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CHILDREN'S LEGAL RIGHTS - 1980

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TABLE OF CONTENTS

Table of Contents(continued)

INTRODUCTION

Historically, children have had little or no recognized rights under the law. They could be sold into indenture, be forced to work long hours in factories and mines, or be institutionalized, all without legal recourse. The concept that children are the chattel of their parents has not died easily. In fact, it has only been within the past two decades that legal rights on behalf of children have begun to emerge.

No one can deny that the progress which has been achieved during that period has been significant. Equal educational opportunities have been made available to classes of children who had previously been excluded from the school system. No longer can parents abuse their children without fear of State recrimination. And since the historic Gault decision,[1] the child's rights within the juvenile justice system are constantly being redefined by the courts.

Nevertheless, the victory is less than total. Children are still afforded far less protections and rights under the law than are adults. Consider the fact that children may be brought into court and placed in custody, not for violating a law, but for being "ungovernable"; or that they may be placed into mental health facilities by their parents without benefit of a fair hearing; or that they, unlike covicted adult criminals, may be subject to corporal punishment within the confines of an institutional sitting, i.e., the classroom of a school.

The primary reason that children do not share the legal benefits and privileges of adults is that the rights and interests of children are frequently balanced against the rights and interests of their parents and of the State. Because every major decision affecting children has been set in

[1] Application of Gault, 387 U.S.1, 87 S.CT. 1429 (1967)

that context, children's legal rights cannot be discussed in a vacuum. They must, of necessity, be viewed within the framework of the constitutionally recognized right of the parent to raise his own child as he[2] sees fit and to make all major decisions affecting his child's welfare. Should the parent fail in that duty, the right of the State to intervene and assume parental responsibility for the child, under the doctrine of "parens patrie", has been established.

The following discussion is intended to provide a general overview of how children's rights have developed within the juvenile justice system, the educational system, the area of custody and adoption, and the area of health care, taking into careful consideration the counterveiling rights asserted on behalf of their parents and the State.

It is not the purpose of this paper to provide specific information with regard to the laws and practices of any particular jurisdiction. The reader is encouraged to consult with a local attorney if he is in need of specific legal advice with respect to any of the issues discussed.

[2]The Authors clearly understand that the individuals referred to throughout this paper may be either male or female. However, for readability purposes, the male gender will be used.

THE JUVENILE JUSTICE SYSTEM

In its broadest sense the juvenile justice system includes every type of situation in which a child is brought under the jurisdiction of the juvenile court, voluntarily or involuntarily. It will be the purpose of this chapter to analyze the legal issues and trends of four major categories of children and youth who are under the juvenile court's jurisdiction: juvenile delinquents; status offenders and children in need of supervision; abused and neglected children; and children in foster care.

The common theory underlying the basis for jurisdiction in each of these categories is the doctrine of "parens patrie." According to this doctrine, the state has a right to exercise a parental-type control over a child when it is in his best interest to do so. The evolution of this doctrine is in contradiction to the historically accepted right of a parent to exercise absolute control over his child. The right of the State to intervene in family life in each of these categories is no longer questioned, although the circumstances and degree of intervention and the procedures by which it is accompolished continue to be sources of litigation.

Because state laws vary in how they label children within the juvenile justice system (for example, a truant child may be "in need of supervision" in one state, "dependent" in a second state, and "delinquent" in still another) and in how they treat these children, this analysis will explore the most common practices throughout the country. Despite the lack of uniformity from state to state there are broad legal issues which transcend these differences and which have implications for most jurisdictions. Those issues which have been the subject of major court decisions, as well as those most likely to be the subject of future litigation or legislative efforts, will be closely examined.

I. Juvenile Delinquency

Historical Perspective

Prior to the 19th century, children accused of crimes were tried in adult criminal courts and, if convicted, were confined to the same institutions as adults. Among these institutions were jails, almshouses, work houses and poor houses. Gradually, society began to fear that confinement with adults in these institutions would lead to the criminalization or pauperism of the children. The recognition of this danger and the steps taken to alleviate it marked the beginning of the law of delinquency.[1]

The first step taken in this direction was the creation of separate institutions for the confinement of children. Some of these institutions took only those children which they thought would be good candidates for rehabilitation. As the process developed, lower courts began to send children directly to these facilities, without trying them in criminal court. It was felt that trials were unnecessary since these new children's institutions were not intended to punish the child, but to benefit him.

The first judicial challenge to this concept came in 1838, in Ex Parte Crouse,[2] when the constitutionality of committing an incorrigible child without the benefit of a trial was tested. The Pennsylvania Supreme Court upheld the right of the State to so act in order to save the child from a course which surely would result in "confirmed depravity." To do otherwise, the Court reasoned, would be an act of extreme cruelty.[3] Significantly, this court gave the first judicial recognition to the doctrine of "parens patrie," citing it as the authority for the State to commit a child for his own benefit.[4]

By 1848, it was generally accepted that courts of chancery could subject children to confinement or impose other remedies, presumably less harsh than adult criminal courts, when it was determined to be in the best interest of the child. Ultimately, this process culminated in the establishment of a separate juvenile court with laws and procedures specifically drawn for children, the first such court being established in Cook County, Illinois in 1899.

What is Delinquency?

The most common definition of a delinquent child is an individual within a certain age bracket, for example ten years old through eighteen years old, who is found to have committed a delinquent act, or an act which would be designated as a crime if committed by an adult. Also, as delinquency was originally defined in most jurisdictions, a delinquent child included those children who were not found guilty of any criminal activity, but of being "incorrigible." The specialized concerns of this category of juveniles, commonly referred to as "status offenders", will be examined in the next section.

The Gap Between Theory and Practice

However lofty the initial goals of the juvenile court system may have been, it soon became apparent that in reality the child was not being treated fairly. In an effort to avoid the stigma of a criminal trial, all of the traditional elements of the adversary proceeding were eliminated, including the legal safeguards afforded adult individuals in those proceedings. Consequently, as has been judicially noted, the child was receiving the worst of both systems: he received neither the protections afforded adults nor the solicitous care and rehabilitative treatment postulated for children.[5]

Gault: The Emergence of Due Process

Gerald Gault, a teenager in Arizona, made an obscene phone call and changed the history of juvenile law in this country. For his phone call, a juvenile judge committed Gerald to the custody of a state institution for juvenile offenders for a maximum of six years. Had Gerald been an adult, he could have been fined between five and fifty dollars or imprisoned no longer than two months. Furthermore, despite the disparities in the sentences,

Gerald was afforded none of the legal rights enjoyed by his adult counterpart. Gerald's parents appealed his case.

In 1967, the United States Supreme Court reviewed the case[6] and set forth the essential due process protections to which Gerald was constitutionally entitled: the right to timely and adequate notice of the charges against him, the right to counsel, the privilege against self-incrimination, and the right to confront accusers and cross-examine withnesses.

The Court rejected the argument that by providing these procedural safeguards, the rehabilitative and beneficial aspects of the juvenile justice system would be destroyed. The Court stated that many of the informal features of the system could remain intact. However, insofar as that system contained those aspects more in the nature of the criminal justice system, namely, labeling an offender and committing him to a restrictive facility, the total informality of the juvenile justice system had to give way to constitutionally adequate procedures.

Since Gault, the major problem facing the courts has been to determine what additional protections are necessary in juvenile proceedings to insure fairness. This has not been an easy task because of the continued desire to preserve the uniquely protective and informal nature of the juvenile court. Courts are consistently being asked to balance the rights of a juvenile who stands accused and the need to preserve a system designed specifically to serve his best interests.

The Supreme Court has had to resolve this dilemna in a number of decisions.

Burden of Proof

The first test after Gault, supra, came in 1970. The Supreme Court was asked whether "proof beyond a reasonable doubt" is among the essentials of due process and fair treatment required during the adjudicatory hearing when a child is accused of an act which would constitute a crime if committed by an adult. The Court, in In Re Winship[7], held that it is. The juvenile court in this case had adjudicated a boy "delinquent" based upon the preponderance of the evidence, a far less stringent standard of proof than "beyond a reasonable doubt." In reversing this decision, the Supreme Court held that it would be unconstitutional to label a boy "delinquent" and confine him to an institution on evidence which would be insufficient to convict him if he were an adult. The Court also stressed that by adding this requirement there would be no effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place, thus, essentially preserving the nature of the juvenile proceeding.

Jury Trial

Shortly following Winship, however, the Supreme Court held that a jury trial is not constitutionally required in juvenile court proceedings, making it clear that not all rights afforded an alleged adult criminal were to be made available to the juvenile. The Courtin McKeiver v.Pennsylvania,[8] held that if a jury trial were constitutionally required, it would create a fully adversary proceeding and possibly put an end to what has been the "idealistic prospect of an intimate,informal protective proceeding."[9]

Miranda: Right to Remain Silent

More recently, the Supreme Court was asked to determine whether a juvenile's rights were violated because he was not afforded the protections established in the Miranda decision.[10] Pursuant to that decision,a person being detained on suspicion of committing a crime is entitled to have an attorney present during questioning. In Fare v.Michael C.,[11] the juvenile waived his right to an attorney, but requested the presence of his probation officer. His request was denied and the youth made several admissions. The Supreme Court held that a probation officer, although someone in a position of

trust and guardianship, is not equivalent to an attorney and the absence of his presence did not invoke the Miranda right against further questioning. The admissions were allowed into evidence.

It is unclear whether this decision is unique to juveniles or represents the general reluctance on part of the Court in recent decisions to extend the original holding of Miranda.

Public Identification of Delinquents

Most recently, the Supreme Court ruled that a state may not prohibit a newspaper's publication of the identity of a youth charged as a juvenile offender. The Court held, in a unanimous decision, that the paper's First Amendment rights prevailed over the State's interest in protecting the child's identity.[12] This decision is in marked contrast to the original goal of the juvenile justice system which was to protect the privacy of the child.

It appears likely that except for the very definite guidelines established in Gault and Winship, supra, additional due process protections will be afforded or denied juveniles on a case by case basis. These decisions will continue to vary between jurisdictions unless ultimately decided by the Supreme Court. It is possible, of course, to seek additional protections through the legislatures which always have the option to provide more than the constitutionally minimum requirements.

Diversion

In theory, the most enlightened method of protecting juveniles from the stigma of any type of quasi-criminal process is to divert them from the juvenile justice system. The rationale is that in certain cases, children alleged to have committed delinquent offenses will benefit most from not having a formal petition filed against them and not having to endure the hearing process. Some children are diverted at the police investigatory stage, others through a court or court-related program designed to provide services to the child without a formal adjudication.

The main concern with regard to diversionary programs is the same as that expressed about the juvenile justice system in general; namely, that by foregoing the formal adjudicatory process, the child's constitutional rights may be denied.

Police Adjustment

Essentially, police adjustment can be defined as the disposition of a case without court referral. While the police have a certain measure of discretion in charging adults, the discretion excercised in juvenile cases is generally far greater. This practice reflects the belief that children can be inspired by a strong official warning and that a certain amount of rowdy behavior is a part of growing up.[13]

This stage of the process is relatively informal, usually involving only the arresting officer, the complainant, the child and his parents. Attorneys are usually not involved in station house adjustments. The strongest danger that arises in this type of setting is that while attempting to have the incident "adjusted," the child might inadvertently waive his Fifth Amendment rights. In turn, if adjustment fails, the child may find his admissions used against him.

Informal Adjustment

Prior to the filing of a petition alleging delinquency, the intake worker or probation officer may decide that a certain case would be a good candidate for informal adjustment. Frequently, the intake worker is required by statute to informally adjust some types of cases while others are within his discretion. Informal adjustment may involve dismissing the case entirely or involve referral to another agency for services. In either case, informal adjustment diverts the child from the court proceeding and no formal record remains.

One significant legal distinction between the station house adjustment

and the informal adjustment process in some jurisdictions is that, in the latter, an admission by the child may not be used against him if the case is subsequently tried.[14] In those jurisdictions in which this is not the case, the child and his parents should be advised of the child's Fifth Amendment rights as set forth in the Miranda decision.

The child should not be coerced into entering a diversionary program. He must be informed of his options, including his right to contest the allegations against him at an adjudicatory hearing. His parents should be present at the intake process when informal adjustment is being considered and made aware of all of their child's legal rights.

Restitution

Although restitution is a classic example of a diversionary program, its use is also gaining increasing support as a dispositional alternative following adjudication.

Restitution, the concept of paying back the victim or making some compensation to society in general, was traditionally not favored in the juvenile justice system because of its punitive nature. Current thinking, however, is that while restitution does have some punitive aspects inherent in its use, the overall benefit to the offender and the victim is also consistent with rehabilitative goals.

Restitution programs must clearly define the rights and responsibilities of the child and be operated in a method which is consistent with the state's labor laws as well as the Thirteenth Amendment's prohibition against involuntary servitude.[15]

Transfer to Adult Courts

In contrast to those cases which are diverted from the juvenile court because they can benefit from a less formal process, some cases are waived into the adult system because of their serious nature.

In 1966, in a landmark case, Kent v. U.S.,[16] the Supreme Court held that before a juvenile could be transferred to adult court, he was entitled to certain due process protections. These protections include: a hearing on the waiver issue, effective assistance of counsel at the waiver hearing, access to juvenile court records, and if waiver is granted, a statement of the basis for the decision.

Additionally, the Court set forth criteria to be used by juvenile court judges in making these determinations, including, among others: the seriousness of the offense, whether the offense was violent and premeditated, and whether the juvenile would be amenable to treatment under the rehabilitative nature of the juvenile court.

State statues, in addition to providing for waivers to adult court on a case by case basis, can, by definition, exempt juveniles charged with specifically enumerated offenses from the juvenile system. The juveniles thus charged are automatically tried in adult court unless they can show that they would be amenable to rehabilitation under the juvenile system. In this type of case, the burden is shifted to the juvenile to prove his case if he does not wish to be tried as an adult.

A good example of this type of provision is the Juvenile Justice Reform Amendment[17] recently enacted by the State of New York. In response to public outcry against the number of serious offenses committed by juveniles, the law takes several steps to toughen its response to violent crimes, including jurisdictional transfer to adult court.

Dispositional Alternatives

After a juvenile has been adjudicated delinquent, he will face a variety of possible dispositions provided for by statute. Generally the judge will have a great deal of discretion in choosing among them. Again, in response to the serious offender, the judge's discretion may become more limited by laws

which mandate minimum sentences for certain types of offenses.[18]

Additionally, every state is a member of the Interstate Compact on Juveniles, which enables the placement of delinquents in correctional facilities in other states. Although procedures for these placements are set forth in the compact, compliance is generally not enforced.

Constitutional Issues

Since the avowed purpose set forth in juvenile codes is to rehabilitate the juvenile, can he be lawfully detained without receiving rehabilitative services? In a 70-page decision and order, a Federal District Judge ruled that institutionalized juveniles had a right to treatment and ordered that specialized treatment programs be developed for each child. The emphasis of each treatment plan should be to reintegrate the juvenile into society.[19] However, this decision was vacated by the Court of Appeals for the Fifth Circuit which found that the judge should have convened a three-judge court to hear the case.[20] The Supreme Court subsequently reversed[21] the Court of Appeals with respect to the jurisdiction of the district court to hear the case.

The Court of Appeals has since remanded the case to the district court for an evidentiary hearing, since the state facilities involved have undergone change since the commencement of the lawsuit. In doing so, however, the Court of Appeals took the occasion to question the validity of a constitutional right to treatment for juvenile offenders.[22]

A second issue which is still unresolved is whether or not juvenile delinquents must be placed in the least restrictive setting. Although gaining some favor from legislators, the courts have yet to hold that it is constitutionally required.

Delinquency Prevention

Current legislative efforts are aimed at delinquency prevention as well as rehabilitation. Diversionary programs as well as educational efforts are designed to provide services and training to youths in an effort to keep them out of the delinquency system.

One set of children and youth, in particular, is targeted for delinquency prevention. These are the juveniles who, although sometimes labeled or treated as delinquents, are guilty of no more than status offenses.

II Status Offenders: Children In Need Of Services

Nowhere in the body of juvenile law nationwide are the state statutes as diverse as in the definition and treatment of "status offenders." To the extent that these children are treated as delinquents, some of what has already been said about delinquency will apply. To the extent that these children are treated as neglected, deprived or dependent, some of what will be said in the neglect section, infra, will apply. Nevertheless, growing recognition that this group of children may require specialized treatment has resulted in a flurry of legislative activity as well as renewed questions about their legal status.

Historical Perspective

Early reformers who worked to create a juvenile court system separate and apart from the adult criminal system made no distinction between those children who had committed crimes and those who were merely unruly or disobedient to their parents. Indeed all were categorized together as criminals.

