C0-89-1824

REPORT OF THE JUVENILE REPRESENTATION STUDY COMMITTEE TO THE MINNESOTA SUPREME COURT

June 5, 1990

I N D E X

INTRODUCTION

In 1989, the Minnesota State Legislature directed the Supreme Court to study the right to legal counsel in juvenile justice matters and recommend criteria to guarantee that right. Pursuant to that authority the Supreme Court, by order, created the Juvenile Representation Study Committee to study representation of juveniles by counsel throughout the state and to recommend criteria to ensure that the right is exercised in a meaningful manner. (See Appendix A.) With Judge Bruce Douglas as its chair, the Committee met monthly to explore the juvenile justice system. It soon concluded that 1) juveniles do not have adequate access to representation, and 2) juveniles are easily encouraged to waive their rights under an inappropriate adult standard.

The Committee then worked to develop criteria that would guarantee that delinquent juveniles facing serious charges or out-of-home placement, which is considered the equivalent to incarceration for an adult offender, would have mandatory, non-waivable representation. Other children in the juvenile justice system would be given an opportunity to consult with an attorney before waiving their right to representation.

The Committee expressed deep concern for the effect their recommendations would have upon the governmental units responsible for funding juvenile representation. It is clear that adoption of any of the recommendations is going to have a serious financial impact upon such units. However, the data available to aid in determining the costs is dispersed and, for the reasons set forth in this study, insufficient. The Committee strongly urges the Court to recommend to the legislature a more specific study of the financing of juvenile representation services before either body undertakes to implement the Committee recommendations.

***N.B. Portions of this report were prepared by Professor Barry Feld from articles he has previously authored. The Committee gratefully acknowledges this contribution.**

RECOMMENDED CRITERIA FOR

APPOINTMENT OF COUNSEL

1. Delinquency--

   A. Felony and gross misdemeanor--mandatory, non-waivable appointment of counsel
   B. Misdemeanor charges which are subject to statutory enhancement on the second offense--mandatory, non-waivable appointment of counsel
   C. Any proceeding where out-of-home placement of the child is sought--mandatory, non-waivable appointment of counsel
   D. All other delinquency proceedings--consultation with counsel, waiver on the record after consultation

2. Traffic Offenses--

   A. Petty misdemeanors punishable only by a fine of not more than $200--no right to appointed counsel
   B. Non-enhanceable misdemeanor offenses--right to counsel, waivable as in delinquency proceedings
   C. Enhanceable misdemeanor offenses--mandatory, non-waivable appointment of counsel

3. Juvenile Petty Substance and Alcohol Abuse

   A. When out-of-home placement sought--mandatory, non-waivable appointment of counsel
   B. When no out-of-home placement sought--right to counsel, waivable as in delinquency proceedings

4. Protection Matters--

   A. Right to appointed counsel or appointed guardian, waivable upon totality of circumstances standard; right to counsel not waivable when out-of-home placement sought by party unless child is 10 or under and guardian has been appointed

5. Appeals--

   A. Right to appointed counsel on appeal based upon accepted indegency standards, in delinquency, substance and alcohol abuse, or protection matters

   B. No right to appointed counsel on appeal from traffic petty misdemeanor; right to appointed counsel on all other traffic related offenses as in 5A.

I. THE RIGHT TO JUVENILE REPRESENTATION -- In re Gault

More than twenty years ago in In re Gault, 387 U.S. 1 (1967), the United States Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. The Gault Court mandated the right to counsel because "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution", id. at 36. Gault also decided that juveniles were entitled to the privilege against self-incrimination and the right to confront and cross-examine their accusers at a hearing. Without the assistance of counsel, these other rights could be negated. "[T]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings....The child 'requires the guiding hand of counsel at every step in the proceedings against him'". Id. In subsequent opinions, the Supreme Court has reiterated the crucial role of counsel in the juvenile justice process. In Fare v. Michael C., 442 U.S. 707 (1979), the Court noted that "the lawyer occupies a critical position in our legal system.... Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts", id. at 719.

The Gault Court based its decision to grant juveniles the right to counsel on the fourteenth amendment due process clause, rather than the sixth amendment, asserting that as a matter of due process "the assistance of counsel is ... essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution...." 387 U.S. at 36 - 37 (1967). While Gault recognized that the presence of lawyers would make juvenile court proceedings more formal and adversarial, it asserted that their presence would impart "a healthy atmosphere of accountability." Id. While the Court cited favorably recommendations of the President's Crime Commission that counsel be appointed automatically whenever coercive action by the juvenile court was possible, Gault's actual holding was narrower, requiring only that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." Id. at 41.

It is interesting to note that although it is based upon due process requirements rather than Sixth Amendment rights, the Gault decision has been limited in application to delinquency proceedings. The child who is the subject of a CHIPS (Child In need of Protection or Services) petition has an equal or perhaps even better chance of being removed from the home, either as part

of a temporary out-of-home placement or permanent removal from the home following a termination of parental rights. Given the Supreme Court's emphasis on the onerousness of removal of the child from his or her parents and home, it is surprising that constitutional due process claims have not yet compelled the appointment of counsel in child protection matters.

II. THE STANDARD IN MINNESOTA (Statute and Rules)

A. The Statute

In Minnesota, provision is made for the Gault mandated right to counsel by Minn. Stat. §260.155, Subd. 2. The statute is applicable to all proceedings in juvenile court, including child protection matters, thus providing at least a statutorily guaranteed right to counsel in such cases.

Minnesota Statute §260.155 Subd. 2 provides that:

> Appointment of Counsel. The minor, parent, guardian or custodian have the right to effective assistance of counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor or the parents or guardian in any other case in which it feels that such an appointment is desirable.

The statute also provides that the right may be waived upon an express waiver "after the child has been fully and effectively informed of the right being waived." The Minnesota Supreme Courts' standards for advising of and waiving the right to counsel in delinquency proceedings, promulgated in the Rules of Procedure for Juvenile Court, are consistent with the Court's opinions that juveniles can waive their Miranda rights and right to counsel, provided that the waiver is "voluntary and intelligent under the totality of the circumstances." See e.g., State v. Nunn, 297 N.W.2d 752 (1980). In State v. Rubin, 409 N.W.2d 504 (Minn. 1987), the court described the type of "penetrating and comprehensive examination" that must precede an adult defendant's "knowing and intelligent" waiver and strongly recommended the appointment of counsel "to advise and consult with the defendant as to the waiver." Id. at 506. In incorporating the adult waiver standard for juveniles, the Minnesota Supreme Court affirmed the principle that juveniles are legally capable of waiving their constitutional privilege against self-incrimination, their right to counsel, or any other constitutional right when the circumstances indicate that they do so knowingly, intelligently, and voluntarily.

Minnesota Statue § 260.155 Subd. 8 provides that:

> Waiver. (a) Waiver of any right which a child has under this chapter must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

> (b) Waiver of a child's right to be represented by counsel provided under the juvenile court rules must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. In determining whether a child has voluntarily and intelligently waived the right to counsel, the court shall look to the totality of the circumstances which includes but is not limited to the child's age, maturity, intelligence, education, experience, and ability to comprehend, and the presence and competence of the child's parents, guardian or guardian ad litem. If the court accepts the child's waiver, it shall state on the record the findings and conclusions that form the basis for its decision to accept the waiver.

None of the Minnesota cases have specifically focused on the statutory requirement that the child be fully and effectively informed of the right being waived which would seem to be an independent basis for challenging the effectiveness of a waiver.

B. The Rules

The Minnesota Supreme Court's Rules of Procedure for Juvenile Court (hereinafter RPJC) address the right to and waiver of counsel in several separate provisions. The rules governing delinquency are RPJC 4, 6, and 15. RPJC 4 provides:

> Subd. 1. Generally. The child has the right to be represented by an attorney who shall act as the child's counsel.
> Subd. 2. Advisory of Right to Counsel. A child not represented by counsel shall be advised orally by counsel, who shall not be the county attorney, or orally by the court on the record of the right to counsel at or before any hearing on a petition.
> Subd. 3. Appointment of Counsel for the child. (A) If the child or the parent(s) of the child cannot afford to retain counsel the child is entitled to representation by counsel appointed by the court at public expense...

RPJC 6.01 which governs the juvenile's right to remain silent, includes a Miranda advisory informing the child of a right to an attorney during custodial interrogation and allows a youth to voluntarily and intelligently waive the right to an attorney under the "totality of the circumstances."

