result, the best decision, from each child's perspective, cannot be made in every case. The best we can hope for is a system that promotes the best interest of most children.

Burden of proof. The burden of proof question is critical in the return decision process. Because the substantive standard—whether the child can be protected from harm upon return—requires a prediction about the likelihood of future endangerment, conclusive evidence cannot be produced by either the parents seeking return or the agency opposing it. Given the difficulty of making such predictions with a high degree of certainty, placement of the burden will be determinative in many cases.

The standards place the burden on the parents. However, the issue is a very difficult one, with substantial disadvantages in both directions. Therefore, the commentary discusses the pros and cons of each choice.

Placing the burden on the parents is the safe course from the standpoint of protecting the child from reinjury since fewer returns would occur and fewer risks would be taken. Especially in light of the fact that many agencies lack resources to rehabilitate parents, placing the burden on the agency may lead to its returning children in marginal cases, although it has not worked with the parents. Given that the child was removed only because he/she could not be protected in the home, this risk can be considered unjustifiable. In addition, placing the burden on parents may encourage them to make stronger efforts to resume custody. Finally, it is the parents who are seeking to change the status quo and, in general, the law places the burden on this party.

On the other hand, although conclusive proof of future harm is unavailable to both sides, to the extent that implications about future harm can be raised, the agency clearly has greater access to pertinent information and the greater ability to persuade the court. For example, the agency can show that the parents have not cooperated with a treatment program, have not shown an interest in the child, or have failed to care for other children in the home. It can also produce expert testimony indicating that because of a mental condition, alcoholism, or some other problem, the parents probably will endanger the child again. Given such evidence, a judge is unlikely to return the child.

While the parents cannot prove that the home environment will be safe until they have resumed custody, the agency can test the safety of the home environment by returning the child home on a gradual basis, starting with one-day visits and progressing to visits of several days before a final decision is made. The caseworker can observe the parent-child interaction during these visits to determine whether the child can be protected. Of course, parents will act differently under such conditions, but such procedures should uncover homes that remain clearly dangerous.

In addition, placing the burden on the parents may prolong foster care for many children. Since the parents rarely would be able to prove the home safe, judges may take the conservative course and leave the child in care until the agency recommends return. Thus, one may have to choose between the risk of reinjury and the risk of lengthy foster care.

The problem of lengthy foster care would not arise under the termination standards proposed herein since termination would occur, in most cases, within a year of removal if the child cannot be returned. See Part VIII. However, if these termination standards are adopted, a separate justification for placing the burden on the agency arises. Under the proposed system, if the child is not returned, termination generally will follow. Increasing the number of terminations is essential if children are to be provided stable living environments. Yet, it can be argued that before resorting to termination, a substantial and drastic step from the parents' perspective, the state should be required to prove that the child cannot be returned to her parents.

The proposed standard adopts the safer course with respect to reinjury. However, it is intended that the standard be administered in light of the general preference for maintaining natural family units and that the feasibility of return be fully and carefully considered by both court and agency in each case.

When a child is returned home, supervision of the family should be mandatory for at least six months, in order to insure that the child is not endangered again. At that point the case should be reviewed on the need for continued supervision, applying Standard 7.4 regarding cases where children are at home.

Children not returned. Standard 7.5 C. lists the specific issues on which the court must make findings if a child is not returned home at a review hearing. The reasons for requiring specific findings are basically the same as those discussed in the commentary to 7.4 B. The court needs the information specified in 7.5 C. in order to make a realistic assessment of the likelihood of return and to make a meaningful decision about the care of the child for the next six months. If services have been offered and accepted, and everyone is satisfied with them, it may be simply that the changes necessary before the child can be safely returned just take time, and a continuation of the current program would be appropriate. If the parents have visited often and participated conscientiously in the care of the child, but have not participated in the services or counseling offered, perhaps changes in that aspect of the program can be ordered.

Court reviews should not be limited to these issues. However, the specific questions posed in the standard provide the basic information any court would need to make sound planning decisions for the child's future.

Warnings as to termination. The final part of this standard is the requirement that the court explain to the parents the issues which must be decided at the next hearing. Under the standards proposed in Part VIII, termination after a year in placement will be far more frequent than at present. All parents should be made fully aware at each review hearing that if they have not made the progress necessary to allow reunion by the next hearing, their parental rights likely will be terminated so that the child may have a permanent home.

Perhaps the warning may supply some incentive to participate more fully in the programs available to facilitate reunion if that has been the reason for slow progress. It also makes it clear to the parents that the child's needs will be met first, and if they continue to be unable to protect their child, even through no fault of their own, they must bear the brunt of their problems, and the court will still protect the child.

Children's Defense Fund, ***Children Without Homes*** **(1978), 5-7, 161-163.**

Highlights of Our Findings

Families Don't Count

At every point in the placement process children and their natural families are isolated from one another by the action and inaction of those with official responsibility. Pro-family rhetoric notwithstanding, a pervasive, implicit anti-family bias often shapes decisions about children at risk of removal or in out-of-home care.

When the Child is Placed

The initial separation of child of family is often by default. Few alternatives such as homemakers, day care,[8] specialized day treatment, alternative housing and other supportive services are available. Removing a child from home is often the easiest course. Funds for removal are available; adequate funds for alternatives are not.

Sometimes, in order to get appropriate educational or social services for handicapped children, parents are told they must place their children in out-of-home care. Sometimes, they are even told they must give up legal custody of their children.

When it is necessary to place a child out of the home, little thought typically is given to placement with familiar relatives. Sometimes states do not pay foster care rates to relatives, although they will to strangers. Yet without such assistance, relatives often cannot care for the children. This means that even when willing relatives are available, a child is likely to be totally uprooted and placed with strangers.

When the Child is in Out-Of-Home Care

Typically, parents are not explicity encouraged to maintain contact with their children. Sometimes they are actively discouraged from doing so. Only one-half of the reporting counties in our child welfare survey had specific written policies about parent-child visitation. One county reported it permitted such visits only on special occasions, such as the child's birthday. Another permitted visiting only in the courtroom, hardly a setting designed to put either the child or parent at ease.

Parents who want to maintain close contact with a child in placement get little help from local or state officials. Funds to pay transportation costs for visits are limited even though children are often placed long distances from their families. Parents are not routinely informed about the progress children are making. Sometimes they are not even informed when their children are moved. All this serves to reduce psychological ties and lessen the likelihood of reunification.

While the child is in out-of-home care, parents generally get little help with the problems that led to the removal. Funds for services that would enable the family to be reunited are seldom available.

When Ties with the Natural Family are Broken

There is far too little concern for the child's right to a family when initially removed from his or her own home, often before other alternatives are tried. Yet it is a tragic irony that once parental ties have been severed, either as a consequence of parental abandonment or the action or inaction of public systems, legal termination of parental rights is rare. Regardless of the reality of the child's current situation or needs, there is widespread reluctance to initiate proceedings to terminate the rights of biological parents.

For children who should have parental rights terminated or who have had parental rights terminated, efforts to ensure new permanent homes are often not vigorous enough. Adoption efforts are hampered by fiscal barriers, inadequate funds for subsidized adoptions or legal fees, as well as deeply embedded views that certain children—minority children, older children, and children

with special medical needs—are "hard to place," and thus "unadoptable."

Children Don't Count

Children placed out of their homes are not only likely to be cut off from families, but also abandoned psychologically and sometimes literally by the public systems that assume responsibility for them. They are, in effect, children in double jeopardy.

In every county we visited, those who work directly with children report great pressures: impossibly large caseloads, excessive and meaningless paperwork, no time to get to know children for whom they make decisions, no time to visit families, and no training to deal with complex family problems.

Children remain in care for long periods of time, often moving from place to place, without the chance to experience stable caring from any adult. In our survey, 13 percent of the children had been out of their own homes for over four years, and an additional 20 percent for over six years. In all, 52 percent had been in out-of-home care for two or more years. Moreover, the responding survey counties reported that 18 percent of the children in out-of-home care had been moved more than three times.

Children in institutional or group home settings rather than foster home care appear to be particularly vulnerable to public neglect and various forms of institutional abuse. Mechanisms for ensuring that these children are appropriately placed and receive quality care are ineffective or nonexistent.

Sixty-four of the 140 county child welfare offices in our survey reported having written policies requiring caseworker-child contact. But while 46 percent of the counties reporting required such contact if a child was in a foster home, only 30 percent required contact if a child was in a group home; 25 percent if the child was in an institution; and only 12 percent if a child was in out-of-state placement. In other words, the further away the child was from a family context, the less caseworker-child contact was required.

Too many children are in institutions. In each of the seven study states, public officials openly acknowledged that children who did not belong in institutions were placed there. On the other hand, children who do need institutional care or care in residential treatment facilities may not get it. Children with special needs, for instance, are frequently placed in institutions with no appropriate programs or specialized services.

Despite immense public concern about familial abuse, no state CDF staff visited had set up mechanisms, nor issued guidelines to monitor and eliminate the institutional abuse of children. Such abuse takes many forms: the unmonitored, excessive use of seclusion or drug therapies, severe behavioral restrictions, or harsh physical punishment. Despite evidence that abuse of children in institutions and other group settings is widespread, no state studied had a licensing statute spelling out specific sanctions for institutional abuse.

Children are sent far distances from their own communities, sometimes within the same state, but often out of state. Out-of-state placement virtually ensures that there will be no contact with family or caseworker. Nationally, we estimate over 10,000 children are placed out of state at any one time.

The Failure of State Responsibility

States are often neglectful parents—sometimes even abusive ones—failing to meet their ongoing obligations to individual children at risk of or in placement. Public systems lack the capacity to ensure coordinated program planning and sevice delivery. Compliance with even weak laws and regulations is inadequate. We found evidence of such failures in each of the study states.

State statutory protections for children and families facing placement were inadequate.

Statutory criteria in the seven study states for the court's removal of a child from home were often vague and did not require that alternatives be tried in nonemergency situations.[9] Counsel was not uniformly provided at all points in the placement process.