When the children were first placed into institutions apart from adults, the wayward were included with the offenders. It is little wonder that when the juvenile court finally emerged to assume jurisdiction over these children it, too, did not differentiate among them. Moreover, as juvenile law became codified, so too did the principle that the state of being "ungovernable" should be considered a delinquent act, just as the commission of a felony.

What is A Status Offense?

A status offender is commonly defined as a minor who engages in conduct that would not result in a criminal charge if committed by an adult.[23] Examples include: Truants, run aways, incorrigibles, ungovernables and those willfully disobedient to their parents.

Referred to as CINS (child in need of supervision), MINS (minor in need of supervision), PINS (person in need of supervision), and so forth, the focus is on the child and his behavior, and not on the commission of an illegal act.

Legal Issues

The first challenge on behalf of status offenders was made in the 1838 case, Ex Parte Crouse, supra. In that case the court was asked to declare unconstitutional the act of committing "incorrigible" children to institutions without a jury trial. The court, under the doctrine of "parens patrie," upheld the law and the precedent was set.[24]

Status As An Offense

Later challenges on behalf of these children were made on the principle that it is unconstitutional to punish a person because of his "status". The leading case in this area is Robinson v. California,[25] in which the United States Supreme Court unconstitutional a California law making drug addiction a crime.

In this regard, the Wayward Minor Statute of New York was declared unconstitutional. In Gesicki v. Oswold,[26] the Court held that the law, which granted adult criminal jurisdiction over youths 16 through 21 who were "morally depraved" or "in danger of becoming morally depraved," was an unconstitutional punishment of a minor's condition rather than of his action.

However, other laws have withstood this constitutional test. The Washington Supreme Court has upheld its state's incorrigibility statute even though recognizing that incorrigibility is a condition or state of being.

The Court reasoned that the status of beingincorrigible can only be acquired through certain conduct prescribed by statute.[27]

Vagueness

Still other constitutional challenges to status offender laws have been made on the basis of vagueness and overbreadth. The California juvenile statute was declared void because it granted juvenile court jurisdiction over children who were "in danger of leading an idle, dissolute, lewd or immoral life." It was held that this standard was so vague it failed to give fair warning of proscribed conduct to potential offenders or sufficient notice to the juvenile court judge to determine if it was present.[28]

Due Process Issues

To the extent that status offenders are treated as delinquents, they are afforded the same degree of procedural safeguards. It is unquestioned that if they face potential placement into residential facilities, following an adjudication, they are entitled to the safeguards set forth in the Gault decision, supra.[29]

Conversely, when status offenders are treated as neglected or dependent youths their due process rights are less certain. Although it is arguable that these children should have the right to counsel at adjudicatory and dispositional hearings, this has not yet been established as an absolute Constitutional requirement.

Placement

An unresolved issue in all areas of child placement is the constitutionality of confining children in institutions as a method of rehabilitation. The issue is volatile with the status offender who, unlike the delinquent law breaker, is not an alleged threat to society. In other words, is there a valid State reason for confining these children?

It is possible that a legislative resolution to this problem, as well as

to the issue of providing treatment in the least restrictive setting, will pre-empt the necessity of the courts to decide these difficult questions.

Legislative Trends

The Juvenile Justice and Delinquency Prevention Act of 1974[30] is a major piece of Federal legislation designed, in part, to structure policy toward status offenders. Key among its provisions, is a requirement that states, to be eligible for federal monies under the Act, can not place status offenders in juvenile detention or correctional facilities, but may only place them in shelter facilities. The Act also emphasizes the use of community - based services and diversionary programs.

The states, in order to receive federal funds, have begun to amend their juvenile laws accordingly. Whether the substantive effects of these changes will be sufficient to resolve the concerns about status offenders, however, remains an open question.

Do Status Offenders Belong Under the Juvenile Court?

Because of the many programmatic and legal concerns raised about the treatment of status offenders under the juvenile court system, it has been suggested that their needs would be better served if they were removed entirely from under the jurisdiction of the court. It has been argued that services to children and their families, which generally are not being provided now because it is only the child's behavior that is in question, would be more readily available on the outside.

Court interference may actually impede, rather than accomodate, the ability of the status offender to avail himself of community - based resources. And, despite the attempts to build legal protections into the system, the fact remains that jurisdiction over a youth solely because of his status frequently results in his being confined for long periods of time for something which is not, nor presumably ever could be, a crime if committed by an adult.

How this controversy will ultimately be decided is unclear, although it continues to draw heated debate among state and national legislative and advisory commissions, legal defense groups, civic organizations and eminent jurists.[31]

III Child Abuse And Neglect

Historical Perspective

Prior to the latter part of the 20th century society as a whole gave little or no thought to the concept of child abuse. To the extent that it was acknowledged, it was not viewed as a pervasive social problem, but rather as separate incidents of cruelty perpetrated by a few psychotic individuals. The law responded to the problem as identified. Thus, since the perpetrators were thought to be deviants from society, criminal laws were invoked in cases of child abuse. Although some mental health treatment may have been made available under the criminal justice system, there was no universal attempt to provide rehabilitative social services to the abusive parent.

Not only was the criminal justice system inadequate in resolving the problems confronting the abusive parent who came within its jurisdiction, it proved ineffective because of the reluctance of members of society to prosecute and convict a parent for disciplining his child. With the exception of the most excessive cases of brutality, parents were frequently not brought to trial on charges of child abuse, leaving a vast number of children at risk or in serious jeopardy.

It was not until 1962, when the "battered child syndrome"[32] was identified that child abuse was viewed as a sociological problem. National surveys and statistical reports uncovered what appeared to be a problem of epidemic proportions. As the problem of child abuse became better understood and its magnitude became apparent, state governments responded. Statutes began to

appear which dealt specifically with child abuse in order to provide a more systematic approach to the problem.

Currently, all 50 states have child abuse reporting laws. The Federal Child Abuse Prevention and Treatment Act,[33] approved in 1974, has provided renewed incentive to states to deal effectively with the problem of child abuse.

Although the majority of states still provide for criminal prosecution at the discretion of a law enforcement official, the primary goals of modern legislation are threefold: (1) to provide for a reporting system to assist in the discovery of child abuse cases; (2) to provide protective services for the child; and, (3) to provide rehabilitative services to the family.

What is Abuse?

There are many definitions of child abuse. One of the most common ones states that child abuse occurs when a parent or caretaker takes action which causes harm or injury to the child.[34] Such injury may be physical, including sexual abuse, or emotional. It is generally considered to be child abuse when evidence of such injury exists and can not be explained by the available medical evidence as being accidental.

What is Neglect?

Neglect is commonly defined to exist in those situations where parents or caretakers, by an act of omission, cause harm or injury to the child.[35] Neglect is often found to exist when parents do not provide adequate care for their children. A critical element in the definition of neglect is the existence of harm or injury to the child. Absent such a finding, it is questionable whether the state can or should intervene into the family life, as will be discussed in the section involving special considerations with neglect, infra.

The Reporting Laws

The need for reporting laws became apparent when, despite the statistical surveys indicating a widespread number of child abuse incidents, relatively few of these cases were being brought to the attention of the state. The reasons for this seemed to be manifold: doctors were reluctant to make reports against their patients, especially those in the middle-to-upper income brackets; a general reluctance on the part of many to "believe the worst" about their neighbors and friends; and, a general antipathy to getting involved in someone else's family life.

Consequently, reporting laws were drafted to encourage and, in some instances, to mandate the reporting of suspected child abuse. These laws include various legal safeguards designed to protect the reporter from potential liability for filing a child abuse report.

Mandated Reporters

Mandated reporters are those persons who are required by law to report any case of suspected child abuse to the state, most frequently to the state agency with the responsibility for providing protective services to children. The most common category of mandated reporters are those professionals who work with children or who in the course of their employment come into contact with children. This list generally includes, among others: doctors, teachers, social workers, mental health professionals, and law enforcement officials.

Liability for Non-Reporting

States have varying degrees of penalties for enforcing their mandatory reporting provisions. It has been generally assumed that because of the difficulty in detecting failures to report, as well as the fact that the decision to report is often a matter of professional judgment, enforcement of reporting statutes would be impossible despite the existence of criminal sanctions. This assumption is not necessarily valid.

In 1976, the California Supreme Court held that a doctor and a hospital who failed to diagnose and report a case of child abuse were liable both for

medical neglect and for failure to make a statutory report.[36] This case involved an eleven month old child who was brought into the hospital with fractures, bruises, and abrasions.

The fact that states are willing to enforce their reporting provisions will make professionals more responsive to their duty to report. Also, with the spectre of medical malpractice suits being brought against doctors for failing to diagnose and report child abuse, the medical profession has even more incentive to comply with the law.

Liability For Reporting

Having required a group of persons to file child abuse reports, the states have taken steps to protect them when they do. Foremost among these protections is the granting of statutory immunity for mandated reporters. Because of the serious nature of child abuse reports, an error in judgment could result in a suit for defamation of character, invasion of privacy or malicious prosecution.

To provide protection for the mandated reporters in the face of these potential lawsuits the states have enacted three varieties of immunity provisions.

The first type of immunity is absolute. In the states which have enacted these unqualified immunity provisions, mandated reporters cannot be sued at all. The second type of immunity is qualified. In these states, mandated reporters are protected from liability if they act in good faith. This means that although suits can be brought against the reporter, as long as there were reasonable grounds for the reporter to act as he did, he will not be held liable. The third type of statute is identical to the second, except that the good faith of mandated reporters is presumed by law. This means that if someone sues a person for filing a child abuse report, the burden is on him to prove that the report was filed in bad faith or with malicious intent.

In addition to the immunity clauses, the reporting laws also provide for the abolition of the physician - client privilege, as well as most other legally recognized professional - client privileges, except that between attorney and client. The purpose behind these provisions is to facilitate the communication of otherwise confidential information. Because mandated reporters are not legally required to keep otherwise privileged information confidential when child abuse is involved, they can not be held liable for a breach of confidentiality.

Non-Mandated Reporters

In addition to those persons required by law to report suspected cases of child abuse, most statutes encourage the reporting by all other individuals when they have reason to believe a child has been abused. Because these individuals have not been mandated by statute to file reports, there seems little likelihood that they could be held liable for failing to do so. The law has traditionally declined to impose a duty upon an individual to care for his neighbor or come to his assistance.[37]

However, in order to encourage these individuals to get involved, most states will protect the identity of the non-mandated reporter. If the child protective services agency has done a thorough investigation, it is unlikely that the initial reporter's testimony would add any additional evidence to the finding of abuse. But, because a parent has an arguable due process right to cross-examine witnesses, the confidentiality of the reporter may pose a legal problem if his testimony is critical to the case.

Also, many of the statutes do provide a qualified immunity for non-mandated reporters.

<u>State Intervention</u>

Traditionally, parents exercised absolute control over their children. That is, of course, no longer the case. It is generally accepted that the

State can intervene into family life when a child is placed in jeopardy by his parents.[38] Nevertheless, under what circumstances and to what degree the State may intervene continue to be major sources of controversy.

The Supreme Court has emphatically stressed that parents have a fundamental right to raise their children as they deem appropriate, without government intervention.[39] This right is constitutionally protected and cannot be taken away from parents without affording them due process of law. When the state receives a report of abuse or neglect it will begin to intervene into the life of a family. From the start of its investigation to the possible removal of a child from the custody of his parents, the state will be interfering with several basic rights of the family. What legal safeguards are provided at each step of the process are primarily a matter of state law.

The Texas state child abuse statue recently was challenged on the basis that it was constitutionally defective in several areas. Among the issues raised were: the constitutionality of maintaining computerized information about families prior to a judicial finding of abuse; the timeliness of a hearing when the child has been removed from his home on an emergency basis; the requirement for a guardian-ad-litem to represent the child at emergency proceedings; and, the standard of proof which is necessary before parental rights can be terminated.

This case was appealed to the Supreme Court, raising the expectations that the Court would resolve some of the constitutional questions raised by many state laws. However it declined to do so. In <u>Moore v Sims</u>,[40] the Court held that the Federal court in Texas, from which this case had been appealed, should have abstained from hearing the case. The basis for the Supreme Court's opinion was that there was evidence that the allegedly abusive parents who were challenging the law could have received adequate redress in a state court. Consequently, the decision which could have had serious impact on the child abuse statutes in many jurisdictions did not.

Unless the Supreme Court does ultimately decide what the constitutionally minimal safeguards are throughout the abuse and neglect process, it is likely that litigation in this area will continue to flourish. A discussion of some of these issues follows.

Special Considerations With Neglect

Without a substantial State interest, the government has no right to intervene into the parent-child relationship. Intervention when the child is "at risk" has been justified; intervention for less is questionable. The major legal concern with neglect statutes is that they are both vague and overbroad - that they provide no clear criteria to warn a parent that he is "neglectful" and that they are broad enough in scope to cover potentially any American family.[41] These statutes, nevertheless, are the basis not only for state intervention to label children "neglected," "dependent," or "deprived", but, in some cases, to remove them from home. With vague standards, it is also possible that similar cases may be disposed of in entirely different manners.

A related legal concern is that these broad statutory provisions may increase the likelihood of their misuse against the poor and those with cultural differences. It is a fact that well-meaning middle-class social workers may misinterpret the family life of a lower-income or culturally diverse family, resulting in their filing a neglect petition against the parents. In addressing a similar concern the Pennsylvania Superior Court has said:

> " ... the Juvenile Court Law was not intended to provide a procedure to take the children from the poor and give them to the rich, nor to take children of the illiterate

> and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the weak and the sickly and give them to the healthy and strong."[42]

Finally, questions are being raised about the propriety of the State intervening into family life under the auspices of neglect statutes when, despite parental behavior, there has been no impact on the child. The law appears to be making a presumption that if certain parental behavior is present, the child may be adjudicated "neglected" on that basis alone. Once the child has been adjudicated he will most likely stay within the court's jurisdiction until the court order is terminated. It is arguable that removal of a child from his own home solely on the basis of parental behavior, absent harm or imminent harm to the child, is not a sufficiently compelling basis to justify state intervention and is, therefore, constitutionally impermissable.

Investigation

Investigation into the private lives of the families who are subjects of child abuse reports raises several constitutional issues. First, there is the issue of illegal search and seizure under the Fourth Amendment. The Fourth Amendment, with limited exceptions, requires that a search warrant, issued after a finding of probable cause, be produced before the police, in the process of a criminal investigation, can search a person or his property absent his consent. The question arises whether a social services agency's investigation into a suspected case of child abuse or neglect falls within the scope of the Fourth Amendment.

It has been argued that an abuse or neglect investigation is more akin to investigations of welfare recipients than to criminal investigations.[43] The significance of this is that the Supreme Court has held that a warrantless visit to a welfare recipient's home did not violate the Fourth Amendment for several reasons. First, the purpose of the visit was for the welfare of the person being visited, and not for criminal prosecution. Secondly, the welfare recipient had advanced notice of the visit. And, third, administrative procedures, which ensured privacy, prohibited forcible entry, prohibited use of false pretenses to gain entry, and prohibited visits after normal working hours, were adequate safeguards[44] of the recipient's rights.

Whether or not this reasoning will be applied to abuse and neglect proceedings remains to be seen. Two factors which differentiate the situations are: first, that criminal prosecution may follow an abuse investigation by the agency and, secondly, that parents may lose the custody of their child because of the investigation. Although the avowed purpose of the agency's visit is to provide rehabilitative services to the family if necessary, it is at least arguable that these two factors are significant enough to require Fourth Amendment protection.

A second issue raised with regard to an abuse or neglect investigation is whether the Fifth Amendment privilege against self-incrimination is available to the parents under investigation. Since the Fifth Amendment privilege is applicable in criminal prosecutions, its use may be appropriate in some abuse and neglect proceedings. Because the agency worker represents the government and might impose a feeling of restraint upon the parent, there is additional concern that the Miranda warnings[45] must be given. These warnings, in essence, are designed to insure that an individual being interrogated while in custody fully understands his right not to incriminate himself. It would seem, therefore, that if any elements of restraint exist or of likely criminal prosecution exist, the agency worker should give the parent his Miranda warnings.[46]

Emergency Removal and Protective Custody

Most state abuse and neglect laws provide for the emergency removal and

detention of children. The laws vary with regard to who may remove a child, under what conditions he may be removed, and whether or not a court order is required.

Because emergency removals occur without parental consent and without affording parents the right to a pre-removal hearing, state guidelines are necessary to define the conditions under which they may occur. The most common test is when the child is in imminent danger.

Because the child is removed without affording the parent any prior right to challenge such action, most statutes give him the right to a hearing shortly thereafter.

The purpose of this hearing is not to determine whether abuse or neglect exists, but to establish whether temporary custody is essential to the welfare of the child. Constitutionally, is is arguable that the parents are entitled to at least adequate notice of the hearing, an opportunity to be heard and the right to counsel.