RPJC 15 governs a juvenile's waiver of the right to counsel in court. RPJC 15.02 provides that:

> Subd. 1. Standards. After being advised of the right to counsel, pursuant to Rule 4, a child may waive the right to counsel only if the waiver is voluntary and intelligently

made. In determining whether a child has voluntarily and intelligently waived the right to counsel the court shall look at the totality of the circumstances. These circumstances include but are not limited to: the presence and competence of the child's parent(s), guardian or guardian ad litem, and child's age, maturity, intelligence, education, experience and ability to comprehend.

RPJC 36 provides for the appointment of counsel in juvenile traffic cases, without differentiating between minor (petty misdemeanor, non-enhanceable for children at least 16) and major juveniles traffic offenders (see Minn. Stat. §260.193, which removes minor juvenile traffic offenders from the jurisdiction of the juvenile court.) The rule also fails to provide procedures for waiver of counsel in juvenile traffic matters.

RPJC 40 and 50 govern the right to counsel and waiver in child protection matters. Some inconsistencies between the right of the child and the right of the guardian to waive counsel exist in these rules. (Compare RPJC 40.02 with the provisions of RPJC 50.01, subd. 1.) Child protection matters require that any waiver be made voluntarily and intelligently, based upon the totality of the circumstances. For the children of tender years, (which Minn. Stat. §260.155, subd. 8, presumes to be 12 years while Minn. Stat. §260.015, subd. 2a(10) suggests is under 10) waiver on such a basis is not possible. In addition, in many such cases, the interests of the children can best be represented by guardians, rather than attorneys. As in many of the cases the children are facing placement out-of-home, the rule could provide better guidelines for making decisions regarding appointment and waiver.

III. IMPLEMENTATION OF THE STANDARD IN MINNESOTA

A. Overall Representation

In the two decades since Gault, the promise of counsel remains unrealized for many juveniles in many states including Minnesota. On the basis of the available data, it appears that in Minnesota, like many other states, less than half of all juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled. See generally, Feld, "In re Gault Revisited: A Cross State Comparison of the Right to Counsel in Juvenile Court," 34 Crime & Delinquency 393 (1988); Feld, "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make," 79 J. Crim.L. & Criminology 1189 (1989). In 1984, only 46.8% of juveniles were represented. In 1986, only 45.3% youths had lawyers. And in 1988, only 47.8% had attorneys at their adjudication. See Feld, supra; State Planning Agency, "Juvenile Legal Representation -- 1984 and 1988". Professor Feld reported enormous county-by-county variations in rates of representation within Minnesota, ranging from a high of 100% to a low of less than 5%. See Feld, "Right to Counsel," supra at 1214 fns. 142-143. A substantial minority of youths removed from their homes (30.7%) and those confined in state juvenile correctional institutions (26.5%) lacked representation at the time of their adjudication and disposition. Id. at 1236-38. In 68 of Minnesota's 87 counties, only 19.3% of juveniles were represented and over half of all juveniles in those counties who were removed from their homes (57.6%) or institutionalized (52.6%) were not represented at their adjudications. Id. at 1220, 1239. (See Appendix B.)

1. Representation in Felony, Misdemeanor and Certification Cases

While juveniles charged with felony offenses and offenses against the person generally have higher rates of representation than the overall rate, id. at 1237, such offenses constitute less than one-quarter of Minnesota's juvenile courts' dockets. Substantially higher proportions of juveniles charged with minor property offenses such as shoplifting or vandalism, other delinquency such as public disorder, probation violations or contempt, and or who were charged with what were then known as status offenses -- are unrepresented even though many of these juveniles may be detained or later receive severe dispositions.

The problem of non-representation is also geographically skewed within the state. Based on 1986 data, for example, about 66.1% of juveniles charged with felony offenses were represented, as were 46.4% charged with misdemeanors, and only 28.9% of those who were charged with status offenses. In the urban counties, 82.9% of those charged with felonies had counsel, as did 67.9% of

those in suburban or small urban counties, as contrasted with only 49.6% of those juveniles in rural counties. Similarly, in the urban counties, 64.3% of juveniles charged with misdemeanors or gross misdemeanors had an attorney, as did 57.9% of the suburban juveniles. By contrast, only 23.% of rural youths charged with less serious offenses had counsel.

While there is a general impression that larger proportions of juveniles have counsel at the certification hearings to determine whether they should be tried as adults, there is no reliable data available. To the extent that juveniles facing certification typically are charged with more serious offenses and youths charged with serious offenses have higher rates of representation, there is some inferential support for this view.

We may speculate as to why so many youths are inadequately represented. Although several explanations suggest themselves, no reliable study has been done to identify particular causes. Whatever the reason and despite Gault's promise of counsel, many juveniles facing potentially disruptive court dispositions never see a lawyer and waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel.

2. Representation in Child Protection Matters

Representation in matters alleging children to be in need of protection or services (hereinafter CHIPS, which includes the categories of truancy, runaways, and termination of parental rights cases as well as the cases previously classified as incorrigibility, dependency, and neglect) remain largely undocumented. Although the number of cases is three-quarters of the delinquency cases filed (14,607 cases compared to 20,922 delinquency cases in 1988) no reliable statistics are available as to representation. Particularly in what were once classified as dependency or neglect cases, the number of appointments can be significant if each child, the parents, and the guardians ad litem all have appointed counsel, as both the statutes and rules allow. Unfortunately, no statistics regarding these appointments or waivers are kept. Considering that on-going nature of such litigation and the substantial fiscal burden they may represent, it would seem appropriate and desirable that such statistics begin to be gathered.

3. Representation in juvenile traffic cases

Representation in juvenile traffic cases also remains largely undocumented. Many major juvenile traffic offenders are charged with delinquency and statistics regarding their representation would be part of the delinquency statistics discussed above. However, other significant offenses, including such things as DWI, driving without a license, and reckless or

careless driving) are charged by citation as misdemeanors. An adult defendant would be entitled to representation on such offenses, but counsel is rarely assigned to juveniles accused of the same offense. Minn. Stat. §260.193, subd. 3, does provide that minor juvenile traffic offenders (those charged with offenses punishable only by a fine of not more than $200) over the age of 16 are subject to the laws and court procedures controlling adult traffic violators and shall not be under the jurisdiction of the juvenile court. In petty misdemeanor cases, the right to an attorney does not attach for an adult and it does not seem inappropriate to apply the same standard to juveniles over the age of 16 for minor traffic offenses.

4. Representation on Appeal

It has been suggested to the Committee that failure to provide indigent juveniles an adequate mechanism to pursue appeals may contribute significantly to their failure to be assigned counsel initially. Statistics on juvenile appeals are not even kept separately, but are grouped together with other family court statistics. It can be readily inferred from the data available that only a very small number of juvenile cases are appealed. A child uninformed as to the basic right to counsel or unrepresented through the proceedings is not in a position to evaluate the possibility of an effective appeal. Yet without an effective appeal, errors occurring at the trial court level, including the failure to appoint counsel or the acceptance of an inadequate waiver, cannot be redressed. The right to representation on appeal is implicit in the right to counsel. Although both the statutes and the rules provide for a right to appeal, neither provide a mechanism for the appointment of counsel or for continuing an appointment made at the trial court level. Since the juvenile must generally look to some other source to provide the means to appeal, failure to provide these mechanisms means matters are simply not appealed. Whether as a result of financial pressure to hold costs, pressure from parents to have the matter finished, the refusal of parents to finance the appeal, the inability of the juvenile to pay for independent appellate counsel, or some other reason, practitioners seem reluctant to pursue juvenile matters past the dispositional stage.

B. Waiving the Right to Representation

1. Standard for Waiver

The most commonly offered explanation of nonrepresentation is that juveniles waive their right to counsel. In Minnesota, as in most jurisdictions, the validity of relinquishing a constitutional right is determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the

"totality of the circumstances." See e.g., Fare v. Michael C., 442 U.S. 707 (1979); State v. Loyd, 212 N.W.2d 671 (1973); State v. Nunn, 297 N.W.2d 752 (1980). See generally, Feld, "Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court," 69 Minn.L.Rev. 141, 169 - 190 (1984). The judicial position that a young minor can "knowingly and intelligently" waive constitutional rights unaided is consistent with the legislatures' judgment that a youth can make an informed waiver decision without parental concurrence or consultation with an attorney. Minn. Stat. §260.155 (1986).

a. Right to Waive

The right to waive counsel and appear as a pro se defendant follows from the United States Supreme Court's decisions in Johnson v. Zerbst, 304 U.S. 458 (1938) and Faretta v. California, 422 U.S. 806 (1975), where the Court held that an adult defendant in a state criminal trial had a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so. The Supreme Court has never ruled on the validity of a minor's waiver of the right to counsel in delinquency proceedings as such, although it upheld a minor's waiver of the Miranda right to counsel at the pretrial investigative stage under the "totality of the circumstances". Fare v. Michael C., supra. While Faretta held that an adult defendant has a constitutional right to proceed without counsel, whether a juvenile defendant can meet the requirements of a Faretta waiver may be debatable. Moreover, while the Faretta right to proceed pro se was based on the sixth amendment right to counsel, Gault based its holding on the fourteenth amendment. In re Gault, 387 U.S. 1, 41 (1967). A court or legislature could reasonably determine that the "special circumstances" of youth, immaturity, and inexperience imposed a significantly higher, effectively unattainable, standard for competence before allowing the waiver of counsel by a young juvenile. Arguably, Minn. Stat. §260.155, subd. 8, requiring the child to be fully and effectively informed prior to waiver is just such a determination.