None of the child welfare statutes in the study states explicitly required that consideration be given to placing a child with willing relatives as opposed to strangers; that a child be placed in the least restrictive setting; or that a child be placed in his or her own community unless there was specific evidence that to do so would be harmful to the child.

Only one study state (South Carolina), at the time of our visit, exercised its continuing responsibility to individual children in out-of-home care. It requires by statute a periodic review of the children, conducted independently of the public child welfare agency responsible for the care of the children.

Only three study states (Ohio, South Dakota, and Massachusetts) made it possible for minors at risk of voluntary psychiatric hospitalization to have access to counsel prior to hospitalization.

Efforts to provide permanence for children were limited.

No study state had placed emphasis in its statute or policy on reunification efforts to ensure, whenever appropriate, that children and natural families were reunited.[10]

South Carolina was the only study state which, as a matter of state policy, had taken a strong stand in regard to a child's right to permanence. The state had created an Office of Child Advocacy within the Governor's Office to act as advocate and ombudsman for children in foster care and to ensure that their right to permanence was protected.

All seven study states provided for subsidized adoptions, but only two gave *priority* to foster parents for the adoption of children they had cared for for long periods of time. Most study states failed to provide adequate funding for their subsidy programs.

Efforts by the state to ensure that children out of their homes received quality services were lacking.

Licensing, which theoretically constitutes a core component of the state's efforts to protect children, was ineffective. Even in Massachusetts and California, the two study states that had recently substantially modified licensing procedures and regulations, licensing efforts

were still beset with enforcement failures, and the licensing process was isolated from other placement activities. The same isolation pervaded program reviews.

No study state had developed explicit procedures for monitoring purchase-of-service agreements and ensuring that private providers met agreed-upon performance standards.

The administrative structure of children's services was varied and complex, but bore little relationship to the quality of services.

Fragmentation of children's services was widespread. Only three study states had sought administrative solutions, either through offices for children (Massachusetts and South Dakota), or through liaison staff across systems (New Jersey). Yet in each state we found "exchangeable children," who, with the same needs, were the responsibility of different systems.

State oversight of local practice was inadequate regardless of whether child welfare services were administered by the state or by local jurisdictions, with the state in a supervisory role. No local child welfare office that we visited reported receiving any substantive in-service training from the state child welfare agency. Staff did receive training in how to fill out forms.

Shockingly little was known about the status of children in placement. No study state monitored the treatment of minority children for evidence of discrimination.

Based on CDF's survey of child welfare and probation offices in 140 counties, the lack of information about children out of their homes, even in their own counties, was appalling. Responding child welfare officials could not provide data on the race of 54 percent of the children reported to be in out-of-home care; on the age of 49 percent of the children; on the length of time in care for 53 percent of the children; on the number of moves for 87 percent of the children; and on the legal status for 73 percent. Probation officials did no better. Fifty-nine percent could not identify the race of the children reported in out-of-home placement; 66 percent could not report age; and 42 percent could not identify the types of facilities in which the youths were placed.

Only two of the seven study states were even attempting to gather statewide data within the child welfare system, and only one across systems. No study state had systematic accurate information concerning the numbers of children and families receiving services to prevent placement, what services they received, or how effective such services were. No state could routinely and systematically identify those children who move in and out of placements, or trace the pathways of children moving from one system to another.

No study state was monitoring the treatment of minority children. We found evidence of unequal treatment of Indian children in both study states with large Indian populations, Arizona and South Dakota. In general, data about minority children were inadequate, but information available suggested minority children were even more susceptible than other children to the failures of the child-placing systems.

Efforts to give parents, children and foster parents an opportunity to voice complaints or problems were almost nonexistent.

Massachusetts was the only study state that had created within the Office for Children a mechanism for individual parents, children, foster parents, providers, and others to register complaints about services or seek resolution of difficult situations. Families in New Jersey had access to the Office of the Public Advocate empowered to engage in case and class advocacy in a variety of areas. No other study state had specific mechanisms for redressing procedural wrongs or service inequities and inadequacies, other than through normal legal processes, or in several instances, through ombudsman programs within institutions.

Programs That Work

The New York State Court Review System

In 1971, the New York State Social Services Law was modified to require a periodic court review of the status of any child voluntarily placed in foster care under child welfare auspices, and remaining in such care for 24 months or longer.[20] In 1975, the length of time in care was reduced to 18 months, making it consistent with already required reviews of children placed involuntarily.[21]

The New York law was the first of its kind.[22] It requires that the agency caring for the child petition the court for a review. At a hearing, the court then determines whether the child should be: continued in foster care; returned to a parent, guardian or relative; legally freed for adoption; or, if already freed, placed in an adoptive home. All parties—the agency, the foster and the biological parents —must be notified of the hearing and of the dispositional alternatives before the court. Children may be present at the hearing. In cases in which children are continued in care, the court must re-hear the case at least every 24 months, or more frequently if the court believes it is necessary or is petitioned to do so by one of the parties.

The impact of this review system on agencies and on the outcomes for the children has been carefully evaluated by Dr. Trudy Festinger. In 1974, comparing a sample of cases reviewed by the court by December 31, 1973, with cases that were not reviewed, she found that agencies were more likely to move toward permanence for a child (either by obtaining a voluntary relinquishment or by initiating termination proceedings) if there was a court review.[23] In 1975, Festinger re-examined the sample of court-reviewed children comparing actual outcomes for the children with the orders from the inital reviews. She found that by 1975, 77 percent of the children for whom discharge was initially ordered had been discharged, and 91 percent of the children for whom adoption was ordered were in adoptive homes. Of the children for whom the initial order was continuation in foster care, 46 percent has either been discharged or adopted by June 1975. In all, between 1972 and 1974, 46 percent of the sample children entering care in 1970 had left. By 1975, 71 percent of the children had left.[24] This is a clear reversal of the usual pattern that the longer the child is in care, the more likely that the child will remain until the age of majority.[25] Thus, Festinger's studies provide some empirical support for the positive impact of periodic judicial review systems that set forth specific dispositional alter-

natives and include mechanisms for ensuring compliance with those dispositions.[26]

The Concern for Children in Placement Project

The Concern for Children in Placement Project (CIP) represents another approach to ending the banishment of children now in the system. Initiated in 1974, under the auspices of the National Council of Juvenile and Family Court Judges, the project relies on volunteers sworn to an oath of confidentiaity. It is their responsibility to review court records on children out of their homes and to initiate, where appropriate, follow-up judicial reviews and action.[27]

In the first phase of th project, more than 4,000 cases were reviewed in 12 courts across the country by 250 volunteers. In .a number of places, the reviews have resulted in changes within the service systems and consequently, positive changes in the lives of the children.

Rhode Island reported a 50 percent increase in the filing of termination petitions, a 100 percent increase in adoption petitions, and a new request in the family court budget for a permanent care review monitor.

In Ohio, 26 out of 99 children reviewed were moved out of foster care.

In Oregon, 671 out of 1,006 children reviewed—67 percent—were removed from foster care.

In Texas, 136 of the 222 children reviewed—61 percent—were removed from foster care.[28]

A second phase of the project is now underway, involving implementation of the review procedure in 25 additional courts, the development of training materials, a follow-up study of a sample of the children initially reviewed, and the orientation of at least 150 additional juvenile and family court judges to CIP techniques.[29] The project will also pilot test a guardian ad litem[30] program in selected courts.

Freeing Children for Permanent Placement

The New York court reviews, the South Carolina Foster Care Review Boards and the Ohio reviews provide for periodic reviews of children out of their homes. They are required by statute and are conducted or approved by persons who have no direct service or administrative responsibility for children. The Children in Placement Project derives its authority from the concern of local judges. But public agencies providing services to the children have also initiated review efforts targeted on a specific group of children. The Freeing Children for Permanent Placement (FCPP) project is an example of such an effort.

Conducted by the Children's Services Division of the Oregon State Department of Human Resources, the FCPP project was funded in 1973 for three years by the Children's Bureau in the Department of Health, Education and Welfare.[31] The purpose of the project was to identify children in unplanned long-term foster care and provide the intensive services necessary to reunite them with their families or ensure their adoption. Over 2,200 cases were screened in 15 Oregon counties. The screening indicated that 40 percent of the children had been in care more than three years; 40 percent had been in three or more homes; and 58 percent were 12 or older. The average time in out-of-home care for the group was four and one-half years.[32] These statistics reflect national patterns. Of the group screened, 509 children were selected for intensive casework. They represented children who had been in foster care one year or longer, who were regarded by their caseworkers as having little chance to be reunited with their own families, and who seemed adoptable.

The results were dramatic. As of October 1976, 26 percent of the children had been returned home (despite the initial selection criteria); and another three percent placed with relatives. Thirty-six percent of the children had had parental rights terminated and were living in adoptive homes (19 percent with their foster parents); and seven percent were in formalized long-term foster care. Final action had not been taken for the remaining 29 percent, although adoption was planned for many of them.[33]

Cost data from the project indicate that over 4,000 months of foster care were saved during the project period alone when the children were returned home or adopted. This resulted in a savings to the state of $1,082,695 in direct maintenance payments, excluding the cost of follow-up services (usually provided for approximately four months.)[34]

A project staff of 11 caseworkers, each with caseloads of about 25 children, provided the actual services. Legal assistance for children was purchased with project funds from the Metropolitan Public Defenders Office. The lawyers provided technical assistance to the casework staff in bringing termination actions, as well as representation for the children. Project funds were also used for psychological and psychiatric evaluations and expert testimony related to court action. The easy access to legal assistance helped to remove some of the usual barriers to termination.[35]

The FCPP project demonstrates what an intensive, coordinated legal and social service effort can accomplish toward ending the banishment of children.[36] State agencies around the country have been responsive to this approach. When the Office of Child Development in HEW requested proposals from the states to replicate and/or adopt key aspects of the project, 36 states responded. Ten of these states and Puerto Rico were given grants for specific projects to ensure permanence to children now in foster care or to prevent unnecessary foster care.[37] The Oregon project, under a grant from the Children's Bureau in HEW, is also now providing technical assistance to states interested in providing permanence for children in long-term care.