Since emergency removals occur without parental consent, prior to a hearing, and generally without an adjudication, it seems likely that those statutes which will most likely withstand constitutional challenges are those which:limit and clearly define the conditions under which emergency removal can take place, which provide for a detention hearing shortly thereafter, and which afford the parent his major due process rights.

With regard to the child, it is also arguable that he is entitled to the right to counsel at a detention hearing. One of the issues which the Supreme Court failed to address in Moore, supra, was the necessity for a guardian-ad-litem to represent the child at the emergency removal proceedings. Two factors supporting the appointment of a guardian are that, first, the deprivation of liberty interest which he suffers from being separated from his family is not lessened because the removal is temporary, and, second, his interests may not be served by either his parents or the State.

Adjudicatory Hearing

The adjudicatory hearing is the process of factfinding which may lead to an adjudication of abuse or neglect. It is informal in nature, although because of the fundamental rights inherent in the parent-child relationship and growing concern about individual due process rights, it is likely to become more formal in the future.

Parents' Rights

It is uniformly accepted that parents have the right to adequate and timely notice of the hearing and of the allegations against them in order that they can meet those allegations.

Although the right to counsel would seem imperative to assist the parents in utilizing all of their other legal rights, it is not a settled issue. Statutes vary and courts do not agree on the right to counsel at neglect proceedings. The Supreme Court soon will hear argument on the right of an indigent parent to have a court appointed attorney in termination of parental rights proceedings.[47] While this will not resolve the issue of the constitutional requirement for an attorney in neglect proceedings, it may help to clarify the issue.

Parents have the right to confront and cross-examine witnesses. Because of the serious impact the testimony of the State's witnesses may have upon them, it is essential that they be able to challenge it. However, absent the parents' being represented by counsel, this right hardly serves the purpose.

Finally, parents have the opportunity to be heard. They have the right to refute the allegations made against them and to present evidence in support of their position.

Child's Rights

Traditionally, the interests of the child in neglect proceedings were

assumed to be provided for by the State. This is no longer the case. It is now beoming clear that in many of these hearings, the child's interests may be in conflict with both the parent and the state. The Supreme Court in, Smith v. OFFER,[48] noted that because a child usually lacks the capacity to make a decision with regard to his own best interest, his parent or guardian ordinarily makes it for him. However, the Court approved the lower court's decision to appoint an independent advocate for the child when the interests and desires of the parties were in conflict and could, therefore, be prejudicial to the child's welfare.[49]

Whether or not the Court will ultimately decide that the child has a constitutional right to an attorney in abuse and neglect proceedings is uncertain. The child has gained some rights in this regard, however, through the Federal Child Abuse Prevention and Treatment Act, supra, which provides financial incentive to the states to provide for, among other things, guardians-ad-litem for children in abuse proceedings.

Evidence

The rules of evidence used in neglect and abuse proceedings vary from jurisdiction to jurisdiction. Although some courts may be more flexible than others in admitting certain types of evidence, it is almost universally accepted that social reports are not admissable. These reports, of immense value at the dispositional stage, contain hearsay which most likely would be prejudicial if admitted during the fact-finding process.[50]

Standard of Proof

The standard of proof necessary in neglect proceedings is generally either "clear and convincing evidence" or the "preponderance of the evidence." The "clear and convincing" standard is the higher test and has been constitutionally required in several jurisdictions.[51] Nevertheless, the constitutionality of the lesser standard has also been upheld.[52]

The Supreme Court which has set evidentiary standards in delinquency[53] will most likely be called upon to resolve this issue as well.

Disposition

Following an adjudication of dependency or neglect, the judge will conduct a dispositional hearing. At this hearing the social report will usually be admitted into evidence. Although not universally accepted, the parent arguably has the right to review the report and challenge any inaccuracies within it.

The dispositional alternatives available to the judge include permitting the child to remain home and providing the family with rehabilitative services or placing the child in temporary foster care.

The legislative trend is to provide services to the child within his family whenever possible.[54]

IV Foster Care: Children In Placement

Historical Perspective

The care of dependent, neglected, and unwanted children away from their own homes has been a part of American society since colonial times. Historically, the earliest form of substitute care consisted of little more than warehousing children in orphanages or almshouses or perhaps, auctioning them off in town meetings to be placed in states of indenture. Gradually, as the economic, social and political conditions changed, so did the prevailing concepts of children and child welfare. Consequently, proponents of child placement reform in the 19th century urged the use of substitute families for neglected children as an alternative to institutionalization.

Foster care, as originally contemplated by these reformers, was predominantly a matter of placement. Once a neglected child was placed with a substitute family, little or no thought was given about his future. It was not until the middle of this century that the additional goal of providing a

child with a nurturing and stable relationship with a parenting person or persons was added.[55]

What is Foster Care?

The Child Welfare League of America has defined foster care as "a child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or an extended period, and when adoption is neither desirable nor possible.[56]" Most frequently the concept of foster care refers to any type of substitute care for children including that provided in group homes, residential treatment centers, and institutional facilities as well as in alternate family settings. Since many of the legal concerns inherent in the use of foster care are the same regardless of the type of placement, the term "foster care" will be used throughout this discussion to include all types of substitute child care unless otherwise noted.

Irrespective of the type of foster care utilized, its goal is to provide a nurturing environment for the child for a planned period of time.

Growing awareness of the inadequacies of social service agencies in meeting this goal, coupled with an increased interest in protecting the legal rights of all parties involved when a child is removed from the home, has resulted in widespread litigation and developing legislation in the area of foster care. In order to analyze the legal trends in this area, it is helpful to consider how children enter the foster care system.

How Children Enter Foster Care

Voluntary Placements

The first method by which children may be placed into foster care is by the request of their parent or guardian. In most instances, parents voluntarily place their children in foster care in order to resolve a family crisis, with the expectation that such placement will be temporary.

Frequently, this expectation is not realized.

Because there may be no mandate in the state statute to provide services to children other than those adjudicated dependent, deprived, neglected, or abused, social service agencies may make little or no attempt to provide services which will restore the family life of the voluntarily placed child. Consequently, the precipitating factors which led to the placement of the child may not be ameliorated. When this happens the agency will be reluctant to return the child home upon the request of the parent. It is in these instances that voluntary placements become involuntary placements. The parent may request the return of his child only to learn that the agency will file a petition alleging neglect to prevent the child's return. In other cases, petitions are brought against parents for abandonment, even though little effort to bring parent and child together has been made by the state.

Traditionally, the legal protections afforded parent and child in voluntary placements have been few. Voluntary placements were deliberately kept out of the judicial system to encourage parents to seek assistance for their children without going through a court hearing and facing the stigma of being labeled "neglectful". However, when the children are not brought under the jurisdiction of the juvenile court, and the matter is not otherwise provided for by state statute, there is no guarantee that their legal rights will be protected. Although some advocates have raised constitutional questions about the deprivation of liberty for both parent and child when a government agency refuses to return a child who had been voluntarily placed, at least one state supreme court has upheld the constitutionality of such a process.[57]

Currently, steps are being taken to help resolve the problems posed by voluntary placements. For example, in some jurisdictions it has been reported that court orders are being required for voluntary as well as

involuntary placements, and in others court orders are required after the child has been in placement for a certain period of time.[58] Some state statutes require that the conditions of a voluntary placement must be agreed upon by both parent and state and may be terminated by either.[59]

California recently enacted a new section to its Family Protection Act to be used in two demonstration counties which specifies certain requirements with regard to voluntary placements.[60] Some of these requirements include: the necessity for a written agreement; the right of the parent to visit the child; the right of the parent to give medical consent for his child; and, the right to have the child returned after 14 days following written notice, or also upon written notice, within twenty four hours during the first three days of placement.

Finally, because surveys have indicated that voluntarily placed children have remained in foster care as long as involuntarily placed children, several of the states which have enacted mandatory periodic review of children in foster care, specifically includes those children voluntarily placed among the children to reviewed.[61]

Involuntary Placements

Involuntary placements are those in which the child is removed from his home pursuant to a court order. The court order will be issued at a dispositional hearing following an adjudication of neglect, abuse, dependency, or deprivation[62]. When a judge determines that removal is the proper alternative available then, depending upon state law, he will transfer custody of the child to a social services agency for placement or directly commit the child to a foster care setting. The court will retain jurisdiction of the case until the court order is terminated or until jurisdiction is removed by operation of law.

Individual Rights

When a child is placed with a foster family, the expectation is generally that the placement will be temporary and that everyone involved, namely, the parents, the foster family, the agency, and the child himself, if he is of sufficient age and mental capacity to reason, will be working towards the goal of returning the child to his biological parents, if at all possible. However, when the duties and responsibilities of each party necessary to accomplish this goal are not clearly defined, the child most likely will remain in foster care with little or no progress being made. As a result, the courts have been faced with an increasing number of cases asserting rights on behalf of foster children, foster parents, and biological parents to resolve the issue. The interests of these individuals are often in conflict and the courts have been struggling to balance the legal rights of every one concerned. Although certain trends are emerging from the case law, the decisions with respect to these issues are not uniform. The following is a brief analysis of the potential and actual issues being raised on behalf of foster children, foster parents, and biological parents.

The Child

Legal rights advanced on behalf of foster children have been premised in large part on the idea that placement decisions should reflect what is in the best interest of the child. Whether this standard is codified or invoked by individual judges, it is one with few guidelines. Some lawyers and judges have turned to leading authorities in the child care field for assistance in determining what is in the best interest of the child. Perhaps the authority most relied on by lawyers representing foster children is Goldstein, Freud, and Solnit's Beyond the Best Interests of the Child.[63]

In this book the authors offer as an overall guideline for choosing among several placement alternatives, that one which is the least determental

alternative for safeguarding the child's growth and development. Implicit in this guideline is the necessity to consider the child's sense of time, keeping in mind that disruptions of continuity have different consequences for different ages, as well as his need to establish a continuing relationship with at least one adult who is or will become his psychological parent.[64] Psychological parenthood is established through day to day interaction, companionship and shared experiences. The authors maintain that any caring adult can fill the role of a psychological parent, but that an absent or inactive adult never can, despite his biological or legal relationship to the child.[65]

Although some courts have awarded custody or made placement decision relying on the concept of psychological parenthood, the legal right, if any, to maintain such a relationship has been granted far less weight than the right which attaches to the child and his biological parent.

In a landmark case, Smith v. Organization of Foster Families,[66] the U. S. Supreme Court was asked to decide for the first time what, if any, constitutional rights could be asserted on behalf of the psychological family, created by the relationship between a foster parent and a foster child. In the decision, discussed in greater detail below, the Court declined to specifically address that issue, leaving the problem unresolved.

In a subsequent case decided by the Court of Appeals for the Fifth Circuit, Drummond v. Fulton County,[67] ~~the issue of psychological~~ the issue of psychological parenthood was again raised by the foster parents and, at least implicitly, rejected by the court. Counsel for the child, however, tried a different approach.

The child in question, who was two years old at the commencement of the proceedings, had resided with his foster parents since he was one month old. The undisputed facts in the case indicated that the foster parents had treated the child very well. Nevertheless, the state agency had denied their request to adopt him, and instead sought his removal and subsequent adoption to another couple.

It was argued on behalf of the child that he had a constitutionally protected interest in his "right to a stable environment". The argument advanced stated that a child has a liberty right not to be moved from home to home, without a prior hearing, especially in light of the significant literature which indicates that such moves have a traumatic effect on young children. The attorney claimed this right existed regardless of whether the child was in a natural, adoptive or foster setting.

The court, however, noted that the State's motive in interuppting the child's environment at any point was to place him in a setting which it considered superior for his needs. Failing to find any legal source for a right in conflict with that state motive, the court held that the child had asserted no liberty interest. The Court did, however, leave open the door for the possibility that it might come to a different conclusion if it were presented with a different set of facts. What that set of facts might be is unclear from the decision.

Although the "right to permanency" or the right to be free from frequent relocations is gaining impetus in state legislatures, it has not yet been recognized as a constitutionally protected legal right. Thus, absent state law or state policy to the contrary, children will frequently fail in their attempts to remain in a particular setting when the state agency determines that it is in their best interest to be relocated. The Supreme Court has even indicated that when preremoval hearings are conducted, although consultation of the child's wishes might be helpful, such consultation need not require that the child or a representative must be a party with full adversary powers.[68]

When children are separated from their families through government action,

does that government have a duty to provide services to rehabilitate the family? It is commonly recognized that freedom of personal choice in matters of family life is one of the liberties recognized by the Due Process clause of the Fourteenth Amendment.[69] Thus, it can seriously be argued that children who are suffering a deprivation of this liberty interest, as well as a possible physical deprivation of liberty if they are placed in institutions, are constitutionally entitled to some kind of affirmative action by the State to restore their family life.

If state law mandates that services be provided to children in foster care, they would clearly have a statutory entitlement to those services.

In the case, Cameron v. Montgomery County Child Welfare Services,[70] a former ward of the juvenile court is seeking redress for the alleged failure of government and social agencies to provide him with adequate care, treatment, and those services which would have enabled him to return home and be reunited with his mother from whom he was separated for three and a half years following his adjudication as a deprived child. His claim is based on both statutory and constitutional grounds.

It remains to be seen how favorably the courts will react to challenges brought by children seeking affirmative action on the part of government agencies to provide them with necessary services or those seeking redress when they fail. It should be noted at this point that courts have been willing to hold government agencies liable when they were found to be negligent in their duties to protect children, for example, by placing a child with foster parents they had reason to suspect were abusive.[71]

Another issue which arises is with regard to the type of placement chosen for the foster child. Does the child have a constitutionally protected right to be placed in the least restrictive setting? Currently unresolved in the courts, the concept of "least restrictive setting" is winning favor in the legislatures. For example, Federal legislation is being proposed which would provide financial assistance to State foster care programs only if, among other criteria, each child in the program is placed in the least restrictive setting which most approximates a family and which serve his special needs.[72] Finally, attention is being drawn to the need for legal advocacy on behalf of children in foster care. Although guardians-ad-litem are frequently appointed for children in the adjudicatory and dispositional hearings, their role generally stops at the termination of the proceedings. Without someone to protect the interests of the child, he may languish indefinitely in foster care because neither the agency nor his parents initiate necessary action for a change. Although the development of a local ombudsman program would provide the child with more continuous protection, the concept of periodic reviews, discussed later, may do much to alleviate the problem.

The Parent

Traditionally, parents have had almost autonomous authority to raise their children as they see fit. Gradually, through the development of child abuse and neglect laws, this authority has been qualified to permit state interference when parental action or inaction causes harm to the child. Even so, the courts have consistently stressed the importance of preserving family relationships and are reluctant to expand the power of the State to disturb that relationship.

The Supreme Court has on several occasions emphatically spoken of the right to conceive and raise one's own children as an essential right[73] and, in Prince v. Massachusetts[74], stated:

> "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."

It is obvious that parents suffer deprivation of a most fundamental right when the state removes a child from their home. Due process considerations exist not only when the State is seeking to remove the child, but throughout the period of removal.

In Smith v. OFFER, supra, one of the issues before the Supreme Court was whether a statutory provision was constitutionally defective because it did not give foster parents the right to a pre-removal hearing when foster children were taken from their custody and returned to their biological parents. The Court upheld the constitutionality of the statute, in part, because even assuming the foster parents had some liberty interest in protecting their familial relationship with the foster child, that interest could not be protected in derogration of the rights of the biological parents. The Court afforded the interest of the biological parent - one derived "from blood relationship, state-law sanction, and basic human right," a superior degree of protection than the interest claimed by foster parents whose origin was in contract with the state.[75]

However, even though the right to preserve the biological family relationship is fundamental, once the child has been removed from his home, the focus frequently changes from protecting parental rights to determining what is in the best interest of the child. This shift in standards affords the parents less ability to affect the future custody decisions of his child than they were afforded in the initial removal.

Perhaps one of the most drastic examples of the shift in standards is a provision in the Adoption Code of Maryland. That section states that after a child has been in foster care for two years under custody of the agency which makes placements, it is presumed by the court to be in the best interest of the child to award guardianship to the agency with the right to place the child for adoption or in long term care without the consent of the natural parents.[76] Although this presumption can be rebutted, the burden now shifts upon the parents and not the state to convince the court of their case. The erosion of the legal position of the biological parent from the pre-removal standard, where the state must prove him to be an unfit parent, to this point, is obvious.

What legal rights the biological parents retain throughout removal with respect to the day to day care of their children varies. Who has authority, for example, in the area of medical consent is frequently a matter of state law or policy. The American Public Welfare Association Standards for Foster Family Services, provide for a great deal of involvement by the parents when their children are in foster care, including visits with the child. Also recommended by the Association is the use of "placement agreements" which sets forth the rights and responsibilities of the parties involved.

When the duties and responsibilities of the parties are clearly defined in writing it will be easier to prove in court that compliance did or did not occur and whether restoration of the family is a viable goal.