Minnesota's statutes, court rules, and opinions use the "adult standard" of waiver, and direct the court to determine whether a child's waiver is "voluntary and intelligent under the totality of the circumstances." RPJC 15 defines the "totality of the circumstances" as including, but not limited to, "the presence and competence of the child's parent(s) or guardian, the child's age, maturity, intelligence, education, experience and ability to comprehend." Continued reliance on the "adult" standard of waiver requires raising judicial awareness about the particular vulnerabilities of youth and assuring that juvenile court judges conscientiously reviewing waivers under the totality of the circumstances are able to distinguish between competent and incompetent waivers.

Some of the reasons for allowing a child to waive the right to counsel are judicial convenience, enhanced social control, and economy. The absence of defense counsel eases judicial and prosecutorial administrative burdens thereby increasing the control of disruptive or dangerous children. In addition, allowing juveniles to waive their right to counsel encourages children to accept responsibility for their transgressions and take an active role in their own rehabilitation. Mandating representation by counsel might reduce the child's own involvement and participation in his or her case and enhance the perception of being simply a by-stander to important decisions affecting his or her life. Allowing a child to make an informed choice about legal representation, if properly supervised by the court, can advance both the goal of control and rehabilitation. See e.g., In re Manuel R., 543 A.2d 719 (Conn. 1988).

2. Problems with Waiver

The crucial issue for juveniles, as for adults, is whether such a waiver can occur "voluntarily and intelligently," particularly without prior consultation with counsel. The problem is particularly acute when those giving the advisories encourage a predetermined result -- the waiver of counsel -- which influences both the information they convey and their interpretation of the juvenile's response.

a. Application of Adult Standard

The "totality" approach to waivers of rights by juveniles has been criticized extensively. See generally, Feld, "Criminalizing Juvenile Justice", supra at 173 - 77; Grisso, "Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis," 68 Calif.L.Rev. 1134 (1980). While courts have identified factors relevant to the determination of "voluntariness", they have declined to give controlling weight to any particular factor, and instead have relied wholly on the discretion of the trial court in weighing such factors. Relying on juvenile court judges' assessments of the totality of the circumstance has resulted difficulties and inconsistencies. The multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations make almost every case unique. These factors have resulted in virtually unlimited and unreviewable judicial discretion in determining the fundamental rights of juveniles.

Common sense suggests that juveniles simply are not as competent as adults to waive their constitutional rights in a "knowing and intelligent" manner. Studies evaluating juveniles' understanding of advisories indicate that most juveniles who receive them may not understand it well enough to waive their

constitutional rights in a "knowing and intelligent" manner. See e.g, Grisso, "Juveniles' Capacities to Waive", supra; Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence (1981). Professor Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, was inadequate. Id. at 1157. While several jurisdictions recognize this "developmental fact" and prohibit uncounselled waivers of the right to counsel or incarceration of unrepresented delinquents, see e.g., Iowa Code Ann §232.11 (1985); Wis. Stat. Ann. §48.23 (1986), the majority of states allow juveniles to waive their right to counsel in delinquency proceedings without an attorney's assistance.

In Minnesota, nearly one-third of all juveniles removed from their homes and more than one-quarter of those incarcerated in secure institutions were not represented. Feld, "Right to Counsel," supra at 1254-56. In addition, the same standard, as implemented by individual judges, results in dramatic differences in rates of representation as well as in systematic geographic variations. The high rates of home removal and incarceration of unrepresented youths must be a matter of serious concern for all of the participants in the juvenile justice process -- the juvenile court bench, the prosecuting attorneys, the organized bar, the legislature, and especially the Minnesota supreme court that has supervisory and administrative responsibility for states' juvenile courts.

b. Collateral Legal Issues Raised by Waivers of Counsel

i. Out-of-home placements

The questionable validity of many juveniles' waivers of the right to counsel raises collateral legal issues as well. Unless validly waived, counsel must be appointed for any juvenile who is removed from home or confined. See e.g., Scott v Illinois, 440 U.S. 367 (1979). However, basing the initial decision to appoint counsel on the eventual sentence that will be imposed presents severe administrative problems since it requires a judge to predict the eventual sentence prior to knowing anything about the offender or the nature of the offense.

ii. Statutory enhancement of offenses

While it may be improper to remove or confine any unrepresented juvenile, it may also be improper to consider prior uncounselled adjudications for purposes of subsequent sentencing. See e.g., Baldasar v. Illinois, 446 U.S. 222 (1980); Burgett v. Texas, 389 U.S. 109 (1967); State v. Nordstrom, 331 N.W.2d 901 (Minn. 1983); State v. Edmison, 379 N.W.2d 85 (Minn. 1985). The basic principle of Baldasar, that prior convictions

obtained without representation by counsel or a valid waiver should not be used to enhance subsequent sentences, has been applied in several sentencing contexts involving uncounselled prior juvenile adjudications. See, Feld, "Right to Counsel," supra at 1203 - 7, 1335 - 7. While juvenile court judges may not follow formal sentencing guidelines, their use of prior uncounselled adjudications when sentencing juveniles for a subsequent offense implicate the same issues that Baldasar condemned for adults. Indeed, because of juvenile court judges' virtually unrestricted sentencing discretion, the Baldasar issues are especially acute when sentencing juveniles. In addition, under Minnesota's Sentencing Guidelines, uncounselled juvenile adjudications can be used in computing criminal history scores on subsequent adult offenses.

Another variation of the Baldasar problem arises when status offenders are sentenced to secure detention facilities or institutions for violating conditions of their probation. Courts have used the criminal contempt power to "bootstrap" unrepresented status offenders into delinquents who may then be incarcerated. See e.g., L.E.A. v. Hammergren, 294 N.W.2d 705 (Minn., 1980). (But see, Minn. Stat. 260.301, which prohibits a finding of delinquency solely on the basis of contempt charges against a child under the courts jurisdiction for reasons other than delinquency.)

iii. Informal Enhancement of Charges and Dispositions

Although the practice does not implicate the Baldasar holding, prosecutors, courts, and court services officers often use the records of uncounselled admissions to aid in determining the nature of the petition to be sought and the appropriateness of the disposition. Use of such admissions allows identification of continuing problems, aids in the evaluating the true nature and level of the juvenile's activities, permits rehabilitative goals to be set, and makes placement determinations more informed. There is a strong need to continue the use of uncounselled admissions for these purposes.

IV. RECOMMENDATIONS TO IMPROVE JUVENILE REPRESENTATION

Based upon the data and testimony available and the charge given it by the Supreme Court, the Committee considered a number of criteria to insure that within constitutional limits juveniles were guaranteed the right to representation and that waivers were knowing, intelligent, and voluntary when they were given. The general criteria are listed below. Specific recommendations regarding statutory and rule changes are found in Appendix C.

A. Criteria for Juvenile Representation

1. Delinquency--

   a. Felony and gross misdemeanor--mandatory, non-waivable appointment of counsel
   b. Misdemeanor charges which are subject to statutory enhancement on the second offense--mandatory, non-waivable appointment of counsel
   c. Any proceeding where out-of-home placement of the child is sought--mandatory, non-waivable appointment of counsel
   d. All other delinquency proceedings--consultation with counsel, waiver on the record after consultation

2. Traffic Offenses--

   a. Petty misdemeanors punishable only by a fine of not more than $200--no right to appointed counsel
   b. Non-enhanceable misdemeanor offenses--right to counsel, waivable as in delinquency proceedings
   c. Enhanceable misdemeanor offenses--mandatory, non-waivable appointment of counsel

3. Juvenile Petty Substance and Alcohol Abuse--

   a. When out-of-home placement sought--mandatory, non-waivable appointment of counsel
   b. When no out-of-home placement sought--right to counsel, waivable as in delinquency proceedings

4. Protection Matters--

   a. Right to appointed counsel or appointed guardian, waivable upon totality of circumstances standard; right to counsel not waivable when out-of-home placement sought by party unless child is 10 or under and guardian has been appointed

5. Appeals--

a. Right to appointed counsel on appeal based upon accepted indegency standards, in delinquency, substance and alcohol abuse, or protection matters

b. No right to appointed counsel on appeal from traffic petty misdemeanor (minor traffic offense); right to appointed counsel on all other traffic related offenses as in 5A.