The Parents' Rights Unit

One of the repeated themes throughout this report is that parents have few, it any, opportunities to challenge decisions about their children or to express in any meaningful way their continuing conern about what happens to them. In the course of our study, we learned of a program within a large public bureaucracy designed to break the "families don't count" pattern.

In 1975, the New York City Office of Special Services for Children (SSC), which is responsible for more than 28,00 children in foster care, established the Parents' Rights Unit (PRU). A unique ombudsman program, the

PRU provides a resource for natural parents of a child in care having difficulty with a public agency or an agency under contract to the city. Once contacted, the staff of five experienced social workers and a supervisor first encourage the parent to try to settle the matter directly with the facility. If that fails, the PRU becomes involved.

FOOTNOTES

8 While day care services theoretically can have a significant role in relieving stress on families, public policy in general has limited eligibility for publicly supported day care to children of working parents. Only a very small proportion of day care funds has been used for day care to prevent out-of-home placements.

9 There is such a requirement in two of California's 58 counties as a result of experimental time-limited legislation. See Chapter 4.

10 The California legislation cited in footnote 9 refers specifically to reunification efforts.

* * * * *

20 New York Social Services Law § 392.

21 New York Family Court Act § 1055(b).

22 For a state by state analysis of statutory provisions for reviews of children in foster care, see Appendix L.

23 T. B. Festinger, "The New York Court Review of Children in Foster Care," *Child Welfare* 54 (April 1975); 237.

24 T.B. Festinger, "The Impact of the New York Court Review of Children in Foster Care: A Follow-up Report." Child Welfare 55 (September-October 1976): 538-539.

25 It is also true that during the period that the review system was implemented, New York established an adoption subsidy program. This too, no doubt, facilitiated the movement of children out of foster care.

26 In 1974, the Family Court set up a system to notify agencies if reports were overdue, and assigned a staff member in the Office of Probation to review reports for substantive compliance with the court orders. The failure of agencies to carry out court orders, however, remains a continuing problem. The New York State Temporary Commission on Child Welfare plans to develop some new recommendations to strengthen the follow-up of court orders. Temporary New York State Commission on Child Welfare. Memorandum on Children's Defense Fund Recommendations re: *Children Without Homes,* undated. (Mimeographed.)

27 Virginia Cain, Project Director, The Concern for Children in Placement Project, Testimony Before the House Subcommittee on Select Education and the Senate Subcommittee on Children and Youth, Joint Congressional Hearing on Foster Care, September 8, 1976.

28 The general characteristics of the children involved in the reviews revealed familiar patterns. Twenty-four percent has been in foster care 5-10 years. Thirty-one percent had no court review in 3-10 years; 49 percent had little or no contact with biological parents; and 56 percent of the sample had been moved three or more times (223 children were moved 7 to 18 times, and 10 moved 19 times). *CIP Alert,* Vol. 1, (February 1977).

29 Children in Placement Project, Loose Leaf Training Manual, National Council of Juvenile Court Judges.

30 "Guardian ad litem" generally refers to a party appointed by the court to determine the interests of a young child or an incompetent adult in a court proceeding. Its specific use varies from state to state.

31 The project subsequently received funding for a fourth year to continue following the children's placements.

32 Regional Research Institute for Human Services, *Barriers to Planning for Children In Foster Care: A Summary* (Portland: Portland State University School of Social Work, 1976), p.1.

33 For further discussion of the project, see V. Pike, "Permanent Planning for Foster Children: The Oregon Project," *Children Today* 5 (November-December 1976); 22-25,41.

34 A. Emlen, J. Lahti, G. Downs, A. McKay and S. Downs, *Overcoming Barriers to Planning for Children in Foster Care* (Portland: Regional Research Institute for Human Services, Portland State University, 1977), pp. 6,89-110.

35 See, for a discussion of the barriers to termination in Oregon, Regional Research Institute for Human Services, *Barriers to Planning for Children in Foster Care: A Summary.*

36 A handbook based on the project's experience is now available. See, V. Pike, et al., *Permanent Planning for Children in Foster Care: A Handbook for Social Workers* (Washington, D.C.: DHEW, Children's Bureau, 1977).

37 Grants of approximately $90,000 each were awarded for demonstration projects in Alabama, Arizona, Maryland, Michigan, Minnesota, Nebraska, New York, Puerto Rico, Virginia, Washington and Wisconsin. In September 1977, the projects were funded for a second year.

National Council of Juvenile Court Judges, *Children in Placement Project* 13-16.

The Process

Though the CIP process is simple, it requires the dedication and support of the juvenile or family court judge and of local social services agencies. It also requires the commitment of a local project coordinator and volunteers who "make the project happen."

CIP works like this. Each court appoints a local project coordinator for CIP, a person with the qualifications outlined in the section titled, Role of the Project Coordinator.

The coordinator recruits concerned citizens as volunteers and trains them with the materials contained in this manual. These volunteers are sworn to confidentiality by the judge, or sign a pledge of confidentiality.* They then examine the case files of each child under court jurisdiction, to prepare case review forms containing vital information such as:

Who is the child?
Why is the child in placement?
How long has the child been in placement?
What is the child's legal status?
How frequently has the child been moved?
How frequently has the child been in contact with biological parents?
What is the status of the child's siblings?
When was the child's case last reviewed by the court?
Have parental rights been terminated? When?
What are the child's vital statistics?
What is the current treatment plan for the child?
What is the average cost of keeping this child in placement?

To obtain this information, volunteers may sometimes need to have access to social services agencies' files. The judge should initiate contact with these agencies, and the project coordinator maintains liaison with them.

The project coordinator supervises collection of this data, compiles it, and reports regularly to the judge on these results. Judges and agencies can then take action, with high priority cases becoming immediately apparent, and the status of every child in the court's jurisdiction clearly indicated. All of these roles, thus, interlock to help provide a permanent situation for the child without untoward delay.

To achieve this interlock, roles must be clearly understood. The following sections of this guidebook and support materials help foster that understanding.

Role of the Judge

The role of the judge in a CIP program is both philosophical and practical. Strong advocacy by the judge for the

goals and objectives of CIP ensure that all involved in the program—court staff, social service agencies, volunteers and the community at large—develop a respect for and commitment to the program, necessary for smooth operations. Basically, those goals, as outlined by national CIP officers, are:

1. To establish a means by which the court, child welfare agencies and citizens of the community can work together to better serve children in placement.
2. To ensure that each child in the court's jurisdiction has the right to a court hearing at least once a year for the duration of the period that the child remains within the jurisdiction of the juvenile and/or family court.
3. To create public awareness of the nature of the problem and proposed remedies.

Realizing these goals requires not only the philosophical commitment of the judge, but also attention to the practical details of the program. The first step is to acquaint local social service agencies with the objectives of CIP. The prestige of the judge as an expert and community leader make him or her an invaluable communicator of these goals.

The second step is enlisting the assistance of committed concerned citizens, and here, too, the judge plays a vital role—that of selecting the project coordinator, who is responsible for the day-to-day administration of CIP, reporting directly to the judge.

This individual must be able to:

communicate well with the judge, social service agencies and community organizations;

effectively supervise volunteers;

coordinate the flow of materials to the judge, social agencies and the Center for Juvenile Justice, which is tabulating statistics for research and resource sharing purposes.

Preferably, the project coordinator should be someone familiar with the court and its operation, who can devote virtually all his or her time to CIP. Sources for potential project coordinators are existing court staff, retired court or social services agency workers, a court volunteer, or community leaders from the Junior League, American Association of University Women, League of Women Voters, Parent-Teachers Association, senior citizen or church organizations or other similar groups. Funds to pay the project coordinator may be found through CETA, Title XX, or by a special request to the state or local government.

FOOTNOTE

*See Number 3 in the Appendix for samples.

Judge Homer B. Thompson, *California Juvenile Court Deskbook,* 2d ed. (San Francisco: California College of Trial Judges, 1978) Chapter 9, Disposition Hearing, Part II, Cases Petitioned Under Section 300 (dependency cases), Sections 9.36-9.47 and Appendix A, Section 3. Reprinted with Permission.

H. [§9.36] Probation Department versus Welfare Department Supervision

In some counties, supervision of dependent children has been placed entirely with the welfare department. In such counties the welfare department may even handle the investigation, preparation, and submission of §300 cases to the court from detention hearing to to disposition hearing, and annual reviews or other supplemental hearings.

The court and the probation department in many counties have resisted this transfer of supervision of dependent cases to the welfare department. In some counties dual responsibilities have developed. In some, the probation department continues to handle all investigations and presentation of cases before the court, but all or a portion of the dependent child caseload is supervised by the welfare department. One metropolitan county permits the welfare department to supervise all dependent child cases in which the child is receiving welfare assistance, except battered child, sex-molestation, or other difficult supervision cases, and the probation department supervises all other dependent child cases.

The law does not require that *any* case be supervised by the welfare department. Section 272 states that the board of supervisors may delegate to the county welfare department all or part of probation officer duties relating to dependent children described in §300, including those duties specified in §306. The legislative history of §272 suggests that the legislature was merely endeavoring to assure legality for what had already been happening in some counties. There is no suggestion in the history that the court's power to determine who is to supervise should be curtailed, nor were any sections of the Juvenile Court Law that grant this power to the court so modified. It would thus appear that in those counties where the court is willing to accept such supervision, such may be accomplished.

Children are not deemed dependent until they have been so found by the court at a jurisdiction hearing. Hence, §272 does not specifically authorize the welfare department to investigate and present §300 cases to the court.

One argument in favor of welfare department supervision is a fiscal one. It is alleged that the county will save money by assigning social workers to supervise, since the county may be reimbursed by the federal government for such services. Others argue to the contrary that this is but an illusion—that, even granted federal assistance, supervision by the probation department is more economical, since it is free from the myriad of regulations regarding caseload factors and supervisorial staff requirements. Also, experience indicates that, in cases under welfare department supervision, that department is very reluctant to terminate supervision, even though the family problems have been alleviated. Ongoing supervision, when no longer required, is expensive to the county. The author is not aware of any studies that actually establish fiscal savings under welfare department supervision.