Whether or not social services ultimately assist in reuniting the family, it would seem that the state nevertheless has the obligation to make them available. As with the child, in addition to any statutory entitlements, there is a strong constitutional argument that because the state has deprived a parent of the fundamental right to raise his children, he is constitutionally entitled to services which are necessary in order to regain that right.

Foster Parents

Although it varies from state to state, foster parents are generally viewed as independent contractors who enter into agreements with public and private agencies to provide care for children in the agencies' custody. They agree to provide temporary custodial care and to return the children upon

request of the agency. With somewhat conflicting goals, foster parents are asked to provide a neutral environment for the child, to remain unattached to him since the custody is to be temporary, and yet to provide him with a nurturing relationship and a sense of stability. What frequently happens is that when a child remains with one foster family over a long period of time, the foster parents no longer remain emotionally detached from the child. It is this emotional bond between foster parent and foster child which has been at the center of many custody disputes.

Most frequently under the "psychological parenthood" theory, discussed supra, foster parents have maintained that they have a family relationship with the child worthy of constitutional protection. If this is true, then it follows that the state cannot interfere in that relationship without due process of law. This is exactly what was at issue in Smith, supra.

Foster parents and organizations on their behalf were seeking to establish that before a foster child could be removed from the custody of the foster parent, the foster parent was constitutionally entitled to a pre-removal hearing. In determining whether the foster parents were so entitled, the Court considered the question of psychological parenthood. Without specifically acknowledging the existence of such a relationship, the Court did note:

> " ... this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing is biological families."[77]

The Court, however, did not directly state what, if any, constitutional protections these relationships should be afforded. It merely concluded that, assuming any rights did exist, they were adequately protected by the New York statutory scheme which was being challenged. That scheme did provide for pre-removal hearings in those cases when the re-location was to another foster home and in those cases when the child had been in the foster home for eighteen months.

Following the <u>Smith</u> case, the trend has been to not elevate the status of the psychological family relationship to one worthy of constitutional protections.[78] Consequently, even if state law or policy grants certain rights to foster parents, for example, pre-removal hearings in all cases, it is questionable how valid they would be if they were in contradiction of the acknowledged rights of the biological parents and, even perhaps of the potential adoptive parents.

Aside from the psychological parent concept, foster parents have also met with resistance in attempts to adopt their foster children by arguing that it was in the best interest of the child. A good example of this is a New York case in which a set of foster parents agreed to provide a pre-adoptive home for an infant. Three months later the placing agency sought to remove the child and place him with prospective adoptive parents. The couple challenged the removal, arguing that it was in the best interest of the child to permit them to adopt him.

The court emphasized the intended temporary nature of foster care and the different criteria used by agencies when selecting foster as compared with adoptive parents. Beyond their ability to provide board and care, prospective adoptive parents are matched as closely as possible to the biological parents of the child. Furthermore, the court observed, reluctance on the part of foster parents to return children to the agency upon request will seriously jeopardize the continued utilization of the foster care program.

The court concluded that because the foster parents were attempting to frustrate the adoption plans of the agency having legal custody of the child, they would have to prove not only that they would be suitable adoptive parents, but also that they would provide a better home than that chosen by the agency. Essentially, the foster parents would have to show a detrimental effect upon the child if he were removed.[79]

One area in which foster parents have gained recognition is in the area of subsidized adoptions. Adoptions subsidies are provided in cases where children have been hard to place for adoption because of their special needs. Most frequently these children are hard to place because of age, ethnic background, membership in a sibling or minority group, or the presence of a handicap. Foster families, who otherwise may not have been able to afford to adopt these children, have been able to do so under the subsidy program. Although these children may also be adopted by other persons, it is frequently the foster parent who does so. Consequently, under the Model State Subsidized Adoption Act, foster parents are assumed to be the most appropriate adoptive parents when they seek to adopt a child who qualifies for a subsidy.

<u>The Trend Towards Permanent Placement</u>

In 1978, the Children's Defense Fund published an in-depth study into the foster care system. The study reported that over 500,000 children were in foster care and shockingly little was known about their status. And, despite the fact that out of-state placements virtually ensures no contact with family or caseworker, the study estimated that over 10,000 children were placed out of state at any one time. This is in spite of the Interstate Compact on the Placement of Children, adopted by the majority of states, which contains certain procedures which Compact members must follow before placing a child out of state.[80]

The conclusion most frequently drawn from these statistics is that thousands of children are literally "lost" in the foster care system. That is to say, there are many children who do not have a plan for permanent placement, be it with their biological parents, adoptive parents, or in a long-term foster care program. They are permitted to stay in "temporary" care indefinitely, perhaps at one placement, perhaps being juggled between many.

Post-Dispositional Review Legislation

The legislative response to this problem has been to require some kind of periodic review process for children in foster care. The purpose of such legislation is to keep track of the children who enter the foster care system. If the reviews are effective, the progress of each child's case will be monitored with the goal of providing that child with a permanent placement as soon as possible. The types of legislation currently in existence include periodic judicial or citizen review, periodic administrative review, a one time review after placement for a certain period of time, and review by the court upon petition.[81]

The Federal Government is also expressing concern in this area. Congress is currently considering comprehensive legislation designed to improve the foster care system.[82] The proposed legislation provides strong financial incentives for states to use foster care only when preventative services in a child's home fail or are refused. In those cases necessitating foster care, the bill would ensure that the child is returned to a permanent living arrangement as soon as possible. To this extent, the bill provides that no child will be involuntarily removed from a home -- except on a short-term emergency basis -- unless the situation in the home has been judged to present a substantial immediate danger to the child that cannot be mitigated by preventive services, that the child is dependent or in need of supervision and preventive services are inadequate or have been refused, or the child is delinquent. Voluntary placements also must be preceded by an offer and refus-

al of or inadequacy of preventive services.

The child must be placed in the least restrictive setting, as close to home as possible, and with a relative whenever possible. Services must be provided to the child and the family to ensure the earliest possible reunion. Provision must be made for a judicial or administrative review of the case of each child in foster care no longer than 18 months after original placement. This review would determine whether the child should be returned home, continued in foster care, or placed in some other permanent setting. The parents, foster parents, and legal guardian of the child all have a right to a hearing to challenge any governmental action under this bill.

Judicial Response

The National Council of Juvenile and Family Court Judges has taken affirmative action to improve the foster care problem. In 1974, under the auspices of the Council, the Concern for Children in Placement Project was begun. The project relies on volunteers to review court records on children in placement in demonstration counties and initiate judicial reviews where appropriate.

The Council is also developing a book designed specifically to assist juvenile and family court judges in conducting post-dispositional reviews. The Council is taking the position that judges must take a more active interest in the welfare of children, relying on their inherent powers to conduct review hearings if necessary, and ensuring that expert testimony is available from child care authorities anytime it will benefit a case.

The Council also emphasizes the need to provide a permanent placement for the child and stresses that this should be the ultimate goal of monitoring children in foster care. In this regard, they have drafted a Model Statute for Termination of Parental Rights with the specific purpose of providing permanent custody for children. The statute provides, among other things, for continued jurisdiction under the juvenile court, for both the termination proceeding and for follow-up reviews on the child

Termination of Parental Rights

When all reasonable efforts have been made to return the child to his family and it becomes apparent that there is little likelihood of accomplishing that goal, the agency will consider its alternatives. It can either continue the child in planned long term foster care or seek to place the child for adoption.

Termination of parental rights to free the child for adoption is a drastic step. Standards and guidelines for involuntary termination are set forth in all state statues. Because of the serious deprivation which the parents stand to suffer, the full panoply of due process rights should arguably be made available to them.

Currently on appeal to the Supreme Court is the issue of whether an indigent mother is entitled to court-appointed counsel in termination proceedings.[83] This case should help to establish the constitutionally minimal safeguards to which parents are entitled when the state seeks to terminate their parental rights.

FOOTNOTES

1. See, for example, Packel, " A Guide to Pennsylvania Delinquency Law, " 1 Vill. L.R. 21: 1
2. 4 Whart. 9 (PA. 1839).
3. Id. at 11.
4. Id.
5. Application of Gault, 387 US 1, 18, 87 S.CT. 1429 (1967). See, Footnote 23 in the decision.
6. Id., 387 U.S. 1
7. 397 U.S. 358 (1970)
8. 403 U.S. 528 (1971)
9. Id. at 545
10. Miranda v Arizona, 384 U.S. 484 (1966) Essentially, a person held in custody pursuant to a criminal investigation must be advised: of his right to consult with an attorney, have an attorney present during questioning, and that if he cannot afford an attorney, one will be provided for him. He must also be informed of his right to remain silent and that any information obtained may later be used against him.
11. ___U.S.___, 99 S.CT. 2560 (1979)
12. Smith v Daily Mail Publishing Co., ___U.S.___, 99 S.CT. 2667 (1979).
13. See, Packel, Supra, generally at 8-9
14. See, for example, 11 P.S. § 50-304(d).
15. See, for example, Gottesman and Mountz, "Restitution-Legal Analysis", National Council of Juvenile and Family Court Judges (1979).
16. 383 U.S. 541 (1966)
17. N.Y. Family Court Act, § 711 et seq. as amended by the Juvenile Justice Reform Act of 1978 (Ch. 478)
18. Id.
19. Morales v Turman, 383 F. Supp. 53 (E.D. Texas 1974)
20. 535 F. 2d. 864 (5th Cir. 1976)
21. 430 U.S. 322 (1977)
22. 563 F. 2d 933 (5th Cir. 1977)

23. Sarri, "Adolescent Status Offenders - A National Problem", Child Welfare Strategy In the Coming Years, DHEW Publication (OHDS) 78-30158, p. 285

24. 4 Whart. 9. (PA 1839)

25. 370 U.S. 660 (1962)

26. 366 F. Supp. 371 (S.D.N.Y. 1971)

27. Blandheim v State of Washington, 529 P. 2d 1096 (1975)

28. Gonzalez v Maillard, No. 50426 (N.D. Calif. Feb. 9, 1971), Vacated 416 U.S. 918 (1974)

29. M. v Superior Court of Shasta County, 4 Cal 3d 370, 482 P. 2d 664 (1971)

30. P.L. 93-415 (S. 821) (1974)

31. Sarri, Supra. AT 311-316

32. Helfer, Ray E. and Kempe, C. Henry, The Battered Child, 2nd. ed. (Chicago, Ill: Univ of Chicago Press) 1974.

33. P.L. 93-247, 42 U.S.C.A. §§ 5101-5106

34. Caulfield, "The Legal Aspects of Protective Services for Abused and Neglected Children," DHEW Publication No. (OHDS) 78-02007, p. 2

35. Id.

36. Landers v Flood, 131 Calif. Rpter 60 (1976)

37. See, generally, Prosser, Law of Torts, (4th ed. 1971)

38. See, for example, Jehovah's Witnesses of Washington v King County Hospital, 278 F. Supp. 488 (D.C. Wash. 1967); Aff'd 390 U.S. 598 (1967)

39. Prince v Massachusetts, 321 U.S. 158 (1944)

40. ___U.S.___, 99 S.CT. 2371 (1979)

41. Fitzgerald, "Rights of Neglected Children and Attempts by the State To Regulate Family Relationships," Child Welfare Strategy in the Coming Years, DHEW Publication No. (OHDS) 78-30158, pp. 376-377

42. Interest of LaRue, 366 A. 2d 1271, 1275-1276 (1976)

43. Caulfield, Supra. p. 9.

44. Wyman v James, 400 U.S. 309 (1971)

45. See Note 10, Supra.

46. Caulfield, Supra. pp. 106-108.

47. Re Otis, No. 79-5215, reported at 42 U.S.L.W. 3290, 3316.

48. 431 U.S. 816 (1977)

49. 431 U.S. at 841, See Note 44.

50. Caulfield, Supra, p. 37.

51. See, for example Interest of LaRue, Supra, 336 A2d. at 1276; and, Matter of Robert P., 61 Cal. App. 2d 310 (1976)

52. See, for example, In Re J.R., 87 Misc. 2d 900, 386 N.Y.S. 2nd 774 (1976)

53. In Re Winship, Supra, 397 U.S. 358.

54. See, for example, H.R. 3434 which would provide Federal incentives to states to provide services to children within their homes, and place them into foster care only if those services fail.

55. Wiltse, Kermit T. "Current Issues and New Directions in Foster Care," Child Welfare Strategy in the Coming Years, DHEW Publication No. 78-30185, pp. 53-60.

56. Child Welfare League of America, "Standards For Foster Family Care Services" (1959)

57. Lee v Child Care Service Delaware County Institution District, 337 A.2d. 586 (1975)

58. See, for example, general discussion, Wiltse, Supra, pp. 64-67.

59. See, for example Mass. Gen. Laws. Ann. Ch. 119, 23(a).

60. Cal. Welf. & Inst. Code § 16552.

61. See, for example, N.Y. Soc. Serv. Law § 392; Fla. Stat. Ann. § 409.168; and MO. Stat. Ann. § 453.305 (Vernon).

62. Although children adjudicated delinquent and those receiving mental health services are frequently placed into foster care systems, it is not the purpose of this section to discuss any specialized problems in the placement or treatment of these children.

63. Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child, (The Free Press: New York) (1973)

64. Id., p. 53

65. Id., p. 19

66. 431 U.S. 816 (1977)

67. Drummond v Fulton County Department of Family & Children's Services, 564 F. 2d 1200 (1977), cert. den. 437 U.S. 910

68. Smith, Supra, 431 U.S. at 852, See Note 59

69. See, for example, Cleveland Board of Education v La Fleur, 414 U.S. 632, 639-640 (1974)

70. Reported at 5 Fam. Law Rptr 2676. (E.D.PA) (1979)

71. Bartells v County of Westchester, Reported at 5 Fam. Law Rptr 2001 (1978)

72. HR 3434, Supra.

73. See, for example Meyer v Nebraska, 262 U.S. 390 (1923); and Stanley v Illinois, 405 U.S. 645, 651 (1972)

74. 321 U.S. 158 (1944)

75. Smith, Supra, 431 U.S. at 846

76. Md. Ann. Code. art. 16 § 75

77. Smith, Supra 431 U.S. at 844-845, See Note 52

78. See, for example, Drummond, supra, which specifically held that the foster parents had no protectible interest in that case. 563 F.2d at 1208.

79. Ninesling v Nassau County Department of Social Services, 46 NY 2d 382, 386 N.E. 2d 235 (1978)

80. "Children Without Homes," Children's Defense Fund, Washington D.C. (Lib. of Congress 78-74230), pp. 1-47.

81. Id., See, generally Appendix, Table 1 for an excellent summary of legislation in the 50 states

82. HR 3434, Supra.

83. In Re Otis, Supra.

ADOPTION

Adoption

The current focus in child care placement is the need to remove children from foster care and to provide them with permanent homes. Consequently, courts and legislators are making a concerted effort to review the current state of adoption laws. They are struggling with the need to facilitate the use of adoption, while protecting the rights of all of the parties involved. The issues which are developing as a result of that process will be discussed below.

Historical Perspective

Adoption was not favored at common law and early attempts to codify its use were frequently met with hostility. The first adoption statute was passed in Massachusetts in 1851, followed shortly thereafter by laws in the other jurisdictions. Prior to the enactment of these statutes, children, like chattel, were transfered from parent to parent by deed without legal proceedings.[1]

The purpose of enacting adoption statutes was to provide protection for the parties involved: the child, the adoptive parents, and the biological parents. This was done primarily through the involvement of the judicial process as well as by the introduction of an agency to investigate prospective adoptive homes and to place children.

What is Adoption?

Adoption is the legal process by which a child acquires parents other than his biological parents and parents acquire a child other than their biological child. As a result of an adoption decree the legal rights and obligations which formerly existed between the child and his biological parents come to an end, and are replaced by similar rights and obligations with respect to his adoptive parents.[2]

Independent Adoptions

Adoption agencies were created by law to facilitate in the placement of children. By investigating the homes of prospective adoptive parents, the agency can better provide a placement that is in the best interest of all parties involved. Nevertheless, legal and illegal placements of children by individuals, absent agency involvement, continue to grow.

These so-called "black and gray market adoptions" are causing growing concern in the legislatures. Every state prohibits the buying and selling of children, i.e., the black market adoption. In these kinds of adoptions, the intermediary arranges the adoption for profit. Although there are criminal sanctions for selling children, detection is generally difficult.

Increasingly problematic, however, are those adoptions in which an intermediary arranges the adoption not for profit. These adoptions may or may not involve payment of the mother's expenses. The adoptive and biological parents are frequently strangers, know little or nothing about each other, and have all of their necessary dealings handled by the intermediary A fine line often exists between paying for the mother's expenses and paying for the baby in these adoptions, hence the term, gray market adoptions. Although these adoptions are legally permissable in most jurisdictions, some states have outlawed all independent adoptions except to a relative[3] and others are considering doing so.