B. Rationale for the Proposed Criteria

The Committee felt it was essential that in delinquency cases involving felony and gross misdemeanor charges, misdemeanor charges subject to enhancement upon a second offense, and any delinquency proceeding where out-of-home placement is sought that the juvenile have a mandatory, non-waivable right to counsel. This is the Gault case construed narrowly. It would compel the court to provide at least standby counsel in those cases. A rule or law mandating non-waivable assistance of counsel for juveniles appearing in juvenile court would impose substantial burdens on the delivery of legal services in rural areas. Presumably, however, rural counties already provide adult defendants with representation and stand-by counsel in criminal proceedings so the organizational mechanisms for delivering legal services to juveniles already exist. Moreover, despite any possible fiscal or administrative concerns, every juvenile is already entitled by Gault and by statute to the assistance of counsel at every critical stage in the process and only an attorney can redress the imbalance between a vulnerable youth and the state. As the Supreme Court said in Gault, "the condition of being a boy does not justify a kangaroo court", In re Gault, 387 U.S. at 28, especially if the justification proffered for such a proceeding is simply fiscal convenience. The issue is not one of entitlement, since all are entitled to representation, but rather the ease or difficulty with which waivers of counsel are found, which in turn has enormous implications for the entire administration of juvenile justice. At a minimum it is necessary to extend counsel to every juvenile who is facing the possibility of being removed from home, whether on out-of-home placement or detention in a juvenile facility.

To ensure that the right to representation is properly extended, court rules and legislation should prohibit the removal from home or incarceration of any juvenile who was neither represented by counsel nor provided with stand-by counsel. Such a limitation on disposition is already the law for adult criminal defendants, see e.g., Scott v. Illinois, 440 U.S. 367 (1979), for juveniles in some jurisdictions, see e.g, Wis. Stat. Ann.

§48.23(1)(a)(1986) (if counsel is waived, court may not transfer legal custody of the child), and the operational practice in jurisdictions such as New York and Pennsylvania, where virtually no unrepresented juveniles are removed or confined, see, Feld, "In re Gault Revisited", supra. Such a policy recognizes that severe dispositions require more rigorous procedural safeguards. To assure judicial compliance with this policy of representation, as an absolute prerequisite to home removal, the laws governing dispositions should be amended to provide that no service provider may receive reimbursement for any out of home placement disposition for which the court administrator does not certify that the juvenile was represented by counsel at the proceedings leading to the adjudication of delinquency and the disposition.

As noted earlier, enhancing sentences on the basis of prior uncounselled convictions violates both federal and state law. Minnesota includes some juvenile delinquency adjudications in the criminal history score of the adult sentencing guidelines. Many unrepresented juveniles who are later tried as adults may have their prior, uncounselled juvenile adjudications included in their adult criminal history scores. Prior adjudications provide part of the "prima facie" case which may lead to the transfer of some juveniles offenders to criminal court for prosecution as adults. In addition, many judges who sentence on a discretionary basis in either juvenile or criminal courts also consider previous delinquency adjudications and dispositions when imposing the present sentence. Finally, judges who sentence juveniles for violating a valid court order or condition of probation often base their finding on a prior, uncounselled adjudication as a status offender. Whenever judges sentence juvenile or adult offenders, whether on the basis of guidelines or discretion, and also consider juveniles' prior adjudications of delinquency, additional important legal issue arise. Baldasar, Burgett, Nordstrom, and Edmison condemn the enhancement of a defendant's current sentence on the basis of prior convictions where the defendant was unrepresented. The enhancement of sentences occurs both formally by statute or guideline and informally as an exercise of judicial discretion. Not only are many unrepresented juveniles routinely adjudicated delinquent and removed from their homes or incarcerated, but their earlier dispositions substantially influence later ones. Feld, "Right to Counsel," supra.

Having decided to consider juveniles' prior records for disposition both as juveniles and as adults, sentencing authorities must now confront the reality of uncounselled prior adjudications and invalid waivers in juvenile courts. If juvenile adjudications are to be used to enhance sentences for juveniles or adults, then a mechanism must be developed to assure that only constitutionally obtained prior adjudications are considered. Again, automatic and mandatory appointment of counsel in all cases is the obvious device to assure the validity

of prior adjudications. Anything less will subject a juvenile or young adult's sentence to direct or collateral attack, produce additional appeals, and impose a wasteful and time-consuming burden on the prosecution to establish the validity of prior adjudications.

In addition to identifying certain cases in which appointment of counsel is mandatory and non-waivable and in which there is limited use of adjudications based upon uncounseled admissions, a prohibition on waivers of counsel without prior consultation and the concurrence of counsel would provide greater assurance than the current practice that any eventual waiver entered by a juvenile in any type of case was truly "knowing, intelligent, and voluntary." Since waivers of rights, including the right to counsel, involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any less stringent alternative could be as effective. An absolute requirement of consultation with counsel prior to a waiver takes account of the immaturity of youths and their lack of experience in law enforcement situations. In addition, it recognizes that only attorneys possess the skills and training necessary to assist the child in the adversarial process. Moreover, a requirement of consultation with counsel prior to waiver would assure the development of legal services delivery systems that would then facilitate the representation of juveniles.

When consulting with independent counsel, procedural mechanisms should be developed to assure that juveniles are receiving an adequate advisory from counsel prior to entering waiver and that such waivers are truly "knowing, intelligent, and voluntary." These mechanisms might include the following: advising the child of the right to counsel in language the child can understand; an explanation of counsel's role and the advantages of representation; a comprehensive explanation of the charges and the nature of the proceedings, the permissible range of punishment to which the child is exposed, and any additional facts essential to an understanding of the case including any defenses or mitigating circumstances; and a clear and complete explanation of the disadvantages of self-representation.

This advisory would be supplemented by certification of the advisory and a discussion on the record which establishes: 1) the child has received the advisory from counsel; 2) judicial findings of fact on the record that the child a) possesses sufficient intelligence and capacity to appreciate the consequences of self-representation; b) an ability to effectively participate in his or her own case; and 3) counsel advises the court that the child understands the advisory and the consequences of waiver.

Such an advisory could be formalized and standardized as an appendix to RPJC 15 in a manner similar to the appendix to Rule of Criminal Procedure 15 which summarizes the waiver of rights accompanying a plea of guilty. In order to encourage judicial compliance with the waiver standard, in any case in which a full and complete record conveying the foregoing information is lacking, there should be a conclusive presumption that the waiver of counsel is invalid.

Finally, the right to appeal should be secured. It should not be dependent upon a parental ability or willingness to pay, but should be based upon the juvenile's own standard of living and comparison of that standard to indigency guidelines by the trial court. Access to transcript, exhibits, papers, and files should also be given to the juvenile. Although provision for recovery of costs from the parents may be made, it should be noted that such a possibility has a chilling effect on the willingness of the juvenile to pursue an appeal and introduces conflict between the juvenile and his or her parents.

IV. FISCAL ISSUES AND CONCERNS

A. Need for Fiscal Study

Perhaps the most difficult issue the Committee faced was balancing the constitutional interests of the juvenile against the allocation of scarce fiscal resources available to those responsible for funding representation. It has been the goal of this Committee to identify the most effective, efficient, and economic method by which the constitutional right to representation can be fully vindicated. It recognizes that adoption of any of its recommendations will have a substantial impact on the delivery of other necessary services. (An informal estimate was made that 3500 cases would be added to the Hennepin County juvenile docket, necessitating significant additions to both the prosecutor's and defender's office, as well as additional allocation of judicial resources, if the recommendations of the Committee were adopted.) It also recognizes that inaccurate cost projections, either by this Committee or by any agency charged with providing services, would impede sound fiscal planning.

The Committee attempted to identify the present costs of providing defender services and to predict future costs. Severe problems and limitations were encountered. Both the Supreme Court Task Force on Financing of the Trial Courts and the Governor's Council on State and Local Relations, as part of their examinations of the methods by which trial court functions are funded, attempted to explore the costs related to providing defender services. Although defender costs and expenses relating to felony and gross misdemeanor services were comparatively easy to derive, as these services are provided through the state public defender system, costs and expenses relating to both misdemeanor and juvenile defender systems evaded effective review. Misdemeanor and juvenile defense are funded on a local level (either the county or the district) in a number of different ways, with costs being assigned to different accounts, depending on the nature of the system by which services are delivered. The 1989 survey the Supreme Court Task Force conducted indicated that misdemeanor and juvenile defense costs are generally not handled as separate accounts; that they may be part of the court's, the district's, or the county's budget, or be a part of all three; that expenses, including expert witnesses, may be part of a different budget and not included in cost for counsel at all. It thus becomes very difficult to identify only those costs which directly relate to the representation of juveniles. In addition, the Committee has received ample testimony that any increase in defense services is going to require additional appearances and services from the county attorney's office, necessitating additional funding for those services. Court services offices may also experience some financial impact.