There are important casework reasons why supervision should, in most cases, be retained by the probation department. The court has no direct supervision over workers in the welfare department; it does have direct authority over the probation department. Hence, the court is able to assure itself of the *quality of supervision*

only by retaining direct control over its management. Many judges find social workers unresponsive to court orders in the execution of their supervisorial duties. Also, as previously observed, many kinds of dependent child cases are difficult to supervise and require expertise in their supervision (such as child-battering and sex-molestation cases). When supervision of these difficult cases has been delegated to the welfare department, the results have often proven unsatisfactory. Although the probation department may also err in handling individual cases, at least the court is in a position to take the corrective steps required.

The response of the probation department of Santa Clara County to a proposal that the welfare department assume supervision of all cases, as well as investigation and presentation of cases, is set forth in App B §4.

Some probation department officers are willing to divest themselves of responsibility in this area. The court should weigh the pros and cons most carefully before consenting to an outright transfer of supervision of dependent cases to the welfare department.

I. [§9.37] Periodic Reports

Section 365 provides that the court may require the probation officer or other agency to render such periodic reports concerning dependent children committed to their care under §362(1)(c)-(d) as the court may deem necessary or desirable. See also Rule 1377(h). This authority for periodic reports is intended to supplement the consideration given to all dependent cases at the time of the automatic annual review of such cases under §366.

A court may, at the time of the disposition hearing or the annual review, order the case returned to its calendar for periodic check at the end of a 60-day, 90-day, or other specific review period. However, since the probation department has the authority and duty to bring all cases back to the court under a supplemental petition (§387) when circumstances warrant further attention by the court, the need for periodic report under §365 is minimized. If the probation department is doing its job properly and has the court's confidence, such periodic checks should seldom be necessary. In a metropolitan county with a bulging caseload these periodic reports, if calendared, add a substantial burden.

J. Annual Reviews

1. [§9.38] *Purpose of Review.* Section 366 provides for annual reviews in all dependency cases. See also Rule 1378. An annual review is a subsequent hearing, very similar to a disposition hearing, at which the progress of the matter during the preceding year is reviewed by the court, which then makes a decision regarding the need for continued jurisdiction.

2. [§9.39] *Responsibility of Probation Officer.* Section 366 provides that for each annual review the probation officer shall make an investigation, file a supplemental report, and make his recommendation regarding disposition.

Rule 1378(c) additionally provides that if the "recommendation is to continue the minor in placement outside of the home, the petitioner shall include in the report an evaluation why the previous plan for reuniting the family has not been successful and recommend a further plan for reuniting the minor with the family." Furthermore, the rule states that if the minor has been in placement outside of the home for two or more consecutive years, the report should indicate whether any action is planned to declare the minor free from the custody and control of the parents under general law.

It has been held that a mother is not entitled to a juvenile court hearing before the initiation of proceedings under CC §232 to remove her children from her custody and control. *In re Shannon W.* (1977) 69 CA3d 956, 138 CR 432.

3. [§9.40] *Notice of Hearing.* Section 366 provides that at the time of the disposition hearing and at every subsequent hearing at which a minor is adjudged a dependent child (except that at which jurisdiction is terminated), the court shall continue the hearing to a specific future date not more than one year from the date of the order. See also Rule 1377(f). Thus, the persons present at the disposition hearing are at that time given oral and written notice of the date of the annual review hearing. In addition, §366 requires that a notice of the hearing shall be mailed by the probation officer to the same persons as is in an original proceeding and to counsel of record, by certified mail addressed to the last known address of the person to be notifed, or shall be personally served on such persons, not *earlier* than 30 days preceding the date of the hearing. See also Rule 1378(b), which specifies that notice be given not *earlier* than 30 *nor less than* 10 calendar days preceding the date of the hearing.

4. [§9.41] *Statutory Guidelines for Annual Reviews.* The only provisions regarding annual reviews are found in §366. This section does not specify the exact procedure that the court is to follow in conducting such a review. However, it does specify that, at the time of continuance for annual review, the court shall advise all persons present of (a) the date of the future hearing; (b) their right to be present; (c) their right to be represented by counsel at the future hearing; and (d) their right, at the future hearing, to show cause why the jurisdiction of the court over the minor should be terminated. See also Rule 1377(f). If the parents appear at the annual review without counsel, the court should follow the procedures discussed in §§7.14 and 8.45, regarding appointment of, or provision for, the presence of counsel.

5. [§9.42] *Case Authorities.* At an annual review hearing, the burden is on the parents to show cause why the jurisdiction of the court over the minor should be terminated. *In re Robinson* (1970) 8 CA3d 783, 87 CR 678; Rule 1378(d). See also *In re Francecisco* (1971) 16 CA3d 310, 94 CR 186, where the appellate court held that the mere showing that the child had a parent capable of

exercising effective parental care and control did not satisfy the burden. Language to the contrary in *In re Neal D.* (1972) 23 CA3d 1045, 100 CR 706, was disapproved in *In re B. G.* (1974) 11 C3d 679, 114 CR 444. The Supreme Court in *B. G.* stated that the Juvenile Court Law "proceeds on the principle that once juvenile court jurisdiction is established, [that jurisdiction] continues as long as the best interests of the minor so require." See §8.46.

6. [§*9.43*] *Applicable Rules of Evidence.* There is no statutory provision governing the rules of evidence applicable to an annual review. By analogy to the disposition hearing, it would seem that the court should apply only the basic tests of *relevancy* and *materiality*. Although not so provided in §366, it would appear, again by analogy to the disposition hearing, that the court should read and consider the probation report and order it admitted into evidence.

7. [§*9.44*] *Conduct of Hearing.* The hearing outline set forth in §9.28 for disposition hearings in dependency cases is readily adaptable for use in annual review hearings. See also Rule 1378(e).

8. [§*9.45*] *Form of Annual Review Order.* The probation officer's recommendation is usually stated in the proper form for a dispositional order. If the court is making the recommended disposition, it may verbally follow that form in making its order. A form of order for use in annual review hearings is reproduced in App A §2.

9. [§*9.46*] *Possible Dispositions.* At the time of the annual review the court may make any disposition that it might have made at the original proceeding. If there is still need for jurisdiction, the court will usually be continuing the child in the existing placement and continue the case once again for annual review. See Rule 1378(e). Often parents do not even appear at the annual review, and usually the court will not require them to attend. They usually attend only when they wish to discuss problems that have arisen regarding visitation or placement, or when they seek to have the jurisdiction over the child terminated.

10.[§*9.47*] *Automatic Termination of Jurisdiction.* As noted, §366 requires that annual reviews be set within one year from the original order. In order to assure that the one-year period is not exceeded, many courts set the date about 11 months from the date of the disposition hearing. This allows an extra 30 days for complications that may arise at the time of the hearing and may require a brief continuance. The court should be careful never to continue an annual review hearing beyond the one-year period.

There is no appellate authority as to whether a hearing beyond the one-year period causes the court to lose jurisdiction. Most courts feel that it does, and require a new petition to establish jurisdiction when the one-year period is inadvertently allowed to expire without an annual review.

On a case being transferred in from another county, care must be taken not to allow the one year to expire from the date of the last annual review in the county from which the case was transferred. To avoid this problem, some courts set the case down for an annual review, and serve the parents with notice thereof, at the time of transfer in so that an annual review is held and a new annual review date is set at the time of the hearing on the transfer in.

Rule 1382(e) provides that the transfer-in hearing, relating to a dependent child, shall also be calendared and noticed as an annual review.

§2. Annual Reviews (§300)

A. Minor Remaining in or Returning to Home

JURISDICTIONAL

(Not applicable unless a petition has been filed; in that case use orders as in previous jurisdictional sections.)

DISPOSITIONAL

1. That the minor is continued as a dependent child of the court;

2. That the minor is permitted to [remain in/return to] the home of the [parent(s)/guardian], [name and address], and the minor's care, custody, control, and conduct [be placed/continue] under the supervision of the probation officer, [County Welfare Department/Catholic Social Service] to supervise;

3. Any other orders deemed necessary and advisable (including order for continuing payment);

4. That the matter is continued until [date 11 months hence] at [time] for the annual review hearing;

5. The court advises all persons present

a. Of their right to be present at the annual review hearing.

b. Of their right to be represented by legal counsel at the annual review hearing.

c. Of their right to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated at the annual review hearing.

B. Minor Not Returning Home

JURISDICTIONAL

(Not applicable unless a petition has been filed; in that case use orders as in previous jurisdictional sections.)

DISPOSITIONAL

1. That the minor is continued as a dependent child of the court;

2. That it is found that the welfare of the minor requires that his physical custody not be returned to the [parent(s)/guardian];

3a. That the minor continue under the care, custody, and control of the probation officer in suitable foster home placement with court approval for continued placement in the [foster home of (name and address)/home of (specific relationship, name, and address,]; or

3b. That the existing commitment to [specific institution] remain in effect; and, if applicable

4. That the juvenile probation department continue to pay to [name and address of foster home or institution] the amount of $..... per month;

5. That the matter is continued until [date 11 months hence] at [time] for the annual review hearing;

6. The court advises all persons present

a. Of their right to be present at the annual review hearing.

b. Of their right to be represented by legal counsel at the annual review hearing.

c. Of their right to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated at the annual review hearing.

C. Termination of Parental Rights

Sanford Katz, *Freeing Children for Permanent Placement Through a Model Act,* 12 Family L.Q. 203, 206-220, 229-237 (1978).

Foreword

September 21, 1978

Over half a million American children have been living outside their birth parents' home for as long as ten years.[1] Most of these children, who are in foster family or institutional care as a result of abuse or neglect proceedings, are in a condition of legal limbo. Neither adoption nor even a permanent plan for their futures is possible because they have not been legally freed from their birth parents.