The problems inherent in independent adoptions arranged by intermediaries are numerous. First, not-for-profit placements may in fact involve a large amount of money being passed between the parties. Secondly, the legal rights of the individuals involved are frequently unprotected. For example, the biological mother may be coerced into giving up the legal rights to her child under circumstances which would not pass judicial scrutiny. So too, the child's interests may not be adequately protected when the prospective adoptive parents have not be screened. Further, the child will not be guaranteed a permanent placement if the legality of the adoption is questioned and a custody battle ensues. Finally, the adoptive parents have no knowledge of the child's background, health problems, or other significant factors. They, too, stand the chance of losing their right to the child if the legality of the adoption is challenged.

Voluntary Relinquishment

Before a child can be adopted, his relationship with his biological parents must be legally terminated. Adoption statutes generally provide for two types of parental termination, those which are voluntary and those which are involuntary.

Voluntary relinquishment of parental rights occurs when the biological parent consents, in writing, to release his child for adoption. In what cases adoption may occur without the consent of one parent and under what circumstances voluntary relinquishment may in reality be coercion are issues surrounding the use of voluntary termination.

Most state statutes specifically enumerate the individuals who must give consent before the child can be released for adoption. Although these statutes frequently require the consent of the legal guardian or the court under certain situations, this discussion will be limited to the consent that is required to be obtained from the biological parents.

In every state, consent of the mother is necessary before the child can be freed for adoption. Several states have attempted, however, to exclude or qualify the need for the father's consent when the baby is illegitimate. The rights of putative fathers with respect to the custody of their children has been the subject of several key Supreme Court decisions.

The Putative Father

The first major decision to address the rights of putative fathers was

Stanley v Illinois.[4] In that case the Supreme Court struck down as a violation of the Due Process Clause, an irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. In this case, the children were residing with the father following their mother's death. The court concluded that they could not constitutionally be removed from his custody, absent a judicial finding that he was an unfit parent.

However, in the first direct challenge to a state statute which permitted an illegitimate child to be placed for adoption solely upon the consent of the mother, the Supreme Court rejected the father's argument that he had the right to veto the proposed adoption. In Quilloin v Walcott,[5] the Court held that the child's countervening interests had to be considered. The mother in this case had given her consent to adopt to the man she had married and with whom she and the child had been living for eight years. Consequently, it was in the best interest of the child to grant the adoption. The Court also indicated that there were legitimate state interests in differentiating between putative fathers and married or divorced fathers. Consequently it rejected Quilloin's equal protection argument.

Subsequent to Quilloin, the Court did declare as unconstitutional a New York statute with similar provisions. The statute required that the consent of a mother but not the father must be given before an illegitimate child could be adopted. Although the Court had failed to sustain Quilloin's equal protection argument advanced on the basis of different treatment between types of fathers, the Court, in Caban v Mohammed,[6] found the law to be discriminatory between sexes. In a 5-4 opinion, the majority of the Court held that maternal and paternal roles are not invariably different in importance.

What this holding means is that any state which provides for voluntary relinquishment of parental rights will have to take into consideration the rights of the putative father. At the very least, he will have the right to challenge any proposed adoption of his child and, if Caban is construed literally, to veto it.

Notice

State statutes generally provide that notice must be afforded to anyone whose consent to adoption is required when an adoption proceeding is planned. Absent statutory exceptions, for example, legal incompetency or abandonment, the State must show that all reasonable attempts to provide notice have been made. What constitutes adequate notice may give rise to litigation in the future. However, the generally acceptable method is to use the rules of civil procedure for the service of process in a civil action.

In light of its opinion in Caban, the Supreme Court acknowledged that difficulties in locating and identifying unwed fathers at birth could impede the adoption process. However, the Court declined to comment upon whether these difficulties would justify a statute addressed particularly to newborn adoptions, requiring more stringent requirements concerning the acknowledgement of paternity or a stricter definition of abandonment.

In any event, failure to comply with the notice requirement has provided the clearest justification for setting aside an adoption at the request of a biological parent.[7]

Coercion

In order to be valid, the consent to adoption must conform to any formalities required by law. These may include, for example, a written signature before witnesses or consent given under oath.

Beyond the formalities, consent is valid only if it is truly voluntary. If the decision to terminate was made under duress, coerced, or otherwise made against the individual's free will, a valid ground for challenging the legality of the consent and the adoption exists. Where evidence supports this claim,

courts will generally set aside the adoption because the fradulent nature of the consent prevented the parent from having a fair hearing.[8]

To insure against the possibility of coerced consents, several states are considering requiring judicial process in every instance where parental rights are being terminated. Through this method, the parent would be required to satisfy a court that he understood the legal ramifications of terminating his parental rights and that he wished to do so.

Involuntary Termination

Involuntary termination of parental rights occurs when the State obtains a judicial order for termination without parental consent. State statutes specify under what conditions parental rights may be terminated. The most frequent among these are abandonment, serious or prolonged abuse and neglect, and failure to support. The most recent trend is to provide for the commencement of termination proceedings after a child has been in foster care for a specified period of time.[9]

The two major concerns expressed about involuntary terminations are the vagueness of the grounds for termination and the rights of the parents to challenge it. These issues exist regardless of whether the termination provisions are part of the State's Juvenile Code governing dependency or neglect, or are part of the Adoption Code.

The vagueness argument alleges, essentially, that parents will be deprived of the fundamental right to raise their child because they are accused and found guilty of conduct which is not clearly proscribed by law. This, it is argued, is constitutionally impermissable.

However, one State Supreme Court has upheld such a statute, although it agreed that terms such as "proper parental care" were broad. The court concluded that the terms were to be interpreted "in light of history, culture, generally accepted standards of morality and the common understanding and behavior of reasonably conscientious and well-intentioned parents."[10]

The second issue is what safeguards should be made available to parents when the state seeks to terminate their parental rights. Although the parents are usually granted an opportunity to challenge the termination, the right to counsel has not yet been recognized as a constitutional requirement.

The right of an indigent mother to court-appointed counsel in a termination proceeding is currently under appeal to the Supreme Court.[11] That case is being watched closely for the effect it may have in enunciating the due process rights of parents. The American Bar Association has filed an Amicus brief in support of the appointment of an attorney. The position of the Bar Association is that continued legal custody of the child is a fundamental right and a liberty interest protected by the Constitution.

As the states attempt to facilitate the process of termination of parental rights in an effort to free more children for adoption, it is likely that litigation in this area will flourish. Likewise, as increased concern is expressed over the welfare of the child, the need for an attorney to represent him in termination proceedings undoubtedly will be debated.

Race And Religion As Factors in Adoption

The prevailing rule is that both race and religion may be considered as factors when determining whether prospective adoptive parents would provide a suitable placement for the child. This subject was most recently addressed by the Court of Appeals for the Fifth Circuit in Drummond v Fulton County Department of Family and Children Services.[12]

In that case, the couple was denied the opportunity to adopt their foster child, in part because he was of a different race from them. In sustaining this decision, the court held that a consideration of race is in the best interest

of the child since it prevents blanket placements of white children to white families and black children to black families. However, the inherent difficulties in interracial adoption is a relevant factor to consider. The court stressed that when not used in a discriminatory fashion, both race and religion have been held to be constitutionally acceptable factors to consider in the placement of children.

Subsidized Adoptions

Subsidized adoption is a program established by law and funded through state and local dollars. It is intended to expedite the adoption of children who have not heretofore been placed due to their age, race, handicap, or membership in a large sibling group. The kinds of children concerned and the benefits given through this program vary from state to state. Subsidized adoption benefits are now available in 47 States and the District of Columbia, excluding only Wyoming, Hawaii and Mississippi. Additionally, the Federal Government is considering legislation which would provide federal benefits for subsidized adoptions.[13]

Adult Adoptees And Confidential Records

Adoptees who wish to gain access to information about their adoption have encountered a host of legal difficulties. All 50 states have some kind of statute that protects the confidentiality of adoption information. Although these statutes vary greatly with regard to what information is to remain confidential, who may obtain access to the information, and under what conditions it is to be released, the purpose of these statutes is generally the same -- namely, to strengthen the family relationship of a child and his or her adoptive parents, as well as to encourage biological parents to give their children for adoption when they are unable to care for them.[14]

Adult adoptees have tried several legal theories to challenge these statutes with varying degrees of success. For example, in those states that do not prohibit an adopted child from inheriting property from his or her biological parents, it has been suggested that an adoptee's right to know if he or she has inherited any property is sufficient reason to make adoption records available.[15]

However, attempts by adoptees to convince courts that their right to adoption information is, in all instances, constitutionally guaranteed have generally met with failure. The courts have been reluctant, in particular, to declare as unconstitutional those statutes that permit adult adoptees to secure adoption information pursuant to a court order, which can be issued only after a finding of "good cause". Despite the constitutional arguments advanced by the adoptees, most notably under the right-to-privacy concept of the Ninth Amendment and the equal protection and due process concepts of the Fourteenth Amendment, the courts have generally found that the states have a sufficient interest in not making access to adoption records an absolute right.[16] By qualifying the right of adoptees to secure information about their adoption, the state can promote the purpose set forth above -- that is, the preservation of the adoptive family and the encouragement of the adoption process -- and can also protect any countervailing constitutional right the biological or adoptive parents may have to their privacy.

FOOTNOTES

1. See, for example, Clark, Homer H. Law of Domestic Relations, (West Publishing Co: St. Paul, Minn.) 1978, p. 603
2. Id., p. 602
3. See, for example, Mass. Gen. Law Ann. 28A § 11(C); Calif Civ. Code § 2244; Conn. Gen. Stat. Ann. § 45-63; and Mo. Stat. Ann. § 259.22
4. 405 U.S. 645 (1972)
5. ___ U.S. ___, 98 S. Ct. 549 (1978)
6. ___ U.S. ___, 99 S. Ct. 2560 (1979)
7. See, generally, Clark, Supra, p. 668; Armstrong v Manzo, 380 U.S. 545 (1965)
8. Id., See in particular, Note 20. See also, Adoption of Baby Girl Fleming, 369 A2d 1200 (1977)
9. See, for example, Md. Ann. Code. 16 § 75.
10. State v Metteer, Reported at 5 Fam. Law Rptr 2670 (1979)
11. In Re Otis, No. 79-5215, reported at 42 U.S.L.W. 3290, 3316.
12. 563 F. 2d 1200 (1977), Cert. den. 437 U.S. 910
13. H. R. 3434
14. "Confidentiality of Adoption Records: An Examination", 52 Tulane Review 817 (1978)
15. Spillman v Parker, 322 So2d. 573 (La. App. 4th Cir. 1976)
16. See, for example, Mills v Atlantic City Department of Vital Statistics, N.J. Super, 372 A.2d. 645 (1977)

HEALTH CARE

Pervasive throughout the law involving children and health care is the reluctance of courts to interfere with the parental duty to provide for a child's welfare. It has long been assumed that parents will act in the best interest of their child with regard to both medical and mental health care. Although there has been some erosion in their legal right to make or consent to all treatment decisions involving their children, a great deal of deference to the wishes of the parents is still accorded.

I MEDICAL CARE

Parental Consent

With some exceptions, parental consent is required before a physician may legally treat a child. Consent by the minor is insufficient and a physician could be held liable if he relies solely upon that consent. Statutory exceptions permitting minors to consent to their own health treatment most frequently include those minors who are between the ages of 18 and 21, those who have graduated from high school, or those who have been emancipated.[1]

Emergencies and Special Statutes

One of the recognized exceptions to the necessity of obtaining parental consent to medical treatment is when the life or health of the child would be placed in serious jeopardy. In emergency situations when there is insufficient time to secure the consent of parents, most statutes authorize the physician to act despite the absence of parental consent.[2]

Additionally, there are special statutes in most jurisdictions which provide for treatment of certain diseases or conditions without parental consent. Generally included among this list are venereal diseases and other reportable diseases, drug or alcohol abuse problems, and pregnancy.[3]

Failure To Provide Adequate Medical Care

Having placed the major responsibility to provide for the child's health care on the parents and having made it difficult for physicians to treat a child absent their consent, the State assumes the parent will adequately protect the medical needs of the child. For a variety of reasons this assumption is not always a valid one.

Sometimes the unwillingness of parents to seek necessary medical treatment for their children is because of their religious beliefs. Although the parents have a recognized constitutional right under the First Amendment to raise their children according to their religious tenants,[4] that right may come into conflict with the health and welfare of the child. When this happens, the courts must balance the right of the parents to practice their religion without state interference and the right of the child to receive medical treatment.

Courts are in substantial agreement that the state may intervene over the objections of the parents to provide necessary medical treatment when the child's life is in imminent danger.[5] When the child's life is not in danger, however, some courts will not order medical care over parental objections. One such court has held that the State's interest in providing medical treatment to the child is not of sufficient magnitude to outweigh the religious beliefs of the parents when the child's life is not immediately imperiled.[6]

The majority of courts do rule in favor of medical treatment over parental objection when the child's life is not endangered, if the objection is based on non-religious grounds.[7] The method of intervening in these cases is generally to seek an adjudication of "neglect" by virtue of parental failure to provide "adequate medical care." Once the child has been adjudicated and is brought within the jurisdication of the juvenile court, medical treatment can be ordered for him.

Despite cases to the contrary, the New York Court of Appeals recently

failed to find a child "neglected" because his parents chose to have him treated with laetrile, rather than with the conventional methods of treating his disease. The court stated that the issue was not simply whether or not the parents had made the right or wrong decision. Rather, the issue was whether they had sought accredited medical assistance and followed the recommendation of their physician for a treatment which had not been totally rejected by all responsible medical authority. Having found from the facts that they did undertake reasonable efforts to secure medical treatment for the child, the court concluded that the state could not meet its burden of demonstrating neglect.[8]

Contraceptive Counseling

One of the emerging issues in the area of medical care is the ability of minors to seek information or medical assistance in the area of birth control, without obtaining parental consent.

In 1977, the Supreme Court struck down as unconstitutional, a state statute which prohibited the dissemination of contraceptives to anyone under the age of sixteen.

In Carey v Population Services International,[9] the Court held that the Constitutionally recognized right to privacy in connection with decisions affecting procreation extended to minors as well as to adults. The Court concluded that there was no basis for a blanket prohibition upon the distribution of contraceptives to minors. Any state restriction on that right would be justified only if the state could prove that it were serving a significant state interest which was not present in the case of an adult. Absent such a finding, there was no basis for treating the minor differently.

Abortion

The most recent major decision involving parental consent and health care treatment for a minor is Bellotti v Baird.[10] In this case, the Supreme Court struck down a statutewhich involved what amounted to absolute veto power by parents over their daughter's right to have an abortion. The significance of the case lies not only in the holding, but in an attempt by the Court to effectively blueprint a hypothetical type of statute which would involve the parents in the abortion decisions of their daughters and still pass Constitutional muster. An analysis of the case follows.

The Bellotti case involved a Massachusetts statute which required the consent of both parents -- or, in their absence, the consent of a court of law -- before an unmarried woman under the age of 18 could obtain an abortion. The law was challenged by an abortion clinic and by an unmarried teenager representing a class of unmarried minors, who have adequate capacity to give valid and informed consent to an abortion and do not wish to involve their parents.

The Massachusetts Supreme Court had construed the statute as prohibiting minors, regardless of their maturity, from obtaining judicial consent for an abortion without prior parental consultation. The only exceptions permitted were in emergency or life threatening circumstances, or when the parents were unavailable and could not be reached. In most instances, therefore, the parent had to be notified of any judicial proceedings concerning their daughter's right to obtain an abortion.

In situations where parents had been contacted and refused to give consent, the Massachusetts court had interpreted the law as entitling the judge to also withhold judicial consent if it was determined that, despite the girl's maturity, an abortion would not be in her best interest. Thus, even though a minor might have made a mature, informed and reasonable decision to have an abortion, the judge could still deny her permission.

In deciding the Bellotti case, the U.S. Supreme Court first noted that Massachusetts had enacted the controversial statute in an attempt to reconcile the constitutional rights of a woman to choose to terminate her pregnancy with

the special interest of the state in encouraging an unmarried pregnant minor to seek the advice of her parents before deciding whether to bear a child. In a prior decision, the Court had determined that the state could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy.[11] The question the Court now faced was whether the procedures set forth in the Massachusetts statute unduly burdened the minor's right to secure an abortion, thus violating her Constitutional rights to privacy and liberty.

The Supreme Court concluded that the statute, which had been construed by the Massachusetts court to require parental consultation in almost every case before court involvement was permissible, was sufficiently comparable to a parental veto to make it Constitutionally deficient. Further, the fact that a judge could also withhold consent despite a minor's maturity also made it unduly burdensome for a minor to seek an abortion.