Further, predication of costs of a system of representation when that system represents only fifty percent of those who are technically entitled to such representation would amount to little more than informed guess-work. The amount necessary to effectively extend the right to counsel to juveniles who are not presently being represented cannot be based, in any meaningful way, on the amount expended for those who are represented.

For these reasons, the Committee has a grave concern that any recommendation based upon present available data for funding a system to deliver juvenile representation will result in an inadequately funded system that may seriously underrepresent juveniles and result in the continuing denial of the rights that are guaranteed. At the same time, the Committee recognizes the importance of funding considerations, especially at the present time, and that the accurate analysis of costs is essential to providing a defender system that can protect the rights of the juveniles it is to serve. The Committee therefore urges that a study be designed and executed to evaluate systemic costs based implementation of all or part of the Committee's recommendations prior to implementation of those recommendations. Such a study would involve determining present expenditures by counties, judicial districts and other involved governmental units; and further, would require the identification of the number and type of cases processed, whether counsel was appointed, whether out-of-home placement occurred, and the costs involved, including costs of representation, costs of prosecution services, and costs of appeal, if any.

In addition, an assessment of the methods by which defense services are delivered should be made to evaluate the economic effectiveness of each. The Juvenile Representation Committee has identified some basic methods by which defense services are delivered to juveniles. In both the Second and the Fourth Judicial Districts, the state public defender system, with state funding, provides juvenile defense services. A similar public defense system provides a dedicated juvenile and misdemeanor defender system in most suburban and larger rural counties, funded either on a county or district level. Services may also be provided under contract by a private firm to a county or group of counties or the court may appoint private attorneys to deal with juvenile defense work, either on a case by case basis, or to handle a number of related matters.

B. Practical Concerns

1. The Use of Guardians

The present development of guardian programs and the use of guardians in juvenile matters should be encouraged. In

particular, in CHIPS cases involving infants and children of tender years, where the child is an innocent victim of the circumstances in which he or she is found, the role of the guardian may provide greater benefit to both the child and the court than an attorney. The guardian's role is to identify and advocate the best interests of the child. Properly trained, a guardian can provide excellent services at a lesser cost to the system than an attorney. The Minnesota Association of Guardians ad Litem (MAGAL) has a comprehensive training program which includes 40 hours of training and periodic evaluation of performance. Many of the guardian ad litem programs presently implemented in Minnesota make extensive use of volunteer guardians. (A copy of the Ramsey County Guidelines for Guardians ad Litem is included in the exhibits.)

2. The Importance of Diversion and Predictability of Outcome

In those counties where the representation rate of juveniles was significantly high, the Committee was able to identify two key factors which aided in holding down costs. First, an adequate diversion program allows the majority of juveniles offenders to be held accountable for their actions without requiring court appearance and without a resulting court record. As a result, although the juvenile is held responsible, questions concerning out-of-home placement and subsequent use of court appearances do not arise. Effective diversion programs involve the concurrence and cooperation of police, the county attorney and the court. Jointly developed guidelines in identifying behaviors which will or will not result in diversion, as well as a method of identifying children in need of treatment so that appropriate treatment programs are made available, are essential. Counties with active diversion programs do not have as great an amount of time dedicated to juvenile trials as those without such programs.

Second, consistent, predictable outcomes, independent of the counsel or the judge involved, also seem important as a method of saving time and money in the juvenile proceeding. Knowing the probable outcome of the case seems to encourage the juvenile to admit at an earlier stage and to accept responsibility for his or her acts, and can serve a valuable rehabilitative function. Where the outcome can be predicted, trial time and rescheduling of hearings are significantly reduced. The possibility of guidelines or dispositional schedules should be explored. Again, the cooperation and affirmative interaction of the prosecutor, the defender, and the judge are essential to the effectiveness of this system.

3. Providing the Information to the Juvenile--Videotape, Guardian

Methods of effectively communicating rights, availability of programs, possible outcomes, and other information to the juvenile, particularly in large, rural areas, were also explored. In some juvenile representation delivery systems, where counsel serves more than one county, the juvenile is not able to make inquiries concerning the case. Even in counties where counsel is available and juveniles are encouraged to consult prior to the scheduled hearing, fewer than 20% of the juveniles take advantage of the opportunity. By making a guardian or a videotape available which would explore the various aspects of the juvenile process, the juvenile may be less reluctant to get the information and would be better informed as to rights, procedures, and outcomes and better able to participate in the proceedings. This is not intended to substitute for the juvenile's opportunity to consult with an attorney, but rather to supplement and extend the amount of information the juvenile has available when making decisions relating to representation and waiver. One of the fears expressed by several committee members is that a group advisory will be given to juveniles in order to save time. Although the recommended criteria attempt to restrict the possibility of group advisories, making videotapes or guardians available is another method to ensure that the juvenile is informed of his or her rights.

4. Other Issues

a. Decriminalizing traffic and other minor cases--A significant amount of time, effort, and money could be saved if most traffic cases and other minor cases were decriminalized, eliminating the need for appointment of counsel and the presence of the prosecutor. A Supreme Court Task Force is currently exploring the ramifications of this recommendation.

b. Specialized education and training--Specialized training and education for prosecutors and defenders would improve the quality of representation and speed the process of handling juvenile trials. Insufficient numbers of skilled practitioners in this area result in protracted hearings and frequent rescheduling and rehearings. The Minneapolis Legal Aid Society has undertaken the project of coordinating efforts to improve child advocacy and to develop standards for attorneys practicing in this area. Some of the documents they are using are included in the exhibits.

c. Regional arraignments and calendaring practices--Adjustments in present arraignments and calendaring practices which would allow the juvenile hearing to center more upon the availability of defense counsel rather than the convenience of

the court would provide an economic method of making counsel available in rural areas where counsel acts in more than one county. This model is very effective in a suburban county where it is used.

APPENDIX A

SUPREME COURT ORDER

JUVENILE REPRESENTATION STUDY COMMITTEE

SUPREME COURT OF MINNESOTA

ORDER ESTABLISHING THE JUVENILE REPRESENTATION STUDY COMMITTEE AND APPOINTING MEMBERS

October 16, 1989

C0–89–1824

WHEREAS, 1989 Minn. Laws Chapter 335, Article 3, Section 43, authorizes the Supreme Court to study the right to legal counsel in juvenile justice matters and recommend criteria for that right to the legislature by July 1, 1990; and

WHEREAS, the right to legal counsel in a juvenile proceeding is guaranteed under the United States Constitution and is fundamental to the protection of the rights of the juvenile; and

WHEREAS, the establishment of criteria is necessary to guarantee the right to counsel in an effective manner; to ensure uniformity of access to counsel throughout the state; and to secure adequate funding of legal assistance programs;

NOW, THEREFORE, IT IS HEREBY ORDERED that a Juvenile Representation Study Committee is established to study representation of juveniles by publicly funded legal counsel and to develop recommended criteria to guarantee that the right to counsel is exercised in a meaningful way and in a uniform manner throughout the state. The Committee shall file its report with the Supreme Court by May 31, 1990.

IT IS FURTHER ORDERED that the following persons are hereby appointed to serve on the Committee:

JUVENILE REPRESENTATION STUDY COMMITTEE

Honorable Doris Huspeni
Minnesota Court of appeals
1300 Landmark Tower
St. Paul, Minnesota 55102

Honorable Bruce Douglas
Tenth Judicial District
Wright County Courthouse
Buffalo, Minnesota 55313

Professor Barry Feld
University of Minnesota Law School
229 19th Avenue South
Minneapolis, Minnesota 55455

Senator Michael Freeman
Minnesota State Senate
122 State Capitol
St. Paul, Minnesota 55155

Honorable Allen Oleisky
Hennepin County Juvenile Center
626 S. Sixth Street
Minneapolis, Minnesota 55455

Honorable Thomas Lacy
First Judicial District
Dakota County Government Center
Hastings, Minnesota 55033

Marcia Statton
Corporate Counsel—Medtronic
7000 Central Avenue N.E.
Minneapolis, MN 55432

John Stuart
Public Defenders Office
Hennepin County Government Center
Minneapolis, Minnesota 55487

Ann Carrott, Esq.
Douglas County Attorney's Office
Douglas County Courthouse
Alexandria, Minnesota 56308

Joanne Vovrousky, Assistant Attorney
403 Government Services Center Bldg.
320 W. Second Street
Duluth, Minnesota 55802

Roger Swenson
Eighth District Public Defender
214 6th Avenue
Madison, Minnesota 56256

Commissioner Lee Luebbe
Winona County Board of Commissioners
1009 West Howard
Winona, Minnesota 55987

Salvador Rosas
Neighborhood Justice Center
500 Laurel
St. Paul, Minnesota 55102

IT IS FURTHER ORDERED that Judge Bruce Douglas shall serve as Chairperson of the Committee and that Stephen Forestell, of the Minnesota State Judicial Advisory Service, shall serve as staff to the Committee.