It is to the interest of the state, looking toward a stable and continuous society, and to the interest of the children themselves if they are to become physically, mentally and morally sound adults, that they be raised in security and permanence. The Model Act to Free Children for Perment Placement has been drafted to this end. The Act and the accompanying Commentary are intended to serve as an impetus to the fifty-four jurisdictions of the United States to reform their child welfare laws.

Model Act to Free Children for Permanent Placement with Commentary

Section 1—Purposes of Act; Construction of Provisions

(a) The general purposes of this Act are to:

(1) provide prompt judicial procedures for freeing minor children from the custody and control of their parents, by terminating the parent-child relationship;

(2) promote the placement of such minor children in a permanent home, preferably through adoption or by vesting their *de facto* parents with legal guardianship; and

(3) ensure that the constitutional rights and interests of all parties are recognized and enforced in all proceedings and other activities pursuant to this Act.

(b) It is the policy of this State that:

(1) whenever possible and appropriate, the birth family relationship shall be recognized, strengthened, and preserved through efforts and procedures as provided for under [state] statute(s);

(2) removal of a child from his home shall occur only when the child cannot be adequately protected within the home;

(3) if a child has been removed from his home for one year and cannot be returned home within a reasonable time therafter, the state should promptly find an alternative arrangement to provide a stable, permanent home for him;

(4) the interests of the child shall prevail if the child's interest and parental rights conflict; and

(5) because termination of the parent-child relationship is so drastic, all non-judicial attempts by contractual arrangements, expressed or implied, for the surrender or relinquishment of children, are invalid unless approved by the court.

(c) This Act shall be liberally construed to promote the general purposes and policies stated in this section.

COMMENTARY TO SECTION 1

Three broad general purposes are stated in subsection (a). The first general purpose of providing judicial procedures for the termination of the parent-child relationship is similar to the general purpose of all existing state termination statutes. The phrase "freeing minor children from the custody and control of their parents" is derived from California *Civil Code* Section 232-39, entitled "Freedom From Parental Control and Custody."

Subsection (a)(2) declares that the intent of the Act is to promote the settlement of children in permanent homes, preferably through adoption or via vesting legal guardianship in *de facto* parents. This section reflects the philosophy that a child's ongoing needs for proper physical, mental and emotional growth and development can best be met when he is firmly anchored in a family of his own.

Paragraph (3) of subsection (a) addresses the constitutional requirement of protecting individual due process rights. In subsequent sections the Model Act provides for counsel for parents, appointment of guardians *ad litem* for children, minor or incompetent parents and adequate notice to all parties.

Subsection (b) articulates the key underlying policy principles that are to guide the state's approach to judicial termination of parental rights. In paragraph (1) the state pledges, whenever possible and appropriate, to recognize the birth family relationship and to strengthen and preserve that parental relationship through efforts and procedures mandated by other existing state statutes.

Paragraph (2) provides that the sole criterion for removing a child from its home is that the child cannot be protected within the home either by his parents alone or through the marshalling of community social services or court ordered protective supervision. This principle appears in some neglect laws, but is not generally found in existing termination statutes. The Model Act's sole focus is upon protecting the child, while most state neglect statutes also refer to an inability to protect the public.

When a child has been removed from his home for one year, paragraph (3) of subsection (b) places an affirmative duty upon the state to ascertain whether the child can be returned home within a reasonably foreseeable time. The exact length of time will vary depending upon the child's age and the various considerations enumerated in Section 4. If a return to the birth family is not possible or appropriate, this paragraph requires that the state begin to take steps to provide such a child with an alternative stable, permanent home.

Paragraph (4) mandates that the interests of the child shall prevail. This represents a departure from the wording of most existing termination and neglect statutes. Only California's *Civil Code* Section 232.5 directs that: "The provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child."

The final paragraph in subsection (b) declares invalid all nonjudicial attempts at severance of the parent-child relationship by contractual arrangements. Termination of a parent-child relationship involves a severe reordering of personal statutes and legal rights and obligations. A judicial proceeding is necessary to ensure that the constitutional rights of all parties are recognized and enforced in accord with the general purpose expressed in subsection (a) (3). The Model Act, in subsequent sections, provides for some accommodation to the administrative procedures of some states which permit agencies to accept voluntary relinquishments from parents or other caretakers. In some instances, the required judicial proceeding may be only to ratify the voluntary relinquishment and to certify the proposed plan for the child. *See* Section 3, 10(d) and 15(a) *infra*.

The last subsection (c) is a directive for liberal construction of all provisions of the Act in order to accomplish the stated purposes.

Section 4—Grounds for Involuntary Termination of the Parent-Child Relationship

(a) An order of the court for involuntary termination of the parent-child relationship shall be made on the grounds that the termination is in the child's best interest, in light of the considerations in subsections (b) through (f), where one or more of the following conditions exist:

(1) the child has been abandoned, as defined by Section 2(a)(4)(iv);

(2) the child has been adjudicated to have been abused or neglected in a prior proceeding;

(3) the child has been out of the custody of the parent for the period of one year and the court finds that:

(i) the conditions which led to the separation still persist, or similar conditions of a potentially harmful nature continue to exist;

(ii) there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and

(iii) the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.

(b) When a child has been previously adjudicated abused or neglected, the court in determining whether or not to terminate the parent-child relationship shall consider, among other factors, the following continuing or serious conditions or acts of the parents:

(1) emotional illness, mental illness, mental deficiency, or use of alcohol or controlled substances rendering the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(2) acts of abuse or neglect toward any child in the family; and

(3) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, and education as defined by law, or other care and control necessary for his physical, mental, or emotional health and development; but a parent or guardian who, legitimately practicing his religious beliefs, does not provide specified medical treatment for a child, is not for that reason alone a negligent parent and the court is not precluded from ordering necessary medical services for the child according to existing state law.

(c) Whenever a child has been out of physical custody of the parent for more than one year, the court shall consider, pursuant to subsection (a)(3), among other factors, the following:

(1) the timeliness, nature and extent of services offered or provided by the agency to facilitate reunion of the child with the parent;

(2) the terms of social service contract agreed to by an authorized agency and the parent and the extent to which all parties have fulfilled their obligations under such contract.

(d) When considering the parent-child relationship in the context of either subsections (b) or (c), the court shall also evaluate:

(1) the child's feelings and emotional ties with his birth parents; and

(2) the effort the parent has made to adjust his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home in the foreseeable future, including:

(i) the extent to which the parent has maintained regular visitation or other contact with the child as part of a plan to reunite the child with the parent;

(ii) the payment of a reasonable portion of substitute physical care and maintenance if financially able to do so;

(iii) the maintenance of regular contact or communication with the legal or other custodian of the child; and

(iv) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time.

(e) The court may attach little or no weight to incidental visitations, communications, or contributions. It is irrelevant in a termination proceeding that the maintenance of the parent-child relationship may serve as an inducement for the parent's rehabilitation.

(f) If the parents are notified pursuant to Section 10(a) and fail to respond thereto, such failure shall constitute consent to termination on the part of the parent involved. The court may also, pursuant to Section 12(c), terminate the unknown father relationship with the child.

COMMENTARY TO SECTION 4

This section is designed to provide greater specificity in the statement of standards in termination and neglect statutes. Subsection (a) sets forth three fact situations which, if proven to exist, may justify an involuntary termination if deemed in the child's best interest. The three situations are: abandonment, prior adjudicated abuse or neglect, and being out of the custody of the

parent for a year if the conditions that led to separation or similar conditions of a potentially harmful nature still persist, there is little likelihood that the child can be returned in the near future, and continuation of the parent-child relationship greatly impedes chances for adoption or integration of the child into a stable and permanent home.

Subsection (b) establishes guidelines for the court's consideration if termination is sought because of prior adjudicated abuse or neglect. The emphasis is upon whether a parent's present emotional or mental condition or use of alcohol or controlled substances consistently renders the parent unable to care for immediate and ongoing physical and psychological needs of the child. Parental acts of abuse or neglect toward other children in the family must be considered in determining whether the child who is the subject of the petition is harmed or threatened with harm. A "spiritual healing" clause, (b)(3), exempts a parent from being deemed negligent for the sole reason that, in legitimately practicing his religious beliefs, he does not provide specified medical treatment.

In subsection (c) a number of factors are listed for the court to consider when a child has been out of the custody of the parent for a year because of either private placement arrangements made by the parent or under court order. In order to ascertain whether return is likely in the foreseeable future, the court is directed to explore (1) the timeliness, nature and extent of services provided to the parents; (2) the terms of any social service contract agreed to by an authorized agency and the parent; and (3) the extent to which all parties have fulfilled their obligations under the contract.

This directive to consider a social service contract is in line with current task-oriented, reality-based casework which has been proven to be helpful in improving the parenting capacity of borderline or character disordered parents. It is critically important that agency intake and service practices reflect an understanding of the psychodynamic functioning of families that abuse or neglect their children. Treatment services should be offered by workers who are trained in differential diagnosis and who have the capacity to encourage positive growth.

Subsection (d) requires the court to evaluate and consider the child's feelings and emotional ties with his birth parents. Whether the parent has made efforts to adjust his circumstances, conduct or condition to make it in the child's best interest to return in the foreseeable future must be weighed. The court must consider such matters as whether the parent has maintained regular visitation, assumed reasonable support and maintenance obligations and cooperated with the agency. These aspects are thought to be important indices of whether additional services are likely to bring about a lasting parental adjustment which will permit the child's return to the parent. In cases where parental contact has been sporadic, i.e. merely a card at Christmas, and does not indicate any pattern or ability to sustain ongoing communication, subsection (e) permits the court to disregard such incidental contacts. This section underscores the Model Act's general purpose that to further the best interests of the child, it must be recognized that some children need the opportunity to grow and mature separate and apart from their birth parents.

Finally, subsection (f) provides that parental failure to respond to properly given notice, pursuant to Section 10 will constitute consent to termination or, pursuant to Section 12(c), the court may terminate the rights of the unknown father.

Section 11—Hearings: Phases and Conduct

(a) All termination petitions, filed under this Act, shall be considered by the court in three distinct phases, commencing with a preliminary hearing, pursuant to Section 12, followed by the adjudicatory phase to determine the appropriateness of termination, and concluding with a dispositional hearing, pursuant to Section 16.