The Court, in addition to rendering its verdict on the merits of the statute, then proceeded to identify a plan that would be constitutionally acceptable with regard to unmarried minors who seek abortions. First, the Court established that such a law must provide the minor with an opportunity to go directly to court without first consulting with or notifying her parents. At that time the Court must authorize her to get the abortion without parental consultation if it is satisfied that she is mature and well informed. However, if the court is not persuaded that she is competent to make a mature decision, it may consider whether abortion is in her best interest and grant or deny her request accordingly. Because of the strong interest in encouraging family involvement concerning a minor's decision, the Supreme Court said that a judge may consider the need for parental consultation when determining what is in the best interest of the child. Therefore, parental consultation may be required in individual cases, even if parental consent is not.

By choosing to elaborate on this alternate method of handling termination of teenage pregnancies, the Supreme Court has at least implicitly affirmed the sanctity of the family relationship and the desirability of involving parents in the health-related issues of their children.

Defective Newborns And Nontreatment

One major issue has emerged recently which touches on the rights of both medically and mentally ill children. This issue is whether life sustaining medical treatment should be provided to "defective" newborns, those babies born with profound or multiple handicaps. Decisions to deny an infant's right to life by withholding treatment are frequently made by parents and physicians when the prognosis for meaningful life is considered extremely poor or hopeless. Examples of the types of infants most frequently found in this category are babies with Down's syndrome, Lay-Sachs disease, anencephaly (absence of cognitive part of the brain) and incurable chromosome defects.

Besides the very obvious and critical moral and ethical considerations society will have to make about these cases, the courts will have to struggle with the legal issues involved.

Currently there are no laws which govern the permissability of withholding treatment in selective cases. Consequently, most legal commentators believe that laws governing child neglect and possibly homicide could be invoked against the parents and the physician.[12] The argument advanced for the legality of withholding treatment is that no active steps have been taken to end life.

The few courts that have directly confronted this issue have ordered that treatment be provided to the child.[13] One court specifically recognized that the most basic right is the right to life and rejected any consideration for the quality of life involved.[14]

The issue of what is in the best interest of these children, especially in consideration of the potentially conflicting interests of their parents is one that more and more courts will be asked to decide. The ultimate resolution of these cases is certain to have significant impact on the basic rights of thousands of handicapped infants.

II MENTAL HEALTH CARE

A minor's right to secure necessary mental health care was initially predicated upon the consent of his parents and so was similar to his ability to obtain other medical services. Consequently, if a parent refused to consent to psychiatric treatment, an emotionally distrubed child was frequently left untreated. Some state laws are beginning to recognize the right of adolescents to seek mental health services, although provisions for notification of the parents are generally included.[15] A body of legal literature dealing with the rights of minors to receive psychiatric treatment without the knowledge or consent of their parents has also begun to develop.[16]

Emerging Issues

In the past decade, advances on behalf of mentally handicapped persons have been significant. Although the Supreme Court has not yet elevated the "right to treatment" to one of constitutional proportion, several federal courts have implicitly done so.[17] Similarly, other federal courts have responded favorably to the right to protection from harm,[18] to treatment in the least restrictive environment,[19] to equal educational opportunities,[20] to protection from intrusive or hazardous procedures,[21] to substantive and procedural safeguards in the civil commitment process,[22] and to liberty.[23]

How much progress will ultimately be achieved on behalf of mentally handicapped adults and the resulting impact on mentally handicapped children is far from certain at this point. Whether or not the rights of mentally handicapped children will ever be co-extensive with the emerging rights of their adult counterparts is questionable because of their status as minors. In establishing the rights of children, not only must the interests of the State be considered, but the rights of the parents as well. Of the three legal developments in the area of mental health care which have had the most direct impact on children, the first to be discussed best underscores this fact.

"Voluntary" Commitments To Residential Facilities

There are generally two methods under State law whereby individuals can be admitted into mental health facilities for treatment. The first is voluntary commitment. Most state laws provide that a voluntarily admitted patient can leave the hospital when he wishes to after fulfilling any necessary administrative requirements. The only way that a voluntary patient can be detained in the facility against his will is if involuntary commitment proceedings are commenced.

Involuntary commitments form the second type of admission into residential care. These are committments which occur without the consent of the patient and upon a judicial finding that residential mental health treatment is required.

Although the statutes provide that adults and minors alike may be admitted to residential care by either procedure, there is frequently one essential difference -- voluntary admissions of minors are not, in most cases, made through the request and consent of the minor, but by the parent. Furthermore, the ability of the voluntarily placed child to leave the facility, unlike his adult counterpart, is predicated upon more than his own desire to leave.

Believing that these "voluntary" admissions of children by their parents were more in the nature of involuntary commitments, actions were commenced in two jurisdictions to test the constitutionality of the procedures. The cases culminated in a pair of Supreme Court decisions which held the legal safeguards in both instances to be adequate.

In Parham v J.L and J.R.,[24] the Court first upheld as constitutional the Georgia procedures for voluntary commitment. Under Georgia law, parents or legal guardians can submit an application for hospitalization to the superintendent of a state facility when they believe their child needs residential mental health treatment. The superintendent has the power to admit the child temporarily for observation and diagnosis. If, following that observation and diagnosis, the superintendent finds that (a) there is evidence of mental illness, and (b) the child is suitable for treatment in the hospital, the child may be admitted "for such period and under such conditions as may be authorized by law". Georgia has no statewide regulations governing the procedures to be used by superintendents, each of whom is responsible for developing admission guidelines at his facility.

Following commitment, the child has no right to demand his own freedom. The parent or guardian can secure the child's release at any time by requesting his release, which must be granted within five days; otherwise the child will be released when the superintendent determines that hospitalization is no longer necessary.

Attorneys on behalf of the children in the Georgia case argued that because the minors were being deprived of their right to freedom and liberty, they could not be committed against their will without a full due process hearing. The lower court agreed. It held that the children had a constitutional right to be free from bodily restraint and from the emotional and psychic harm that could result from unnecessary institutionalization. Under the Fourteenth Amendment the child could not be deprived of this right without due process of law.

The Supreme Court, however, was unwilling to recognize the interest of the child separate and apart from the interest of his parents. It concluded, therefore, that the private interest at stake in this case was a combination of the parents' and child's concerns, the presumption being that parents act in the best interest of their children. Based on this reasoning, the Court held that "simply because the decision of a parent is not agreeable to the child or because it involves risks, does not automatically transfer the power to make that decision from the parents to some agency or officer of the state". The Court observed that the Georgia procedure provides a safeguard against the danger of irrational parental behavior, because commitment depends upon the superintendent's independent examination and medical judgment. The Court further noted that the state has a significant interest in confining the use of its costly mental health facilities to cases of genuine need and would not, therefore, admit a child who does not need this expensive service simply because his parents requested it.

The Supreme Court was reluctant to saddle the state system with unnecessary obstacles that would discourage the mentally ill or their families from seeking psychiatric assistance. The Court feared that many parents who sincerely believe their children need help would forego seeking care for their children if such care were dependent on an adversary proceeding.

Finally, the Court held the state also has a genuine interest in utilizing the time of its psychiatrists and professionals for the diagnosis and treatment of patients rather than in the often lengthy and time-consuming procedure of testifying in due process hearings.

Having determined, therefore, that (a) parents usually act in the best interest of their children and that (b) their judgment is afforded a second, independent review by a medical person, and taking into consideration the above-mentioned state's interests, the Court concluded that Georgia's procedures afforded the child sufficient protection to satisfy the child's rights under the due process clause of the Fourteenth Amendment.

The Court adopted this same reasoning in <u>Secretary of Public Welfare v</u>

<u>Institutionalized Juveniles</u>.[25] Because procedures in Pennsylvania provided even more statutory and regulatory safeguards than those in Georgia, the Pennsylvania plan for parental commitment of children without a due process hearing also was upheld.

The Supreme Court's decisions in these cases were limited to upholding the states' procedures for admitting children to residential facilities. The Court did not discuss, or decide, whether children have a right under the Fourteenth Amendment to a post admission hearing to determine the necessity of their continued placement.

Justice Brennan, in his concurring opinion, stated his belief that a voluntarily committed child had a right to at least one post-admission review hearing. Advocates of children, distressed by the decisions in these two cases, will undoubtedly be testing his opinion in the near future.

<u>De-institutionalization And The Mentally Retarded</u>

A second development affecting the rights of mentally handicapped children has been the trend toward de-institutionalization for mentally retarded youngsters. This movement has gained renewed impetus from a recent federal court decision, <u>Halderman v Pennhurst State School And Hospital</u>.[26]

In that case, a suit brought on behalf of institutionalized mentally retarded children and adults, alleged their right to receive adequate treatment or habilitation in the least restrictive setting. The Federal Court of Appeals for the Third Circuit, although refraining from establishing such a constitutional right, did state that the right existed under both federal and state law.[27]

The Federal Appeals Court left intact a substantial part of the lower court order designed to ensure such a right. Essentially, under the Circuit court's decision, individualized programs must be developed for every patient in the institution with a presumption in favor of placing each individual into a community living arrangement. The court stopped short of ordering the institution closed, indicating that there may be some mentally retarded persons for whom institutional life <u>is</u> the least restrictive environment under which they could be habilitated. If there were a constitutional right to be placed in the least restrictive setting, the court concluded, that right would be premised on individual needs. For this reason, the court was unwilling to close the facility and foreclose the possibility that some individual's needs might, in fact, include institutionalization.

<u>Equal Educational Opportunities</u>

A dramatic breakthrough in the rights of mentally handicapped children has been achieved in the area of education. Through a series of landmark decisions,[28] and progressive federal legislation,[29] the ability of mentally handicapped children to acquire a quality education now has been ensured in most cases. For a thorough discussion of this subject, please see the chapter on education.

FOOTNOTES

1. See, for example, 35 P.S. § 10101
2. See, for example, 35 P.S. §10104
3. See, for example, 35 P.S. § 10103
4. <u>Wisconsin v Yoder</u> 406 U.S. 205 (1972)
5. Caulfield, "Legal Aspects of Protective Services for Abused and Neglected Children," DHEW Publication No. 78-02007, p. 109; <u>Jehovah's Witnesses</u> of <u>Washington v King County Hospital</u>, 278 F.Supp. 488 (D.C. Wash. 1967); aff'd 390 U.S. 598 (1967).
6. <u>In Re Green</u>, 292A.2d. 387, 392.
7. In General, See 52 ALR 3d 1118 for an annotation of cases; see, also, Caulfield, id.
8. <u>In re Hofbauer</u>, reported at 5 Fam. Law Rptr. 2788 (1979)
9. 431 U.S. 678 (1977)
10. ___ U.S. ___, 99 S.CT. 3035 (1979).
11. <u>Planned Parenthood v Danforth</u>, 428 U.S. 52 (1976)
12. Soskin and Vitello, "A Right To Treatment or A Right to Die?", <u>Amicus</u>, Vol. 4, No. 3, (May/June 1979) p. 124
13. See, for example, <u>Maine Medical Center v Houle</u>, No. 74-145 (Cumberland County Super Ct, Maine, 1974); and, <u>In Re Obernauer</u> (Juv. & Dom. Rel Ct. Morris County, N.J. 1970)
14. <u>Maine Medical Center</u>, <u>Supra</u>
15. See, for example, P.S. 50 § 7204 and Colo. Rev. Stat. § 27-10-103.
16. See, Brooks, Alexander D., <u>Law, Psychiatry and the Mental Health System</u>, (Little, Brown and Company: Boston) 1980, p. 177
17. See, for example <u>Rouse v Cameron</u>, 387 F. 2d 241 (D.C. Cir. 1967); <u>Wyatt v Stickney</u>, 325 F. Supp. 781 (M.D. Ala. 1971); <u>Halderman v Pennhurst State School and Hospital</u>, 446 F. Supp. 1295 (E.D. Pa. 1977), Reversed in part, Civ. No. 78-1490, (3rd Cir 1979)
18. See, for example, <u>New York State Association for Retarded Children, Inc v Rockefeller</u>, 357 F. Supp. 752 (E.D. N.Y. 1973)
19. See, for example, <u>Dixon v Weinberger</u>, 405 F. Supp. 974 (D.D.C. 1975)
20. See, for example, <u>Armstrong v Kline</u>, Civ. No. 78-172 (E.D.PA (1979) <u>Pennsylvania Association for Retarded Children v Pennsylvania</u>, 334 F. Supp. 1257 (E.D.PA 1971)

21. See, for example, Kaimowitz v Michigan Department of Health, Civ. No. 73-19434-AW, 42 U.S.L.W. 2003 (Mich. Cir. Ct. 1973)

22. See, for example, Lessard v Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972)

23. See, for example, O'Connor v Donaldson, 422 U.S. 563 (1973); also, see, Wald and Friedman, "The Politics of Mental Health Advocacy in the United States," Legal Rights of Mentally Disabled Persons (Practising Law Institute 1979) pp. 31-46, For an excellent summary of legal rights for mentally handicapped persons.

24. ___ U.S. ___, 99 S. CT. 2493 (1979)

25. ___ U.S. ___, 99 S. CT. 2523 (1979)

26. Halderman, Supra. Civ. No. 78-1490 (3rd Cir 1979)

27. See, PA. Stat. Ann. tit 50 § 4201.; 42 U.S.C. § 6063 (6) (20) (B).

28. See, Generally, Armstrong, Supra; Pennsylvania Association for Retarded Children, Supra; and, Mills v D.C. Board of Education, 348 F. Supp. 866 (D.D.C. 1972)

29. P.L. 94-142, 20 U.S.C.A. §§ 1401 et seq.

EDUCATION

Next to his parents, the school system asserts the most authority and control over the life of a child. Every state has a compulsory education law requiring that minors in a specified age bracket attend public school or its equivalent. Habitual failure to attend school can result in the child being adjudicated dependent or delinquent and even in his placement in custody outside of his own home.

Traditionally, the school had autonomous control over the child for the hours during which he was in attendance. Although the school still retains a great deal of authority, as with parental control, it is no longer absolute.

The development of children's rights vis-a-vis the educational system has been gradual. The initial right of children to come within the school system as well as their rights once they are included in it are discussed below. Additionally, the legal issues involved when the parent-child relationship comes into conflict with the school-child relationship will be analyzed.

I ACCESS TO THE SCHOOL SYSTEM

> "... NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW." AMENDMENT XIV, U.S. CONSTITUTION

The Legal Right To An Education

There is no Federally recognized Constitutional right an an education. Nowhere in the U.S. Constitution, including the Bill of Rights, is the right to an education explicitly guaranteed. Nor, according to the Supreme Court, is there a basis for concluding that it is implicitly protected by the Constitution. [1]

The legal basis for asserting such a right, absent state constitutional considerations, must of necessity lie within the state statutes which provide

for compulsory school attendance and the creation of a public school system. Presumably, these statutes provide an entitlement to an education. Having created such an entitlement, the state can neither exclude children from it for arbitrary or discriminatory reasons[2] nor deprive them of their right to attend school without due process of law.[3]

Therefore, although the Constitution does not create a right to education, the Fourteenth Ammendment has been effectively utilized to ensure that various classes of children are not kept out of the school system arbitrarily and that individual students may not be dismissed unfairly.

Desegregation

The first major challenge testing the right of children to have equal opportunities to education was in the area of desegration. In the landmark decision, Brown v Board of Education,[4] the Supreme Court struck down the doctrine of "separate but equal" schools. Under this doctrine, several states provided for segregated school systems, defending the constitutionality of such an arrangement on the basis that equality of treatment is accorded when the races are provided substantially equal facilities. The Supreme Court rejected this argument absolutely.

The Court found that segregated school systems denied black children equal protection under the law. First, the Court said, the schools were not equal as evidenced by the inequitable distribution of educational resources among schools attended by whites and those attended by blacks. Second, and even more critical, the Court said that segregated schools would be unconstitutional even if the resources were equal. State imposed segregation would generate feelings of inferiority among black students who were separated from other children solely by virtue of their race in a constitutionality impermissable manner.