Dated October 16, 1989

BY THE COURT

PETER S. POPOVICH
Chief Justice

APPENDIX B

STATISTICS ON JUVENILE REPRESENTATION

1988

JUVENILE LEGAL REPRESENTATION--1988

ATTORNEY TYPE AT ADJUDICATION

COUNTY	COUNT / ROW PCT	1 PRIVATE-HIRED OW	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
AITKIN	1	4	1	25	40	0	70
		5.7	1.4	35.7	57.1	0	.3
ANOKA	2	3	1211	7	11	0	1232
		.2	98.3	.6	.9	0	5.2
BECKER	3	1	0	17	195	0	213
		.5	0	8.0	91.5	0	.9
BELTRAMI	4	2	0	53	188	0	243
		.8	0	21.8	77.4	0	1.0
BENTON	5	6	16	8	121	0	151
		4.0	10.6	5.3	80.1	0	.6
BIGSTONE	6	0	0	4	30	0	34
		0	0	11.8	88.2	0	.1
BLUE EARTH	7	9	15	8	160	0	192
		4.7	7.8	4.2	83.3	0	.8
BROWN	8	4	4	3	66	0	77
		5.2	5.2	3.9	85.7	0	.3
CARLTON	9	5	0	26	237	6	274
		1.8	0	9.5	86.5	2.2	1.2
CARVER	10	10	0	66	228	0	304
		3.3	0	21.7	75.0	0	1.3
CASS	11	3	0	99	74	1	177
		1.7	0	55.9	41.8	.6	.7
CHIPPEWA	12	3	2	4	28	0	37
		8.1	5.4	10.8	75.7	0	.2
CHISAGO	13	13	2	18	137	0	170
		7.6	1.2	10.6	80.6	0	.7
CLAY	14	9	0	94	246	0	349
		2.6	0	26.9	70.5	0	1.5
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED OW 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
CLEARWATER	15	2	0	11	20	10	43
		4.7	0	25.6	46.5	23.3	.2
COOK	16	2	0	4	10	0	16
		12.5	0	25.0	62.5	0	.1
COTTONWOOD	17	2	1	7	59	0	69
		2.9	1.4	10.1	85.5	0	.3
CROW WING	18	10	1	64	236	0	311
		3.2	.3	20.6	75.9	0	1.3
DAKOTA	19	13	0	657	8	0	678
		1.9	0	96.9	1.2	0	2.9
DODGE	20	3	0	17	71	0	91
		3.3	0	18.7	78.0	0	.4
DOUGLAS	21	3	6	15	82	0	106
		2.8	5.7	14.2	77.4	0	.4
FARIBAULT	22	9	0	36	52	0	97
		9.3	0	37.1	53.6	0	.4
FILLMORE	23	0	0	11	46	0	57
		0	0	19.3	80.7	0	.2
FREEBORN	24	4	0	64	205	0	273
		1.5	0	23.4	75.1	0	1.2
GOODHUE	25	2	320	1	8	0	331
		.6	96.7	.3	2.4	0	1.4
GRANT	26	2	0	4	17	0	23
		8.7	0	17.4	73.9	0	.1
HENNEPIN	27	308	2073	0	4089	0	6470
		4.8	32.0	0	63.2	0	27.3
HOUSTON	28	0	0	28	69	0	97
		0	0	28.9	71.1	0	.4
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	PRIVATE- HIRED OW (1)	PUBLIC D EFENDER (2)	COURT AP POINTED (3)	NONE (4)	OTHER (5)	ROW TOTAL
HUBBARD	29	2	0	44	74	0	120
		1.7	0	36.7	61.7	0	.5
ISANTI	30	10	15	14	152	0	191
		5.2	7.9	7.3	79.6	0	.8
ITASCA	31	1	0	96	264	0	361
		.3	0	26.6	73.1	0	1.5
JACKSON	32	1	0	14	84	0	99
		1.0	0	14.1	84.8	0	.4
KANABEC	33	5	4	19	73	0	101
		5.0	4.0	18.8	72.3	0	.4
KANDIYOHI	34	4	1	62	81	0	148
		2.7	.7	41.9	54.7	0	.6
KITTSON	35	0	0	1	35	0	36
		0	0	2.8	97.2	0	.2
KOOCHICHING	36	0	1	12	45	0	58
		0	1.7	20.7	77.6	0	.2
LAC QUI PARLE	37	2	0	7	19	0	28
		7.1	0	25.0	67.9	0	.1
LAKE	38	0	0	7	27	0	34
		0	0	20.6	79.4	0	.1
LAKE OF THE WOOD	39	0	1	0	13	0	14
		0	7.1	0	92.9	0	.1
LE SUEUR	40	5	5	11	47	0	68
		7.4	7.4	16.2	69.1	0	.3
LINCOLN	41	0	0	4	4	0	8
		0	0	50.0	50.0	0	.0
LYON	42	5	0	47	64	0	116
		4.3	0	40.5	55.2	0	.5
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED ATTOR 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
MCLEOD	43	11	0	64	112	1	188
		5.9	0	34.0	59.6	.5	.8
MAHNOMEN	44	0	0	18	14	12	44
		0	0	40.9	31.8	27.3	.2
MARSHALL	45	1	0	5	81	0	87
		1.1	0	5.7	93.1	0	.4
MARTIN	46	1	0	44	26	0	71
		1.4	0	62.0	36.6	0	.3
MEEKER	47	2	0	11	68	0	81
		2.5	0	13.6	84.0	0	.3
MILLE LACS	48	8	0	53	57	0	118
		6.8	0	44.9	48.3	0	.5
MORRISON	49	6	0	31	125	0	162
		3.7	0	19.1	77.2	0	.7
MOWER	50	9	0	88	110	0	207
		4.3	0	42.5	53.1	0	.9
MURRAY	51	3	0	5	27	0	35
		8.6	0	14.3	77.1	0	.1
NICOLLET	52	11	0	20	117	3	151
		7.3	0	13.2	77.5	2.0	.6
NOBLES	53	6	4	19	24	0	53
		11.3	7.5	35.8	45.3	0	.2
NORMAN	54	7	1	3	25	0	36
		19.4	2.8	8.3	69.4	0	.2
OLMSTED	55	11	1	85	172	0	269
		4.1	.4	31.6	63.9	0	1.1
OTTER TAIL	56	1	1	30	26	0	58
		1.7	1.7	51.7	44.8	0	.2
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED OW 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
PENNINGTON	57	5	0	24	123	0	152
		3.3	0	15.8	80.9	0	.6
PINE	58	4	0	21	67	0	92
		4.3	0	22.8	72.8	0	.4
PIPESTONE	59	0	0	13	43	0	56
		0	0	23.2	76.8	0	.2
POLK	60	3	0	36	63	0	102
		2.9	0	35.3	61.8	0	.4
POPE	61	0	11	2	30	0	43
		0	25.6	4.7	69.8	0	.2
RAMSEY	62	35	2955	12	302	4	3308
		1.1	89.3	.4	9.1	.1	13.9
RED LAKE	63	0	0	5	7	0	12
		0	0	41.7	58.3	0	.1
REDWOOD	64	3	0	24	84	0	111
		2.7	0	21.6	75.7	0	.5
RENVILLE	65	3	0	8	40	0	51
		5.9	0	15.7	78.4	0	.2
RICE	66	12	60	1	130	0	203
		5.9	29.6	.5	64.0	0	.9
ROCK	67	3	0	5	14	0	22
		13.6	0	22.7	63.6	0	.1
ROSEAU	68	1	0	6	53	0	60
		1.7	0	10.0	88.3	0	.3
ST. LOUIS	69	37	532	1	417	87	1074
		3.4	49.5	.1	38.8	8.1	4.5
SCOTT	70	16	30	40	224	1	311
		5.1	9.6	12.9	72.0	.3	1.3
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	1 PRIVATE-HIRED OW	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
SHERBURNE	71	8	0	104	140	0	252
		3.2	0	41.3	55.6	0	1.1
SIBLEY	72	1	1	12	26	0	40
		2.5	2.5	30.0	65.0	0	.2
STEARNS	73	8	7	27	156	0	198
		4.0	3.5	13.6	78.8	0	.8
STEELE	74	2	7	35	161	0	205
		1.0	3.4	17.1	78.5	0	.9
STEVENS	75	2	0	8	66	0	76
		2.6	0	10.5	86.8	0	.3
SWIFT	76	3	53	3	53	0	112
		2.7	47.3	2.7	47.3	0	.5
TODD	77	0	0	8	38	0	46
		0	0	17.4	82.6	0	.2
TRAVERSE	78	3	0	3	47	0	53
		5.7	0	5.7	88.7	0	.2
WABASHA	79	2	0	21	62	4	89
		2.2	0	23.6	69.7	4.5	.4
WADENA	80	0	0	3	35	0	38
		0	0	7.9	92.1	0	.2
WASECA	81	3	0	23	8	30	64
		4.7	0	35.9	12.5	46.9	.3
WASHINGTON	82	10	1	384	278	0	673
		1.5	.1	57.1	41.3	0	2.8
WATONWAN	83	4	0	6	74	1	85
		4.7	0	7.1	87.1	1.2	.4
WILKIN	84	2	1	5	78	0	86
		2.3	1.2	5.8	90.7	0	.4
	STATE TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