(b) All hearings shall be conducted in the manner of a non-jury civil trial. The proceedings shall be recorded. Only those persons whose presence is requested by persons entitled to notice under Section 10 or who are found by the court to have a direct interest in the case or the work of the court shall be present. Those persons so admitted shall not disclose any information obtained at the hearing which would identify an individual child or parent. The court may require the presence of witnesses deemed necessary to the disposition of the petition, including persons making a report, study, or examination which is before the court if such persons are reasonably available. A parent who has executed a waiver pursuant to Section 10(d) need not appear at the hearing. If the court finds that it is in the best interest of a child, the child may be excluded from the hearing.

COMMENTARY TO SECTION 11

Subsection (a) refers to the three distinct phases of a termination proceeding: the preliminary hearing, as required by Section 12, the adjudicatory phrase, governed by Sections 3, 4 and 15, and the dispositional phase, governed by Section 16.

Subsection (b) expressly incorporates many of the "typical" neglect hearing provisions found in existing state laws as analyzed in Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 FAMILY L. Q. 70-71 (1975). The termination hearing is to be heard by the court without a jury, conducted in an informal manner but transcribed, and closed to the general public except interested parties. The court may require the presence of witnesses and persons making any report, study or examination of involved parties. In addition, to provide a mechanism for simplifying a voluntary relinquishment, the Model Act does allow for excusing the presence of a parent who has executed a waiver pursuant to Section 10(d) *supra.* The Model Act dispenses with a jury trial in order to minimize criminalization of the termination proceeding.

Section 12—Preliminary Hearing

(a) If a party appears without counsel, the court shall inform him of his right thereto and upon request, if he is

indigent, shall appoint counsel to represent him. No party may waive counsel unless the court shall have first explained the nature and meaning of a petition seeking termination of the parent-child relationship.

(b) If identity of the birth father of the child is unknown to the petitioner, at the preliminary hearing required under Section 10(a) the court shall:

(1) Inquire of the mother concerning the identity of the father, but may not compel disclosure by the mother;

(i) If the mother provides identification of the father, the court shall immediately give notice to the father pursuant to the provisions of Section 10;

(ii) If the mother does not or cannot provide identification of the father, the court shall determine whether notice of the proceedings by publication or posting is likely to lead to the identification of the father and, if so, shall order such notification; but only upon the mother's written informed consent;

(2) If the procedures in (i) and (ii) above fail to provide identification of the father, then the court shall appoint an attorney as guardian *ad litem* for the putative father to conduct a discreet search for him and to report the results to the court no later than 30 days from the date of the preliminary hearing.

(c) If after acting upon the provision stated in subsection (b), the identify of the father is not determined within 30 days following the preliminary hering, the court shall immediately enter an order terminating the unknown father's relationship with the child.

(d) In all involuntary termination proceedings, the court shall appoint an independent attorney to represent the separate interests of the child and to serve as the child's guardian *ad litem*. The court, in its discretion, may appoint a guardian *ad litem* for the child in any voluntary termination proceeding pursuant to Section 3 of this Act.

(e) Upon a finding at the preliminary hearing that reasonable cause exists to warrant an examination, the court, on its own motion or on motion by any party, may order the child to be examined at a suitable place by a physician, psychiatrist, licensed clinical psychologist, or other expert appointed by the court, prior to a hearing on the merits of the petition. The court also may order examination of a parent or custodian whose ability to care for a child before the court is at issue. The expenses of any examination, if ordered by the court, shall be paid by the [_____] .

COMMENTARY TO SECTION 12

This section of the Model Act introduces the important concept of a "preliminary hearing" into the termination proceedings. At the preliminary hearing it is the function of the judge to advise all the parties, before formal commencement of the proceedings, of their constitutional rights to be represented by counsel and to remain silent, to confront, cross-examination and subpoena witnesses. The judge must also ascertain whether any party appearing without counsel fully understands his right to counsel or to appointed counsel if indigent. Subsection (a) specifically prohibits any waiver of counsel until after there has been a full explanation of the nature and meaning of the termination of the parent-child relationship. Subsections (b) and (c) outline the steps that the court shall take at the preliminary hearing when the birth father's identity is unknown to the petitioner.

In all involuntary termination proceedings the court must appoint an attorney as guardian *ad litem* for the child to provide the child with separate and independent counsel. In the discretion of the court an attorney to serve as guardian *ad litem* may be appointed for the child when a parent voluntarily seeks termination, but such an appointment is not mandatory. As authorized under Sections 11 and 15 (a) of the Model Act, the court may adjourn the preliminary hearing to allow appointed counsel adequate preparation time. If all parties are fully apprised of all of their rights and are represented by counsel, the proceeding may go immediately forward into the adjudicatory stage.

The right to appointed counsel found in subsection (a) is an important feature that conforms to due process standards under the requirements of *Stanley v. Illinois*, 405 U.S. 645 (1972). This subsection rejects the distinction made by some courts that neglect or termination proceedings, although civil and not criminal, nonetheless do not require court appointed counsel for the indigent parent. Since *Stanley*, an increasing number of state supreme courts have held that an indigent parent involved in an involuntary termination proceeding concerning his child is constitutionally entitled to be represented by counsel.

Subsection (a) thus also adopts the view that a right to appointed counsel for the indigent parent is constitutionally mandated. The position advocated by some courts, which would restrict the right to appointed counsel for parents in termination proceedings on an *ad hoc* judicial estimate of the need for counsel, is rejected on the ground that it will encourage litigation and will fail to give parents necessary guidance and protection.

It should be noted that subsection (a) imposes an obligation upon the court to explain to the parent the significance of the termination proceeding. Such explanation is deemed essential, because for many parents, the nature of the termination proceeding is unclear. The required explanation is intended to assure as far as possible that before waiving appointed counsel an indigent parent fully understands that the termination decree will permanently sever parental rights since otherwise the waiver may be made too casually. Furthermore, this subsection places the initiative on the court to inform the parent of a right to appointed counsel, and only after carefully explaining the nature of the termination proceeding may the court ask the parent if he or she wishes to waive that right. Deeming the right to counsel waived unless requested is expressly disapproved.

Subsections (b) and (c) of this section are a response to the declaration in *Stanley v. Illinois, supra* at 657, n.9 that unwed fathers are entitled to notice of adoption and custody proceedings concerning their children. Notice is required in order to permit such fathers to make a claim to the custody of their children and a showing of their competence to care for them.

Subsections (b) and (c) contemplate in the main a fact situation where the mother has relinquished or wishes to

relinquish an infant for adoption and where either or both the identity and whereabouts of the unwed father are not known. The Model Act thus reflects a broad view of *Stanley* in requiring some reasonable but practical effort to find and reach the unwed father even if unknown. However, subsections (b) and (c) take the position that the effort to provide notice to the unwed father, if futile, need not be pursued to the point that placement of the child involved is unreasonably delayed. While detailing some alternative modes of notice, the policy of the subsidivisions of subsection (b) is to leave the determination of the form of notice, as well as whether notice may be dispensed with altogether, to the sound discretion of the court which has inquired into the matter. Such a procedure is designed to render proper deference both to the due process rights of the birth father and to a proper and sensitive concern for the future placement and welfare of the child.

Privacy interests of both mother and child support the philosophy of subsection (b)(1) that the mother should not be compelled to identify the father in order that he may be notified of a termination proceeding. Whether or not compelling the mother to identify the father is constitutional, the theory of this subsection is that strong policy considerations argue against such compulsion.

The effort to provide due process to the birth father, the natural mother, the child and ultimately, the adoptive parents sometimes results in setting these rights in conflict. Accommodation of the competing rights can best be resolved by a wise use of discretion by the court making the termination decision. Subsection (b) tries as far as possible to fashion remedies that would give the birth father notice of the termination proceeding without rendering the pending termination and future adoption impossible. The court must first consider whether notice is in fact likely to lead to the identification of the father. Subsection (b)(ii) allows for a good faith effort to reach the birth father through notice of publication if the mother consents to the use of her name.

Subsection (b)(2) is designed to prevent the procedure for providing notice to the unwed father from becoming an empty formalism. Provision for appointment when necessary of a guardian *ad litem* may be a particularly effective notice procedure when the mother does not know the father's present whereabouts. The mother may not be willing to have her name included in a notice by publication in a newspaper but may be able to provide the guardian *ad litem* with clues to the father's whereabouts. In such circumstances, the appointment of a guardian *ad litem* to search for the father will protect the privacy rights of the mother and at the same time will be more likely to locate the father than mere newspaper notice.

If the court fails to reach the unknown birth father through the procedures set forth in subsections (b)(1) and (2) the court is empowered by subsection (c) to enter an order terminating the unknown father's parental rights and responsibilities 30 days after the preliminary hearing. This time period is prescribed to assure that at least some significant period of time is allotted for the notification of the unknown birth father in order to give him an opportunity to assert, if he wishes, a right to the care and custody of his child.

In summary, subsections (b) and (c), the "Stanley" provisions of the Model Act, attempt to assure a good faith effort to notify the unwed father even if his whereabouts and identity are not known. At the same time, these subsections authorize the termination of the parental rights of the unwed father, even if he has not received notice, if the court concludes that the process of searching for him is likely to prove futile.

Subsection (e) authorizes the court to order that a child, parent or both, prior to the hearing on the merits of the petition, be examined by a physician, psychiatrist, licensed clinical psychologist or other expert. And subsection (f) requires the court to order a psychosocial assessment of the child's needs, pursuant to Section 13.

Section 13—Psychosocial Assessment and Report

(a) The court, if it assumes jurisdiction at the preliminary hearing, shall order a psychosocial assessment of the child's needs in all involuntary proceedings. This study shall be made either by:

(1) social service personnel attached to the court;

(2) an authorized agency which is not the petitioner or a mental health agency; or

(3) an independent social work practitioner. An authorized agency which is the petitioner may make the assessment only upon court determination that none of the above alternatives are possible. The report shall be submitted within 30 days after the court directive, unless the court grants a request for an extension.