Initial attempts by schools to get around the Supreme Court decision were obvious and met with little success. Examples of the kinds of programs struck down include: the closing of public schools while providing government grants to white children to attend private schools;[5] transfer plans which permitted children to transfer to schools based solely on race;[6] and "freedom of choice" plans.[7]

Affirmative Action To Integrate

Finally, after repeated steps by States to delay the desegregation of public school systems, the courts began to take stronger action. Such action included a decision by the Supreme Court which required the immediate end to all dual school systems and strongly suggested that no more delays should be granted.[8]

And, the most controversial of all actions, was and is court-ordered busing to insure that schools are segregated. The majority of these cases has been upheld on appeal when the scope of the remedy was determined to be within the nature and extent of the constitutional violation.[9] The controversy continues, however, as cases involving busing currently are pending before the Supreme Court.[10]

"Track" Systems

A more subtle way of permitting segregation to exist in the school system was through a method known as the "tracking" system. Through this process, children were placed in different tracks according to their ability as measured by I.Q. tests. Since the tests were reflective of White middle class concepts, black children usually did poorly and were placed in the lowest tracks. The use of culturally biased tests to segregate or discriminate students came under attack. Through court action, track systems are being eliminated,[11] and schools are being required to show that there is a rational relationship between the I.Q. tests they use and the ability of a child to learn.[12]

<u>Education For The Handicapped Child</u>

Historically, handicapped children have been systematically excluded from the school system. Mentally handicapped children were often placed in residential facilities with little or no thought given to their educational needs. Physically handicapped children, on the other hand, were frequently confined to home because there was no way they could function in the schools as they existed. When educational opportunities were made available to these children it was generally through "segregated" school systems, with little guarantee of the educational content or quality of the programs being offered. It was inevitable that a constitutional challenge would be asserted on behalf of handicapped children, much the same as the one made on behalf of black children, alleging their right to equal educational opportunities.

In 1972, such a lawsuit was brought. In <u>Pennsylvania Association for Retarded Children v Pennsylvania</u>,[13] a suit on behalf of all mentally retarded persons between the ages of six and twenty-one challenged their exclusion from the public school system because they were thought unable to profit from an education.

Relying first on the Equal Protection clause of the Fourteenth Amendment, it was decided that retarded children who are educable have a right to an education just as non-retarded children have. Secondly, the procedural safeguards of the Due Process clause of the Fourteenth Amendment require that certain procedures be followed before a child can be excluded from a regular classroom and placed in a special setting.

Shortly after this decision, the Federal District Court in Washington, D.C. issued an even broader decision, requiring that all children who are classified as behavioral problems or emotionally disturbed have the right to a fair hearing before exclusion from a regular classroom.[14]

Despite the fact that these decisions marked significant progress for handicapped children, the victory was limited. Nationwide, the problem of unequal educational opportunities was still a reality for most handicapped children who were not within a jurisdiction with similar court decisions. The need for more litigation and lengthy court appeals to make education available to these children was, however, substantially reduced by an act of Congress.

On November 29, 1975, the Education for All Handicapped Children Act[15] was enacted into law. The Act, popularly referred to as P.L. 94-142, conditions the right of schools to receive federal funds upon compliance with the terms of the Act, thereby having substantial impact on the handicapped children of virtually every school district in the country. The basic requirements imposed upon school districts are discussed below.

P.L. 94-142
Who are the Handicapped Children?

The law clearly defines which children it intends to be covered by its terms. The types of handicapped children include, for example, the mentally retarded, the visually handicapped, the deaf, and those with specific learning disabilities due to psychological disorders. The law clearly states that it does not include children with learning problems which result from their socio-economic background.

This exemption formed the basis for a law suit in Michigan. In that case, parents claimed that their children's rights to equal protection are being violated by the school system's failure to provide special education services when poor academic performance is due to cultural or economic deprivation. A significant issue they raised was the need to label their children as handicapped before they can receive those special services. The Court held, however, that the school's evaluation procedures are rationally related to the purpose of assisting handicapped children and do not constitute a denial of equal protection to culturally deprived students.[16]

This case serves as a reminder that although thousands of handicapped children

have received newly found educational opportunities, there are still gaps in the provision of Special Education services.

Mainstreaming

The policy behind P.L. 94-142 is that all handicapped children are entitled to a Special Education and related support services, which may include, for example counseling, transportation, or Social Work services, designed to meet their individual needs. Moreover, this Education is to be provided in the least restrictive setting and, to the extent possible, with non-handicapped children. Once again the "separate but equal" philosophy is being emphatically rejected, even requiring the provision of all necessary support services to enable a handicapped child to be educated with his non-handicapped peer. Only when the nature or severity of the handicap is such that education in a regular classroom with the use of support aids can not be achieved satisfactorily, may he be removed.

What Does Education Include?

The education to which the handicapped child is entitled includes the variety of academic programs available to non-handicapped children, including among others, art, homemaking and industrial art. He is also entitled to the same non-academic services as other children, including recreational activities, special interest clubs and athletics. To the extent that he can be excluded from any of the extracurricular activities, it is unclear whether he is entitled to a hearing to challenge that decision. It has been argued that his right to a hearing to challenge academic placements is sufficiently broad to include other decisions affecting him in the educational process. The nature of these hearings is discussed in greater detail below.

Having established that the handicapped child is entitled to essentially the same academic and non-academic school-related services as non-handicapped children, courts now face the issue of whether he is entitled to more services. If educational services in addition to those made available to other school children are necessary to meet the needs of the handicapped child, must the school provide it? At least one court has said yes.

In Armstrong v Kline,[17] a class action lawsuit was brought on behalf of handicapped children who require educational services in excess of the 180 days provided and paid for by the school. The court said that the purpose of P.L. 94-142 was not to provide equal services between handicapped and non-handicapped children, but to provide an appropriate education designed to meet the unique needs of the handicapped child. While this does not mean that services must be provided to enable each child to reach his maximum potential, services designed to make him independent or self-sufficient are required.

Compliance With P.L. 94-142

In order to be in compliance with P.L. 94-142, the State must have in effect a plan which provides for the following:

1. Free public education for all children between the ages of 3 and 18.

2. Identification of handicapped children who need special education.

3. Utilization of tests and evaluation materials in a non-racially or culturally discriminatory manner.

4. An individualized education program for each handicapped child which includes: (a) a statement of the child's present level of educational performance; (b) a statement of annual goals and short-term objectives; (c) a statement of the specific educational services to be provided to the child and the extent to which he can participate in regular educational programs; (d) indication of when services will begin and their projected duration; and (e) an evaluative method to determine whether the objectives are being met

5. Due process protections to challenge placements or change of placements of handicapped children including: (a) the right of the parent to examine his child's records and obtain an independent evaluation; (b) written prior notice to the parent if the school proposes or refuses to change his child's placement; (c) an impartial administrative hearing to challenge proposed placements; (d) the right of the parent to counsel, to present evidence and witnesses, and to cross-examine the school's witnesses, and (e) the right to appeal the decision to court.

Expulsion Under P.L. 94-142

The question has been raised whether expulsion is a change of placement which entitles a child and his parent to a due process hearing.

The Mills decision, supra, in addition to requiring a hearing before a child with a behavioral problem can be excluded from a regular classroom, has also stated that a child cannot be suspended for more than ten days. During that suspension he must receive educational assistance and, the court stated, the child could not be expelled. Alternate schooling had to be found for him.

In direct response to expulsion and P.L. 94-142, a federal court has said that the law entitles school authorities to take swift disciplinary measures against disruptive handicapped children including suspension. The court concluded, however, that expulsion contradicts the law's mandate that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment.[18]

Education And The Poor

Finally, with respect to the Fourteenth Amendment, there is one additional class of people who have sought equal rights to education. That group is the poor. In San Antonio Ind. School District v Rodriguez,[19] a suit was brought on behalf of children who live in school districts with a low tax base, alleging that their educational program was inferior to that made available in more wealthy counties. The Court held that poverty was not recognized as a class to be given special recognition under the Constitution as was race or religion. Consequently, the State need not show a "compelling" reason why one of its laws discriminated unfairly against the poor, but only a "rational" reason. The Court concluded that there was a rational basis in providing education based on a local tax structure. The fact that some school districts were poorer than others and the fact that their educational programing might suffer accordingly was not considered a problem of constitutional proportion by the court.

To help alleviate the rather harsh result of the Rodriguez opinion, state and federal statutes are offering some relief. The Federal Government, through its Head Start programs and other legislative efforts,[20] is providing extra educational assistance to the poor. And state statutes, like Maryland's statute for disadvantaged children,[21] provide for state funds to assist in comprehensive educational programs for the child who is disadvantaged because of environmental reasons.

Although the tax structure was upheld in Rodriguez, one requirement that did fail to pass the rational test was a section of the Texas Code which provided that children of illegal aliens had to pay a tuition to attend public school while citizens and legal aliens did not. The court decision which found the section to be violative of the Equal Protection Clause of the Fourteenth Amendment is on appeal.[22]

II STUDENT RIGHTS WITHIN THE SCHOOL SYSTEM

Once students have been granted access to the school system what kind of legal rights, if any, do they retain. The concept that students have any rights vis-a-vis the schools is one which has evolved slowly. Currently, however, there has been a number of major developments in this area worthy of attention.

Initially, the Fourteenth Amendment which served to provide access to the schools for so many children has also been utilized effectively to protect students from arbitrary dismissals.

Suspension And Expulsion

Beyond the statutory issues raised by P.L. 94-142, discussed earlier, there are serious constitutional questions involved when school systems suspend or expel any student, handicapped and non-handicapped alike. Since students have a statutory entitlement to attend school, the state can not deprive them of that entitlement without due process of law.

In the leading case in this area Goss v Lopez,[23] the Supreme Court was asked to decide the constitutionality of suspending high school students for ten days without a hearing. The Court noted that two constitutionally protected interests were involved. First, the students had a property interest in their right to be educated. Secondly, they had a liberty interest in protecting their reputation which if marred by the suspension could interfere in future educational or employment opportunities.

The Court held that for a suspension of ten days or less, due process requires oral or written notice of the charges against the student, an opportunity for him to present his version of the matter in issue, and an explanation of the evidence against him. These steps should be taken before suspension, but if that is not feasible because of possible disruption of normal school business or danger to another, they must be taken immediately upon the student's return.

Although these safeguards are relatively informal, as the discipline increases and the deprivation is more severe, as with expulsion, more formal proceedings will be necessary.

Religion

"CONGRESS SHALL MAKE NO LAW
RESPECTING AN ESTABLISHMENT
OF RELIGION..."

AMENDMENT I , U.S. CONSTITUTION

Pursuant to the "Establishment Clause" of the First Amendment, the Supreme Court has declared as unconstitutional mandatory Bible reading in the public schools.[24] The Court has stated that although individuals are free to practice their religion, the machinery of the State through the school system cannot be used to enforce it on others. As the controversy exists over what is permissable, for example, a period of silent meditation, the basic test employed by the Courts is that religion can be neither advanced nor prohibited by the activity.

In related issues the same "neutrality" test has been used to approve financial aid to parochial schools for the purchase of textbooks and other secular materials,[25] but to reject tuition grants to parents who wish to send their children to parochical schools.[26]

<u>Speech, Conduct, And The Student Press</u>

"... OR ABRIDGING THE FREEDOM OF
SPEECH, OR OF THE PRESS, OR OF THE
RIGHT OF THE PEOPLE TO PEACEABLY TO
ASSEMBLE..."

Speech And Conduct

In <u>Tinker v Des Moines</u>,[27] the Supreme Court, in a landmark decision, guaranteed the First Amendment rights of freedom of speech and freedom of expression to students and teachers within the school setting. In that case, a number of high school students wore black armbands to protest the war in Viet Nam. Their conduct was quiet and non-disruptive. Nevertheless, they were suspended from school and a ban against armbands was imposed.

The Court, in upholding their right to engage in such conduct stressed that students and teachers do not leave their constitutional rights at the

school door. Although the school has a legitimate interest in protecting the educational process from disruption, it cannot impose a blanket ban on the free expression of opinion when no disruption has or is likely to occur. The Court set forth the following standard: "...conduct, by the students, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others..." is not protected by the First Amendment guarantee of freedom of speech.[28]

The type of conduct which is disruptive of the school system continues to be a source of controversy. The standard imposed by <u>Tinker</u> does not require absolute certainty on the part of school officials that disruption will occur before they can take necessary action. They are not in other words, constitutionally required to wait "until the school burns to the ground" before restraining disruptive behavior. On the other hand, the officials must have a reasonable belief that disruption will occur before imposing restraints and not a mere "intuition"[29] or an "undifferentiated fear" that it might.[30] Unless disruption has occured, the burden will be on the school officials to justify any restraining action on the free expression of opinions by the student body.

Press

With regard to the student press and student publications, the First Amendment has been used to protect all forms of written expression except that which is not protected in other media settings, namely, obscenity, libel, and the probability of disrupting violence. One additional exception to First Amendment protections exists within the student press. Those written materials and student publications which are likely to substantially disrupt the school environment, to be precise, the <u>Tinker</u> standard, do not enjoy protection under the First Amendment. Examples of written speech found to be protected by some courts include criticism of school officials or the government,[31] the dissemination of birth control information,[32] and the occasional use of profanity.[33]

Attempts by school officials to censor student publications and to impose prior restraints upon student publications, namely to prevent their dissemination before any disruption has occurred, imposes an even greater burden upon the officials to justify their action. The Supreme Court has stated that any prior restraint on expression comes before the court with a heavy presumption against its constitutional validity.[34] It has been held that in order to pass constitutional scrutiny a prior review of student publications must contain narrow, objective and reasonable standards by which the material will be judged,[35] a limited time period for the decisionmaker to consider whether the material may be distributed,[36] and an appeal procedure if distribution is to be banned.[37]

Finally with regard to the dissemination of non-school materials, it has been held that a restriction on the time, place, and manner of such dissemination may be constitutionally imposed, but not on the message or ideas being disseminated.[38]

Illegal Search And Seizure

"THE RIGHT OF THE PEOPLE TO BE SECURE
IN THEIR PERSONS, HOUSES, PAPERS, AND
EFFECTS, AGAINST UNREASONABLE SEARCHES
AND SEIZURES, SHALL NOT BE VIOLATED..."
AMENDMENT IV, U.S. CONSTITUTION

With some limited exceptions, a warrant issued only after a finding of probable cause must be produced before an adult or his property can be subjected to a police search. Minors in general have not enjoyed as many rights with regard to search and seizure as have adults, and this has been especially true of students. For example, it has generally been held that school authorities may search a student's locker, absent the student's consent and without a search warrant, if they have probable cause to believe the locker contains an item, the

possession of which would be a criminal offense or harmful to another individual.[39] The basis for this authority is that the school, not the student, owns the locker, and that, at most, they share possession of it.

Although the search of a student would seem to require a stricter standard than the search of a locker it has been authorized by statute in some jurisdictions on the basis of probable cause.[40]

The duty of the school officials to protect and provide for the welfare of the entire student body has also been cited as a basis for limiting the Fourth Amendment rights of a student while he is in the school setting. If this is found to be a legitimate concern by the courts, it is likely that searches of the students themselves will also be upheld as constitutionally permissable.

Corporal Punishment

"...NOR CRUEL AND UNUSUAL
PUNISHMENTS INFLICTED."
AMENDMENT VIII, U.S. CONSTITUTION

The Supreme Court has held that corporal punishment administered by a school teacher does not violate a student's right under the Eighth Amentment.[41] The basis for the Court's decision was that the protection of the Eighth Amendment was intended to protect those convicted of a crime, not those attending school.

The Court further supported its position on the somewhat questionable ground that because spanking was a traditionally acceptable practice at common law, its use should not now be held to be impermissable. Further, due process does not require entitlement to notice or a hearing before corporal punishment is inflicted.

The remedy available to any student who feels he has been the subject of excessive force or abuse by a teacher is through civil litigation.

Educational Malpractice

Although the Constitution protects the right of a child to attend school, does he thereby obtain a guaranteed right that he will be educated?

This question was raised in 1976, when a former student sued his high school alma mater for educational malpractice. He alleged that he was a functional illiterate and that the school had failed in its duty to educate him and qualify him for his high school certificate. The fact that the school was aware of and took no steps to eliminate his academic underachievement was cited as evidence of the school's negligence.

The court held that the imposition of a judicially enforceable duty of care is a matter of public policy. It concluded that unlike docotrs, educators have less control over the results of their profession. To hold them liable for results which are contributed to by a variety of physical, emotional, cultural and environmental factors, would be contrary to sound public policy. Further, the Court stated that the purpose of a school is to confer the benefits of a free education upon what would otherwide be an uneducated public, not to protect against the "injury" of ignorance.[42]

There has been indication, however, that courts will entertain lawsuits based on specific negligient acts of educators. This would occur when an educator undertakes a special duty with regard to a student and, through negligient performance of that duty, causes harm to the child. For example, a cause of action was granted to a student who was kept in a class for the retarded for eleven years, despite recommendations by the school psychiatrist to have him re-evaluated every two years. Such an evaluation would have shown the child to be of normal intelligence and would have permitted him to receive a regular education.[43]

III PARENTS, CHILDREN AND THE SCHOOL

The parent's right to care for his child is fundamental. This right has been interpreted gy the Supreme Court as extending to those decisions which

are basic to the child's educational process.[44]

In a landmark case, the Court decided that the Amish had a right to be exempted from the state's compulsory education law after the eighth grade. The case Wisconsin v Yoder,[45] was based upon the First Amendment rights of the parents to raise their children according to their religious faith. The state can not interfere with this right even for the rational purpose of providing education. To force compulsory education beyond the eighth grade would undermine the attempts of the parents to instruct their children into the agrarian ways which are the keystone of the Amish faith.