(CONTINUED)

ATTORNEY TYPE AT ADJUDICATION--1988

COUNTY	COUNT / ROW PCT	1 PRIVATE-HIRED	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
WINONA	85	4	0	13	329	0	346
		1.2	0	3.8	95.1	0	1.5
WRIGHT	86	14	0	65	521	0	600
		2.3	0	10.8	86.8	0	2.5
YELLOW MEDICINE	87	1	0	7	26	0	34
		2.9	0	20.6	76.5	0	.1
	COLUMN TOTAL	733	7344	3090	12394	160	23721
		3.1	31.0	13.0	52.2	.7	100.0

NUMBER OF MISSING OBSERVATIONS = 1744

JUVENILE LEGAL REPRESENTATION 1988

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	1 PRIVATE-HIRED OW	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
AITKIN	1	4	1	21	47	0	73
		5.5	1.4	28.8	64.4	0	.3
ANOKA	2	0	1180	5	30	2	1217
		0	97.0	.4	2.5	.2	4.9
BECKER	3	2	0	19	198	0	219
		.9	0	8.7	90.4	0	.9
BELTRAMI	4	3	0	73	186	0	262
		1.1	0	27.9	71.0	0	1.0
BENTON	5	7	27	12	118	0	164
		4.3	16.5	7.3	72.0	0	.7
BIGSTONE	6	0	0	4	30	0	34
		0	0	11.8	88.2	0	.1
BLUE EARTH	7	22	24	12	168	0	226
		9.7	10.6	5.3	74.3	0	.9
BROWN	8	5	1	8	88	0	102
		4.9	1.0	7.8	86.3	0	.4
CARLTON	9	5	0	26	241	7	279
		1.8	0	9.3	86.4	2.5	1.1
CARVER	10	10	0	70	226	0	306
		3.3	0	22.9	73.9	0	1.2
CASS	11	3	0	106	60	0	169
		1.8	0	62.7	35.5	0	.7
CHIPPEWA	12	2	3	7	23	0	35
		5.7	8.6	20.0	65.7	0	.1
CHISAGO	13	18	3	23	137	0	181
		9.9	1.7	12.7	75.7	0	.7
CLAY	14	12	0	99	252	0	363
		3.3	0	27.3	69.4	0	1.5
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED OW 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
CLEARWATER	15	2	0	14	24	6	46
		4.3	0	30.4	52.2	13.0	.2
COOK	16	2	0	5	9	0	16
		12.5	0	31.3	56.3	0	.1
COTTONWOOD	17	2	2	7	60	0	71
		2.8	2.8	9.9	84.5	0	.3
CROW WING	18	8	4	63	240	0	315
		2.5	1.3	20.0	76.2	0	1.3
DAKOTA	19	13	0	698	7	0	718
		1.8	0	97.2	1.0	0	2.9
DODGE	20	2	0	22	69	0	93
		2.2	0	23.7	74.2	0	.4
DOUGLAS	21	4	9	18	84	0	115
		3.5	7.8	15.7	73.0	0	.5
FARIBAULT	22	9	0	45	35	0	89
		10.1	0	50.6	39.3	0	.4
FILLMORE	23	0	0	11	47	0	58
		0	0	19.0	81.0	0	.2
FREEBORN	24	2	0	85	195	0	282
		.7	0	30.1	69.1	0	1.1
GOODHUE	25	3	306	1	30	0	340
		.9	90.0	.3	8.8	0	1.4
GRANT	26	1	0	5	29	0	35
		2.9	0	14.3	82.9	0	.1
HENNEPIN	27	209	1836	0	4741	0	6786
		3.1	27.1	0	69.9	0	27.1
HOUSTON	28	1	0	26	67	0	94
		1.1	0	27.7	71.3	0	.4
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	1 PRIVATE-HIRED	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
HUBBARD	29	2	0	35	40	0	77
		2.6	0	45.5	51.9	0	.3
ISANTI	30	19	25	20	155	0	219
		8.7	11.4	9.1	70.8	0	.9
ITASCA	31	3	0	112	255	0	370
		.8	0	30.3	68.9	0	1.5
JACKSON	32	1	0	17	82	0	100
		1.0	0	17.0	82.0	0	.4
KANABEC	33	6	4	24	82	0	116
		5.2	3.4	20.7	70.7	0	.5
KANDIYOHI	34	6	1	71	75	0	153
		3.9	.7	46.4	49.0	0	.6
KITTSON	35	0	1	1	38	0	40
		0	2.5	2.5	95.0	0	.2
KOOCHICHING	36	0	1	16	61	0	78
		0	1.3	20.5	78.2	0	.3
LAC QUI PARLE	37	1	0	10	27	0	38
		2.6	0	26.3	71.1	0	.2
LAKE	38	0	0	7	27	0	34
		0	0	20.6	79.4	0	.1
LAKE OF THE WOOD	39	0	0	3	14	0	17
		0	0	17.6	82.4	0	.1
LE SUEUR	40	6	9	11	44	0	70
		8.6	12.9	15.7	62.9	0	.3
LINCOLN	41	0	0	1	4	0	5
		0	0	20.0	80.0	0	.0
LYON	42	6	0	53	69	0	128
		4.7	0	41.4	53.9	0	.5
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED OW 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
MCLEOD	43	11	0	65	113	1	190
		5.8	0	34.2	59.5	.5	.8
MAHNOMEN	44	0	0	18	7	11	36
		0	0	50.0	19.4	30.6	.1
MARSHALL	45	1	0	8	85	0	94
		1.1	0	8.5	90.4	0	.4
MARTIN	46	1	0	52	22	0	75
		1.3	0	69.3	29.3	0	.3
MEEKER	47	3	0	12	72	0	87
		3.4	0	13.8	82.8	0	.3
MILLE LACS	48	8	0	60	60	0	128
		6.3	0	46.9	46.9	0	.5
MORRISON	49	10	0	37	127	0	174
		5.7	0	21.3	73.0	0	.7
MOWER	50	8	0	97	114	0	219
		3.7	0	44.3	52.1	0	.9
MURRAY	51	4	0	5	27	0	36
		11.1	0	13.9	75.0	0	.1
NICOLLET	52	14	0	27	140	3	184
		7.6	0	14.7	76.1	1.6	.7
NOBLES	53	9	3	19	28	0	59
		15.3	5.1	32.2	47.5	0	.2
NORMAN	54	7	0	3	24	0	34
		20.6	0	8.8	70.6	0	.1
OLMSTED	55	8	0	99	137	0	244
		3.3	0	40.6	56.1	0	1.0
OTTER TAIL	56	7	5	86	220	0	318
		2.2	1.6	27.0	69.2	0	1.3
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