(b) The court, when it hears a voluntary petition brought pursuant to Section 3, may order a psychosocial assessment if deemed in the best interest of the child.

(c) The psychosocial assessment shall be based upon consideration of:

(1) the circumstances described in the petition;

(2) the present physical, mental and emotional conditions of the child and his parents, including the results of all medical, psychiatric, or psychological examinations of the child or of any parent whose relationship to the child is subject to termination;

(3) the nature of all past and existing relationships among the child, his siblings and his parents;

(4) the proposed plan for the child;

(5) the child's own preferences according to his maturity of judgment; and

(6) any other facts pertinent to determining what will be in the child's best interest, including, but not limited to the child's culture, such as services provided or offered by the [State Department of Social Services] or by any other agencies or individuals.

COMMENTARY TO SECTION 13

The title of this section of the Model Act is designed to highlight the interdisciplinary judgments that should be weighed in an assessment of a child's current social, emotional and psychological needs and in an evaluation of the capacity of the parent to adequately nurture the child and meet those needs.

Subsection (a) requires that at the preliminary hearing of all involuntary petitions the judge order a psychosocial

assessment of the child's needs to be done by social service personnel attached to the court or by an authorized agency, not the petitioner or mental health agency, or an independent social work practitioner. If an authorized agency is the petitioner, the court may direct that the psychosocial assessment be made by some other agency or by an independent social work practitioner to give the assessment the objectivity that is desirable. This section contemplates that social casework and other clinical services, organized and administered by an executive branch of state government, may be available to the court. If such personnel are not attached to the court, the Model Act requires tht the judge utilize other resources.

When the court hears a voluntary petition for termination, in its discretion it may order a psychosocial assessment, but this is not mandatory. *See* Sections 3 and 12. Again, this more permissive option is available to accommodate existing agency administrative procedures governing voluntary petitions for termination.

Subsection (c) spells out the considerations for the psychosocial assessment. This study is considered critical in helping the court reach a disposition that will further the best interests of the child. A carefully prepared psychosocial study by a professional social caseworker will describe where a child is developmentally, the quality of both past and existing relationships with parents and other current caretakers, and estimate the nurturing capacity of any adult whose parental rights are subject to termination. The proposed future plan for the child, adoption or long-term guardianship, can be evaluated in light of these assessments. For example, a plan that proposed adoption of the child by foster parents with whom strong emotional ties had developed might be deemed preferable to a plan that envisioned several additional moves for a child before any consideration of a permanent placement. The Model Act also requires recognition of a child's own wishes, depending upon his age and maturity of judgment.

Children's Defense Fund, *Children Without Homes* (1978), 26-30.

Dilemmas of Terminating Parental Rights

CHILD: *I came here because they couldn't find my mom. When they find my mom, I'll go back. . . . They need to find my mom.*
INTERVIEWER: *If you had one wish, one thing that you could get, just one wish, what would you wish for?*
CHILD: *It's never came [sic] true, but I've wished to go home a lot of times.*
INTERVIEWER: *Have you ever thought how it would be if . . . [your foster parents]* adopted you?
CHILD: *Then I wouldn't be saying I wish I was at my real mom because I would be at my real mom.*[44]

Red, whose words are quoted above, has been in foster care for five years. He is now nine. His mother abandoned him when he was four. Since then she has had no contact with him, but has refused to relinquish him for adoption. Despite the passage of five years, which in the life of a child is a very, very long time, the state has only recently begun action to make his wish for a real mom come true. Yet the state's statute permits the initiation of desertion proceedings if there has been no parental contact for three months.

For children like Red who cannot or should not return to their own homes, ensuring an alternative permanent home should be a three-step process: (1) timely identification of the children by workers or as a result of independent periodic review procedures; (2) timely initiation of proceedings to determine if legal severing of the rights of the natural parent is appropriate, either by voluntary relinquishment of the child or by court-ordered termination; and (3) timely adoption of the child by a new parent or parents. In almost every county we visited, however, we were told that termination of parental rights was infrequent.[45] While there is no question that termination of parental rights is a serious, difficult step, it is equally true that indefinitely avoiding the issue results in a grave injustice to both the child and the family. We found that often the child's right to permanence was denied because of complex psychological assumptions about parents and children, and because of administrative, fiscal and statutory constraints. These factors are examined next.

Protecting the Parent at the Child's Expense

There is a "catch-22" quality about the reluctance to consider termination. While the child is in placement and even prior to placement, the child's natural family is rarely seen as a resource to help the child. But when the termination of parental rights is at issue, this stance is reversed. Regardless of the reality of the current situation for the family or the child, there is a widespread unwillingness to initiate proceedings or to actually terminate the rights of biological parents. It is a tragic irony that only at this point is a bias toward the child's natural family visible.

Behind this systemwide avoidance of termination proceedings lies some complicated reasoning. Many judges with whom we spoke took the position that while the biological parents were often inadequate, termination is an extreme act, and something might happen in the future to make the parents more adequate. Usually the hope centered on changes in parental behavior: sustained remission of alcohol-related violence, improved parenting, abatement of chronic mental illness. One judge, who had repeatedly refused either to terminate the parental rights of a retarded mother or to return her child to her, said to a CDF staff member: "Who knows, perhaps some day they will develop a miracle drug for retardation."

The overemphasis on biological ties, without consideration of the psychological cost to the child, can place children in serious psychological jeopardy.[46] Consider, for instance, the roller coaster childhoods of three children living in one of our study states.

Jimmy, Michael and Sara are five, six and ten. During the past five years their mother has been hospitalized for alcoholism three times: first for an eight-month period, then for a ten-month period, and then for a three-month period. During the five years, the children were in foster care for a total of 45 months, once for a two-year period

when they were removed from their mother's care because she became violent and abused them, and the other times while she was hospitalized. During this period, on four separate occasions four different caseworkers sought permanent custody of the children (in that state a precursor to the termination proceeding). Each time the judge returned the children to the mother. The children are now back in foster care again.

Buffeted back and forth between their mother and foster homes, Sara, the oldest child, shows signs of depression and deteriorating school work. She has had the burden or protecting the younger children from their mother's violence when all three have been in their own home. At times, she has gone to the police station; at times she has sought aid from neighbors; and often she has slept in the boys' bedroom to ensure their mother did not harm them. After Sara's first stay in foster care she was eager to return home; since that return failed, her feelings have changed. In her words, "I'm a foster child—nobody wants me." The other children respond now to their sporadic encounters with their mother with bedwetting, anxiety and speech difficulties. The youngest child speaks of his mother as "that lady who drinks" and shows no signs of affection for her. Jimmy and Michael's foster parents would like to adopt both of them, but there can be no adoption proceedings without termination.

In a variant of an over-zealous commitment to biological parents, some judges require extensive, time-consuming searches for putative fathers who have shown no interest in their children. We learned, for instance, of a child who had been in foster care for ten years and whose foster parents wanted to adopt him. His own mother had had no contact with the child for six years, and his father for eight years. Yet, the judge insisted that the father be found before he would proceed.[47] Little consideration was given to the impact of the passage of time on the child and his need for a permanent psychological parent in the absence of a caring biological one.

Judges are not alone in perpetuating this reluctance to terminate parental rights. Partially in expectation of judicial reluctance, and partially as a result of their own failures, caseworkers often do not bring potential termination cases to court. Case documentation that efforts to work with the parents have been tried and have failed is crucial to the success of a termination effort. Often, as we showed earlier, such efforts do not take place, or if they do, they are poorly documented. Caseworkers feel that if they bring a petition, natural parents or their lawyers can correctly argue that they were not given a chance. As a compensation for past agency failures, the parent is protected at the expense of the child and his current situation. This is the tragedy behind the still unresolved case of Lee.

Lee is a completely deaf six-year-old Chinese child who, at two-and-a-half, was hospitalized as a battered child. She remained in the hospital for ten months while the hospital sought an agency willing to try to find a foster home for her. During that time, Mrs. T., a teacher of deaf children, began to visit Lee, learning of her through a friend working at the hospital. After ten months, a private agency finally agreed to find a home for Lee. Having grown to love the child, Mrs. T. applied and became Lee's foster parent. For the next five years Lee made tremendous progress, growing into a charming, friendly, happy child, deeply attached to Mrs. T. On several occasions agency workers asked Mrs. T. if she would like to adopt Lee. She said yes, and workers agreed to try to encourage Lee's parents to relinquish the child for adoption.

In the meantime, Mrs. T. sought permission from the agency to take Lee out of the state to enroll her in a school with a unique program for deaf children. With no explanation, the agency denied permission. Two weeks later, Mrs. T. was to appear in court. She found both natural parents with lawyers. The father was agreeable to relinquishing Lee, if he could still see her. The mother, who during the last five years had seen her daughter only five times (each of which was extremely upsetting to Lee), was unwilling. At the hearing, the agency did not support Mrs. T.'s request to adopt the child. The judge equivocated, saying only that Lee should remain in care. Later, an agency worker commented, "It would be unfair to the mother to honor the adoption request because they had not tried hard enough to work with her in the past."

While the legal process drags on, Lee cannot be enrolled in the special program and Mrs. T. is continually anxious and fearful that ultimately this permanently handicapped and once-abused child, whom she has nurtured and cared for for five years, will be taken from her.

Again, this is not an isolated case. It is a tragedy made more poignant by Lee's deafness. But even with non-handicapped children, agencies too often ignore positive changes and dismiss the strengths of new psychological relationships in order to compensate for their failures to work with the parents. In lawsuits in which one party has injured the other, the injuring party is typically ordered to pay damages. In cases like Lee's, the damage award to the injured parents may not be money, but the child, at the expense of her rights and psychological needs.