It is interesting to note that only Justice Douglas in a partially dissenting opinion expressed concern about the child's right in this case. He believed that to impose the parent's notions of religious duty upon the child when the child was of sufficient maturity to express potentially conflicting desires, was an invasion of the child's rights.

In addition to the recognition that courts have given to the parent-child relationship, parents have been afforded increased statutory rights with respect to their children's education. As previously discussed, they have a right to challenge the placement of their children in special education classes under P.L. 94-142 and to remain involved with the educational programs designed for them.

Another major piece of Federal legislation is the "Family Educational and Privacy Act",[46] commonly referred to as the Buckley Amendment. Through this statute, States to be eligible for Federal money must afford parents the right to inspect the education records of their children. The purpose of the act is to prevent inaccuracies in the records which might be detrimental to the children's future educational or employment opportunities.

Parents have the right to an agency appeal to challenge the contents of the records. Inaccuracies must be corrected or deleted. The parents also have the opportunity to add a written explanation of any of the contents. The education records covered by the law are those which include information directly related to a student and which are maintained by an educational agency. Records within the possession of a professional and not the school are exempted from review.

Without written parental consent, education records may only be released to other school officials who have a legitimate educational interest in the child; to officials of schools where the child will be transferring; to federal auditors; when the child applies for financial aid; to state officials when required by law; for research purposes when the identification of the child is not made known, for purposes of accreditation, or in emergency situations.

In all other cases the parents must submit written consent for release of the records. They must specify which records are to be released and the reasons for it. A copy of any record r.leased also must be provided to the parent. If the records are to be released in compliance with a court order, absent parental consent, the parents must be notified before the actual release occurs.

Finally, the educational facility must maintain a record of all releases of a student's education records. This record of access is available only to the parents, the school official who has custody of the record, and to federal and state auditors.

FOOTNOTES

1. San Antonio Ind. School v Rodriquez, 411 U.S. 1 (1973)
2. See, for example Pennsylvania Association For Retarded Children v Pennsylvania, 334 F. Supp. 1257 (E.D. PA 1971)
3. See, for example Goss v Lopez, 419 U.S. 565 (1975)
4. 347 U.S. 483 (1954)
5. Griffin v County School Board of Prince Edward County, 377 U.S. 218 (1964)
6. Goss v Board of Education, 373 U.S. 683 (1963)
7. Green v County School Board, 391 U.S. 430 (1968)
8. Alexander v Holmes County Board of Education, 396 U.S. 19 (1969)
9. See, for example, Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)
10. See, for example, Curry v Metropolitan Branches of Dallas NAACP, No. 78-282
11. See, for example, Hobson v Hanson, 269 F. Supp. 401 (1967) Aff'd Smuck v Hobson, 408 F. 2d 175 (D.C. Cir. 1969)
12. See, for example, Larry P. v Riles, 354 F. Supp. 1306 (1972) Aff'd 502 F. 2d 963 (9th Cir. 1974)
13. 334 F. Supp. 1257 (E.D. PA. 1971)
14. Mills v DC Board of Education, 348 F. Supp. 866 (1972)
15. P.L. 94-142, 20 U.S.C.A. §§ 1401 et seq.
16. Martin Luther King Elementary School Children v Michigan Board of Education, 451 F. Supp. 1324 (E.D. Mich. 1978)
17. Civ. No. 78-172 (E.D. PA. 1979)
18. Stuart v Nappi, 443 F. Supp. 1235 (D. Conn. 1978)
19. San Antonio Ind. School District, supra.
20. 20 U.S.C.A. §§ 3191 et seq.; providing in general, for the need to eliminate minority group isolation in elementary and secondary schools; and, Title I of the 1972 Education Amendments.
21. Ann. Code of Md., Education Article, § 8-102
22. Doe v Plyer, Mem. Opinion. No. TY-77-261-CA (E.D. TEX 1978)
23. 419 U.S. 565 (1975)

24. Abington School District v Schempp and Murray v Curlett, 374 U.S. 203 (1963)

25. See, for example, Board of Education v Allen, 392 U.S. 236 (1968)

26. See, for example, Committee For Public Education v Nyquist 413 U.S. 756 (1973)

27. 393 U.S. 503 (1968)

28. 393 US at 513

29. See, for example, Shanley v Northeast Indep. School District, Bekas Co. Texas, 462 F. 2d 960 (5th Cir. 1972)

30. See, for example, Channing Club v Board of Regents of Texas Tech University, 517 F. Supp. 688 (1970); and, generally, Student Press Law Center, Report (Wash. D.C.), Vol.II, No. 1, Winter 1978-79, pp. 20-23, 30-31.

31. See, for example, Baughman v Freienmuth, 478 F. 2d 1345 (4th Cir. 1973); and Dickey v Alabama 273 F. Supp. 613 (1967)

32. See, for example, Gambino v Fairfax County School Board, 429 F. Supp. 731 (E.D. VA 1977) Aff'd 564 F. 2d 157 (4th Cir. 1977); Bayer v Kinzler, 383 F. Supp. 1164 (E.D. N.Y. 1974) Aff'd 515 F. 2d 504 (2d Cir. 1975); Shanley, supra.

33. See, for example, Bazaar v Fortune, 476 F. 2d 507 (5th Cir. 1973); Jacobs v Bd. of School Comm., 490 F. 2d 601 (7th Cir. 1973), 420 U.S. 128 (1975) (dismissed as moot)

34. Organization For a Better Austin v Keefe, 402 U.S. 415 (1971)

35. See for example Baughman, supra.

36. Id.

37. See, for example, Leibner v Sharbaugh, 429 F. Supp. 744 (E.D. VA 1977)

38. See, for example, Baughman, supra.

39. People v Overton, 24 N.Y. 2d 522, 242 N.E. 2d 366 (1969)

40. Ann. Code of Md., Education Article, § 7-307

41. Ingraham v Wright, 430, U.S. 651 (1977)

42. Donohue v Copeague Union Free School District, 408 N.Y.S. 2d. 874 (1978)

43. Hoffman v Board of Education of the City of New York, 410 N.Y.S. 2d 99 (1978)

44. See for example Myer v Nebraska, 262 U.S. 390 (1923); and Pierre v Society of Sisters, 268 U.S. 510 (1925)

45. 406 U.S. 205 (1972)

46. 20 U.S.C.A. § 1232(g)-(i)

CUSTODY

Custody

When the state intervenes to place a child outside of his own home, the event can be a traumatic one for the child. No less traumatic in many cases are the custody disputes over children which result in the private sector of life. The center of sometimes heated court battles, the child's interests are often subordinate to the competing interests of his parents. As in cases involving state action, the standard employed by most courts which hear private custody disputes is "the best interest of the child". Nevertheless, that standard may easily be lost in the shuffle of the emerging individual rights being asserted on the part of the parents who are parties to the proceedings.

A brief analysis of the major trends in this area follows.

The Tender Years Doctrine

At common law, the father had a right to the custody of his child which was nearly absolute. In keeping with the theory that children were the chattel of their fathers, the male could be deprived of custody only when his child was proven to be in danger or the father was proven to be corrupt.[1]

Gradually, as the presumption that the male owned his wife, child and all of the property in their possession, disappeared, so did the presumption that he was entitled to custody of the child in every instance. As the laws in divorce and separation developed, men and women were theoretically given equal rights to obtain custody of the children. However, in reality, this was not the case.

The image of the male as the breadwinner and provider remained. This coupled with the image of the woman as the homemaker and person in charge of caring for the children, soon led to the logical conclusion, that upon dissolution of the marriage, the father could still provide and the mother could still raise the children. As a rule of thumb, especially when young children

were involved, courts assumed the needs of the child were best served by placing them with their mother. The "tender years" doctrine was born.

The tender years doctrine essentially provides that, absent a finding of unfitness a mother is presumed to be the more nurturing parent when young children are involved and should be awarded their custody following divorce.

Jurisdictions have differed with respect to when they apply the doctrine, variances appearing, for example, according to the age or sex of the child. Similarly, variances appear among the degrees of weight accorded to the doctrine. Although the doctrine has been most frequently used to grant the mother custody absent a finding of unfitness, it has been given less deference by some courts. For example, some courts use "tender years" as a factor, but not the controlling factor, while other courts use it only as a tie-breaker when mother and father appear to be potentially equal caretakers.

Today, the very obvious trend is away from the use of the tender years doctrine altogether. Although one court has explicitly rejected it because it is inherently inconsistent with the statutory standard to decide custody in the best interest of the child,[2] the most likely reason behind its demise is the sexual equality issue involved. As evidence of this, the doctrine has survived in only four states which have passed the Equal Rights Amendment.[3]

In any event, the doctrine of tender years is presumably being replaced by the "best interests" standard. If this is the case, it will be a victory for the child, regardless of the effect felt by the conflicting interests of the parents.

Joint Custody

Being touted as the panacea for bitter custody disputes, joint custody is gaining increased support from both the courts and the state legislatures.

Joint custody, as it is being implemented, can involve one of two situations.

First, both parents can share in the legal and physical custody of their child. They share in making decisions which affect his welfare as well as in assuming alternate responsibility for his physical care. In the second type of joint custody, legal custody is shared by both parents, although physical custody resides in only one.

Several state statutes have already been amended to include provisions which authorize courts to use joint custody. Some of these statutes have even built in a presumption for its use. Typical among this type of statutes is the new California law which provides that joint custody is presumed to be in the best interest of the child where the parents have agreed to such an award.[4]

Courts are beginning to order joint custody with more frequency, although with a sense of caution. One New York court indicated that its use was feasible between amicable parents, but could not be imposed upon severely embattled parents.[5]

The use of joint custody will do much to solve the problem of conflicting parental interests. Its significance in serving or not serving the best interest of the child will become apparent in the near future.

Custody and the Problem Parent

As the divorce rate in the United States continues to soar, more and more judges are finding themselves faced with the unhappy task of deciding who shall get custody of the children. This decision, one which is sure to have a critical impact on the life of the child, is largely a discretionary one. Although the judge may be authorized to award custody "in the best interest of the child", how that phrase is to be interpreted and what factors are to be considered are usually up to the judge.

Appellate courts generally defer to the trial judge in custody cases, acknowledging that the judge has broad discretion to decide the case and reversing that decision only when it is apparent that such a decision could not reasonably have been reached given the facts in the case.

However, when a parent is mentally ill or mentally retarded, the judge may automatically assume that the parent is unfit to raise his or her child. Similarly, when a parent has had a criminal record or deviates in some respect from the norm in his choice of life style, this factor alone may convince the judge that custody should be awarded to someone else. What is missing in these situations is an analysis of the child's welfare and an examination of what is in the child's best interest.

As the parent's deviance from society becomes noticeably more visible, it becomes easier for a judgeto be more subjective in rendering a decision.

One instance that exemplifies this problem occurs when one of the parents seeking custody is an admitted homosexual. Frequently, the custody dispute becomes a battleground in which the lifestyle of an individual is the primary issue and the best interest of the child is secondary.

The existence of state statutes which make homosexuality a crime may form the sole basis for determining a custody dispute involving a homosexual parent, despite the fact that the statute is totally unrelated to the parent-child relationship.[7]

Nevertheless, there have been attempts by some courts to make decisions contrary to the prevailing prejudices in the community. One such court granted custody of two girls to their lesbian mother, because it determined the love between the parent and children would provide sufficient support to the children if they encountered any ridicule in the community. To shelter the children from the adverse realities of life, the court concluded, would be a disservice to them.[8]

This type of decision although occurring with more frequency is not common. Although there is growing acceptance of divergent lifestyles, the best interest of the child is still being subordinated in many cases by the prejudice against the parent seeking custody who is not considered by conservative-minded courts as living within the mainstream of society.

Child Snatching

The problem of "child snatching" or "parental kidnapping" is receiving increased attention. Because there are no effective deterrents in either criminal or civil statutes, child snatching is becoming widespread.

The federal law which deals with kidnapping specifically excludes parents from its scope.[9] And even those States which do provide for criminal punishment of parental kidnappers are reluctant to enforce similar laws from other jurisdictions. Consequently, child-snatching occurs interstate almost at will.

Child custody laws are also ineffective in dealing with the problem. Most states will not honor the custody decrees awarded in sister States, despite the full faith and credit clause of the Constitution.[10]

The Uniform Child Custody Jurisdiction Act (UCCJA),[11] which has yet to be adopted by all of the states, limits custody jurisdiction to the state in which the child has his home. Once a state enters a custody decree in accordance with this act, it is entitled to comity recognition by all states which have enacted the Act.

A bill currently being considered in Congress would make it a Federal offense to restrain and conceal one's child in violation of court order. The bill, among other things, would permit the FBI to investigate cases of child-snatching after 60 days. It is assumed that FBI involvement would not only ensure that many children would be returned, but would act as an effective deterrent to parents.[12]

FOOTNOTES

1. See, generally, Clark, Homer H. Law of Domestic Relations (West Publishing Co. St. Paul Minn.) 1968, p. 584
2. Watts v Watts, 350 N.Y.S. 2d 285 (1973)
3. As Reported in 5 Fam. Law Rpter 4036.
4. Calif. Civ. Code § 4600.5
5. Braiman v Braiman (N.Y. Ct. Apls.) Reported at 4 Fam. Law Rpter. 1133, 2522
6. See, generally, "The Law and the Problem Parent! Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcarated Parents, 16 Journal of Family Law 797 (1977-78)
7. See, for example, Chaffin v Frye, 1 Fam. L. Rep. 2309 (Cal. Ct. App. 1975)
8. M.P. v S.P, 404 A2d. 1256 (1979)
9. 18 U.S.C. § 1201
10. U.S. Const. art. IV, § 1: "Section 1, Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by General Laws Prescribe the Manner in Which Such Acts, Records and Proceedings shall be proved and the Effect Thereof."
11. P.L. 94-218 (1968)
12. S. 105

CONCLUSION:

THE NEED FOR LEGAL ADVOCACY

The best way to insure that children will be protected by the law is through the systematic use of legal advocates to represent their interests. Advocates can be effectively utilized to represent children in individual cases or to represent the interests of an entire group of children through class action lawsuits or legislative lobbying.

Legal Advocacy and the Child

With the exception of the due process safeguards for alleged juvenile offenders set forth in the Gault[1] decision, the right to counsel has not been constitutionally required for children in any other type of proceeding. This is true even though the proceeding may result in the temporary or permanent separation of the child from his family.

Unless counsel for the child is statutorily mandated, it is generally within the discretion of the judge to decide whether or not the child needs an independent advocate. Too often, counsel is not appointed because the interests of the child are assumed to be protected by the presence in the courtroom of his parents, the state agency, or even by the judge, hinself.

Discretionary appointment of counsel results in unequal justice for children. The welfare of a child should not depend on the chance that the judge hearing his case will deem it important enough to provide him with an attorney.

Fear of turning informal proceedings involving parents and children into adversary proceedings is insufficient reason to deny counsel to children. The family has already been disrupted by the time it reaches court, and the provision of separate counsel to represent the child, will seldom cause additional family disharmony. To the contrary, a skilled child advocate will work to bring the family together in most instances, but in a way that will protect the child's interests.

1 Application of Gault, 387. U.S. 1, 87 S.Ct. 1429 (1967)

Legal rights on behalf of children are meaningless if they cannot be effectively asserted. There is probably no group of individuals less able to speak on their own behalf or to articulate their position in a court of law than children.

Irrespective of the nature of the hearing, if the child stands to lose a fundamental right, for example, the right to reside with his own family, the right to his physical liberty, or an opportunity to be educated, he should not only have the opportunity to be heard, but to be effectively heard.

For this reason, it is essential that if children's rights are truly to be protected under the law, children should be legally represented in any proceeding in which they have a substantial interest at stake. For the young child, or the child who cannot effectively express his own wishes, this will generally mean the appointment of a guardian-ad-litem to represent the child's best interest. For the older child who is sufficiently mature and competent to express himself, an attorney should be appointed who will represent him in the same fashion that adults are represented.

Class Advocacy

Finally, the effectiveness of class advocacy on behalf of children is apparent. For example, the equal educational opportunities available to handicapped children has resulted form several major lawsuits[2] as well as critical legislative efforts.[3]

Class advocacy can open major avenues of legal rights for children. However, once they are open it will be the responsibility of the individual advocate to insure that these newly acquired rights are being adequately protected.

2 See, for example, Pennsylvania Association For Retarded Children v Pennsylvania, 334 F. Supp. 1257 (E.D. PA. 1971); and Mills v DC Board of Education, 348 F. Supp. 866 (1972)

3 P.L. 94-142, 20 U.S.C.A. §§ 1401 et seq.

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