The failure to respond to the child's needs takes other forms as well. For instance, in a study of barriers to permanence for children in foster care in Oregon, researchers found it was possible to predict what permanent plans would be made for a child simply by knowing in which county he was placed. In other words, the child's own characteristics exerted very little influence over the caseworker's decision whether to terminate.[48]

To illustrate the reluctance to make hard decisions about natural parents and consequences for children, we have discussed the roles of judges and caseworkers. But other professionals have similar biases. For example, in a case in which a mother had been in and out of psychiatric hospitals 15 times prior to and since the birth of her child, a psychiatrist refused to say the mother would "never" make a good parent. Therefore, the judge refused to free the child for adoption, although the child, now five, had *never* lived with the mother.[49]

We have also seen a variant on the theme expressed by lawyers. Sometimes, in their attempt to redress earlier and real wrongs against the parents of children in foster care, including the initial failure to provide services to parents or properly inform them of conditions leading to

potential loss of their child, they too may ignore the consequences of moving a child from foster parents who have become the child's psychological parents. On the other hand, we were also told that state or county attorneys often would not bring a termination petition unless the parents were egregiously inadequate, regardless of the current circumstances of the child.

The termination of parental rights is a serious action. It represents a relatively unique situation in which, in fundamental ways, the needs and rights of parents and children may be in irreconcilable conflict. There is no question, as we have shown, that children are removed from their homes unnecessarily, and sometimes arbitrarily. Nor is there any question that natural parents are individually, and as a group, often ignored or abused by those with responsibility for their children. But to correct this by creating new hardships for children is not the answer.

Lack of Criteria and Funds

Part of the problem is that adequate criteria for termination decisions are lacking.[50] Guides by which to judge when an individual child's needs and rights should take precedence over the residual rights of natural parents must be articulated explicitly. They must take account of the child's developmental stage, and his or her past and present relationships with natural and psychological parents. All of the following factors should be considered in making an individual determination.

The length of time the child has been out of the home;

The strength of the child's past relationship with the natural parent;

The child's response to current visits and trial stays at home;

The strength of the child's psychological relationship with foster parent(s) if such a relationship has been formed;

The child's wishes, depending on his age.

At present, grounds for termination are often only loosely defined in state statutes and procedural protections are inadequate for the child and the parents.[51] A few states require *separate* counsel for the child and parents in termination proceedings. In a greater number of states, separate counsel for the child may be appointed only when there is conflict between the child and his parents or it is felt to be necessary to protect the child's interest.[52] Administrative guidelines and training for staff regarding termination are either inadequate or nonexistent. In addition, there are fiscal disincentives to terminating parental rights. Legal proceedings are likely to be costly. In many places, private or public agencies initiating termination proceedings must either assume the costs or rely on already overburdened district attorneys' offices for counsel.

Finally, even if termination proceedings are brought they may be drawn-out and complex, often involving appeals taking several years.[53] No system of priorities assures speedy completion of the court proceedings. Meanwhile, the child either remains in psychological limbo, or strengthens his or her psychological ties to natural, foster or potentially adoptive parents—ties that may eventually, depending upon the court decision, be disrupted.

The picture is not uniformly bleak. At least two of the states we visited, along with several others we identified, are implementing institutional mechanisms to reduce the denial of permanence to children. Chapters 4 and 6 detail these efforts. But no mechanisms will smooth out all the dilemmas around the severing of parental rights. The fact is there are few easy cases when termination is at stake. In the case of Lee, the judge's reluctance to terminate was also influenced by an ideological position that children should have parents of the same ethnic background. For him, this weighed as heavily as the evidence that this particular child's mother showed no sustained interest in her, and that under the care of a foster mother with a different ethnic background, the child flourished. Tensions may arise between natural and foster parents—particularly when, after little initial contact, the natural parent has been able to rehabilitate herself or himself and genuinely wants to care for the child. In other instances the dilemma revolves around how to assess the extent of parental interest in the child. But each of these issues must be addressed directly in policy and practice if individual children out of their homes are to be assured of a right to permanence.

FOOTNOTES

42 In this discussion, we are using the term "permanence" to refer to a child's continuing contact with his own family or the establishment of ties with a new psychological family. We also believe that while in the foster care system, children should be entitled to stability and permanence in an out-of-home setting. By and large, this does not happen, and children, as we show in the next chapter, are subject to yet another disruptive form of impermanence: movement from one out-of-home setting to another.

43 For instance, federal public assistance payments to a parent under the Aid to Families with Dependent Children Program cease if there are no children in the home. States usually substitute some form of home relief which provides lower benefits. When the child or children return to the mother, a new application for AFDC must be made.

44 Reprinted with permission from CBS, "60 Minutes," 30 May 1976, "Unwanted."

45 For instance, despite the length of time children in the CDF survey had been in care, only 18 percent of the children were in the permanent custody of the state: eight percent of the children had been voluntarily relinquished by their parents, ten percent had had parental rights terminated. In another study, there were plans for severing of parental ties for six percent of the sample, two percent by voluntary relinquishment, four percent by court proceedings. These figures did not include 75 percent of the sample: that is, children for whom there were no plans or for whom long-term care was "planned." Witlse and Gambrill, "Foster Care, 1973," pp. 8, 10-12.

46 At the same time, there are also instances in which termination proceedings are brought inappropriately—in the face of parental interest. Sometimes this occurs when services have been provided to the parent, sometimes even when they have not. The legal and ethical issues in these cases become particularly complex if the child has formed new psychological ties, and/or the initial removal of the child from the home was inappropriate.

47 In part, this suggests an over-reading of the U.S. Supreme Court decision in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), which involved the rights of a putative father in a dependency proceeding. In *Stanley*, when a mother died and the Department of Welfare sought permanent custody of her children, the putative father argued that he had a right to notice and to be heard on the issue of his fitness as a parent. Although the state court disagreed, the Supreme Court upheld the father's position, noting that he had lived with and supported the children and their mother for many years. However, the decision in *Stanley* has been interpreted by some states as requiring extensive efforts to track down

putative fathers prior to terminating parental rights, even when they have not acknowledged paternity or shown any interst in a child. For a discussion of post-*Stanley* statutes in Illinois, Michigan, New York and Wisconsin, see N. L. Freeman, "Remodeling Adoption Statutes After *Stanley* v. *Illinois.*" *Journal of Family Law* 15 (1976-77); 385-422.

48 The Oregon study is described more fully in Chapter 6.

49 We do not believe that mental illness, mental retardation or incarceration in and of themselves should ever be automatic ground for termination. However, they are factors to be weighed in making a decision.

50 See Wald, "State Intervention on Behalf of 'Neglected' Children," and Institute of Judicial Administration and American Bar Association Joint Commission on Juvenile Justice Standards, *Abuse and Neglect.*

51 The Children's Bureau in the Administration for Children, Youth and Families in HEW is in the process of finalizing a model termination of parental rights statute. The proposed draft mandates counsel for the parent and separate counsel for the child in all involuntary termination proceedings. For a discussion of termination statutes in the CDF study states, see Chapter 4.

52 In neglect proceedings, most parents have a right to be represented by counsel and in some states to be appointed counsel if they are indigent. A handful of states provide for mandatory separate counsel for the child without any qualifications in neglect proceedings, although a number provide for the appointment of either mandatory or discretionary counsel under specified circumstances: for instance if there is a conflict of interest between the parent and child. For a state-by-state description of statutory provisions for counsel in termination and dependency and neglect proceedings, see Appendix E.

SUPERIOR COURT OF WASHINGTON

PETITION FOR TERMINATION OF PARENT—CHILD RELATIONSHIP

JUVENILE

Dependency of CASE NO.

I. INFORMATION

I represent to the court the following:

1.1 Information about the child:
Name:
Date of birth: Age: Sex:
Address:

1.2 Known information about the parent(s) or custodian:
a. Name of father:
Address:
b. Name of mother:
Address:
c. Marital status of parents:
d. Name of custodian:
Address:
e. Martital status of custodian:

II. BASIS

2.1 The child was removed from the custody of the parent named:
on:
(Date)
pursuant to a finding of dependency under RCW 13.34.030 (2) (a) or (b), and at least six months has elapsed.

2.2 The conditions which led to the removal still persist.

2.3 There is little likelihood that those conditions will be remedied so that the child can be returned to the parent in the near future.

2.4 Continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

[ ] 2.5 The finding of dependency has been pursuant to RCW 13.34.030 (2) (b), and necessary services have been provided or offered to the parent to facilitate a reunion.

[ ] 2.6 The parent has substantially failed to accept the services mentioned in (2.5) above.

[ ] 2.7 The parent has substantially failed to comply with the order of disposition which was made pursuant to the dependency finding of:
(Date)

III. RELIEF REQUESTED

Petitioner requests that the court terminate the parent and child relationship in this matter as such action would be in the best interest of the child.

Dated: _____
Petitioner

_____
Title/ Agency/ Relationship

IV. VERIFICATION

State of Washington
County of

The undersigned on oath states that:

4.1 I am the petitioner in this matter;

4.2 I have read the above petition, known its contents and believe it to be true.

_____
Affiant

Sworn and subscribed on:
Date: _____
Clerk or Notary Public in and for Washington
Residing at _____

I. HEARING

1.1 A petition was filed by: _____
requesting that the court terminate the above-named child's relationship with the child's parent(s) named:

1.2 A hearing was held on this matter.
a. Persons appearing were:

b. The court heard testimony from:

II. FINDINGS

Based upon the petition, the testimony heard in this matter and the case record to date, the court finds that:

2.1 There is clear, cogent and convincing evidence that allegations in the petition are true;

2.2 An order terminating the parent-child relationship in this case will be in the best interest of the child.

III. ORDER

IT IS ORDERED that:

3.1 All rights, powers, privileges, immunities, duties and obligations, including any rights to custody, control, visitation or support existing between:
the parent(s): _____
_____
and the child: _____
are severed and terminated and the parent shall have no standing to appear at any further legal proceedings concerning the child;

3.2 Any support obligation existing prior to the effective date of this order is not severed or terminated.

[ ] 3.3 This order does not affect the rights of the parent named;

[ ] 3.4 Since there remains no parent having parental rights, the child is committed to the custody of:
[ ] the Department of Social and Health Services
[ ] other:
and custodian has the power and authority granted by RCW 13.34.210.

Dated: _____ . _____
Judge/ Court Commissioner

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