COUNTY	COUNT / ROW PCT	ATTORNEY TYPE AT DISPOSITION 1 PRIVATE-HIRED OW	2 PUBLIC DEFENDER	3 COURT APPOINTED	4 NONE	5 OTHER	ROW TOTAL
PENNINGTON	57	5	0	28	120	0	153
		3.3	0	18.3	78.4	0	.6
PINE	58	7	0	31	87	0	125
		5.6	0	24.8	69.6	0	.5
PIPESTONE	59	0	0	13	44	0	57
		0	0	22.8	77.2	0	.2
POLK	60	3	0	37	61	0	101
		3.0	0	36.6	60.4	0	.4
POPE	61	0	13	1	26	0	40
		0	32.5	2.5	65.0	0	.2
RAMSEY	62	27	1702	10	1584	14	3337
		.8	51.0	.3	47.5	.4	13.3
RED LAKE	63	0	0	6	3	0	9
		0	0	66.7	33.3	0	.0
REDWOOD	64	3	0	24	77	0	104
		2.9	0	23.1	74.0	0	.4
RENVILLE	65	2	0	9	42	0	53
		3.8	0	17.0	79.2	0	.2
RICE	66	8	64	0	120	0	192
		4.2	33.3	0	62.5	0	.8
ROCK	67	2	0	5	16	0	23
		8.7	0	21.7	69.6	0	.1
ROSEAU	68	1	0	6	55	0	62
		1.6	0	9.7	88.7	0	.2
ST. LOUIS	69	18	403	0	367	304	1092
		1.6	36.9	0	33.6	27.8	4.4
SCOTT	70	17	29	36	234	0	316
		5.4	9.2	11.4	74.1	0	1.3
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED OW (1)	PUBLIC DEFENDER (2)	COURT APPOINTED (3)	NONE (4)	OTHER (5)	ROW TOTAL
SHERBURNE	71	5	0	121	140	0	266
		1.9	0	45.5	52.6	0	1.1
SIBLEY	72	2	1	12	26	0	41
		4.9	2.4	29.3	63.4	0	.2
STEARNS	73	16	12	83	359	0	470
		3.4	2.6	17.7	76.4	0	1.9
STEELE	74	2	7	41	150	0	200
		1.0	3.5	20.5	75.0	0	.8
STEVENS	75	2	0	7	68	0	77
		2.6	0	9.1	88.3	0	.3
SWIFT	76	2	53	3	42	0	100
		2.0	53.0	3.0	42.0	0	.4
TODD	77	1	0	14	62	0	77
		1.3	0	18.2	80.5	0	.3
TRAVERSE	78	1	0	3	47	0	51
		2.0	0	5.9	92.2	0	.2
WABASHA	79	1	0	19	49	1	70
		1.4	0	27.1	70.0	1.4	.3
WADENA	80	0	0	3	41	0	44
		0	0	6.8	93.2	0	.2
WASECA	81	5	0	25	4	31	65
		7.7	0	38.5	6.2	47.7	.3
WASHINGTON	82	13	1	395	280	0	689
		1.9	.1	57.3	40.6	0	2.8
WATONWAN	83	4	0	5	76	1	86
		4.7	0	5.8	88.4	1.2	.3
WILKIN	84	2	1	5	78	0	86
		2.3	1.2	5.8	90.7	0	.3
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

(CONTINUED)

ATTORNEY TYPE AT DISPOSITION--1988

COUNTY	COUNT / ROW PCT	PRIVATE-HIRED 1	PUBLIC DEFENDER 2	COURT APPOINTED 3	NONE 4	OTHER 5	ROW TOTAL
WINONA	85	4	0	17	338	0	359
		1.1	0	4.7	94.2	0	1.4
WRIGHT	86	18	0	78	518	0	614
		2.9	0	12.7	84.4	0	2.5
YELLOW MEDICINE	87	1	0	8	30	0	39
		2.6	0	20.5	76.9	0	.2
	STATE TOTAL	664	5731	3499	14734	381	25009
		2.7	22.9	14.0	58.9	1.5	100.0

NUMBER OF MISSING OBSERVATIONS = 456

TABLE 8

RATES OF REPRESENTATION AND OFFENSE

ATTORNEY =>	STATEWIDE YES	STATEWIDE NO	URBAN YES	URBAN NO	SUBURBAN YES	SUBURBAN NO	RURAL YES	RURAL NO
OVERALL % Counsel at Adjudication	45.3	54.7	62.6	37.4	55.2	44.8	25.1	74.9
FELONY	66.1	33.9	82.9	17.1	67.9	32.1	49.6	50.4
Felony Offense Against Person	77.3	22.7	88.8	11.2	74.9	25.1	63.7	36.3
Felony Offense Against Property	63.0	37.0	80.8	19.2	65.8	34.2	46.7	53.3
MISDEMEANOR	46.4	53.6	64.3	35.7	57.9	42.1	23.5	76.5
Minor Offense Against Person	62.4	37.6	80.7	19.3	57.3	42.7	40.7	59.3
Minor Offense Against Property	44.6	55.4	70.8	29.2	56.7	43.3	20.6	79.4
Other Delinquency	44.9	55.1	51.3	48.7	61.0	39.0	26.6	73.4
STATUS	28.9	71.1	45.6	54.4	33.9	66.1	14.3	85.7
OVERALL % Counsel at Disposition	38.9	61.1						

TABLE G

-5,79

ATTORNEY TYPE AND OFFENSE

	STATEWIDE				URBAN			
	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE
OVERALL	5.1	28.5	11.7	54.7	8.0	54.5	.1	37.4
FELONY	8.1	36.0	21.9	33.9	13.2	69.6	0.1	17.1
lony Offense gainst Person	11.2	43.5	22.7	22.7	15.7	72.7	0.4	11.2
lony Offense gainst Property	7.2	34.0	21.7	37.0	12.4	68.5	-	19.2
ISDEMEANOR	5.5	29.4	11.5	53.6	9.1	55.2	0.1	35.7
nor Offense gainst Person	6.4	40.5	15.5	37.6	10.1	70.7	-	19.3
nor Offense gainst Property	4.9	27.5	12.2	55.4	10.4	60.4	0.1	29.2
ther linquency	6.5	29.7	8.7	55.1	7.1	44.1	0.1	48.7
TATUS	2.1	21.6	5.1	71.1	2.3	43.2	-	54.4

TABLE 3B

-82,83

ATTORNEY TYPE AND OFFENSE

	SUBURBAN				RURAL			
	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE
OVERALL %	2.5	29.6	23.1	44.8	3.8	5.2	16.2	74.9
FELONY %	3.8	33.3	30.7	32.1	6.3	7.6	35.6	50.4
elony Offense gainst Person %	6.9	34.9	33.1	25.1	8.8	10.9	44.0	36.3
elony Offense Against Property %	3.0	32.8	30.0	34.2	5.8	6.9	33.9	53.3
MISDEMEANOR %	2.2	30.9	24.8	42.1	3.9	4.6	15.0	76.5
inor Offense gainst Person %	2.3	30.0	25.0	42.7	4.7	6.6	29.5	59.3
inor Offense gainst Property %	1.7	27.8	27.2	43.3	2.6	4.7	13.2	79.4
ther Delinquency %	3.2	38.8	19.0	39.0	7.3	3.6	15.8	73.4
STATUS %	2.0	22.0	9.9	66.1	2.0	4.8	7.4	85.7

APPENDIX C

RECOMMENDED AMENDMENTS

JUVENILE RULES AND STATUTES

PROPOSED AMENDMENTS TO STATUTES AND RULES TO IMPLEMENT RECOMMENDATIONS

The Committee, in its review, was satisfied that Minnesota has a good statutory scheme for ensuring the right of a juvenile to representation, but that due to a number of factors that scheme frequently failed to provide the protection to which the juvenile is entitled. The following recommendations involve some statutory changes, along with the reasons for them, but largely concentrate on amending the rules so that compliance with constitutional and statutory guarantees is protected and juveniles are prevented from waiving rights without first being fully informed of the consequences of such waiver.

Minn. Stat. §260.155, subd. 8(a), which allows parents or guardians to waive representation of counsel for children age 12 or under should be amended to change that to the age of 10 if the recommendations of the Committee are to be adopted. (See proposed amendments to RPJC Rule 50. Too often, for older children, parents waive counsel for reasons other than the best interests of the child.

Minn. Stat. §260.193, subd. 1(c) and 8(e) should be amended to raise the amount to $200, bringing the statute into conformity with the petty misdemeanor statute, Minn. Stat. §609.02, subd. 4a. (See, Minn. Stats. §§609.0331 and 609.0332)

Provider statutes (those dealing with placement and/or treatment programs) should be amended to prevent the provision of services unless presence of counsel at the proceeding is certified by the court administrator.

Minn. Stat. §611.25 should be amended to allow the state public defender to provide appellate counsel. Under ordinary circumstances, the Supreme Court has authority to order the state office to provide such services. However, given the significant fiscal impact that such a requirement would have upon the state defender's office, the legislature should commit itself to a fitting and reasonable appropriation to cover the costs.

DELINQUENCY MATTERS

Proposed Draft - Rule 4.01, Subd. 2

Advisory of Right to Counsel

Subd.2 Advisory of Right to Counsel. A child not represented by counsel shall be advised orally by counsel, who shall not be the county attorney, of the right to counsel at or before any hearing on the petition.

Counsel shall advise the child substantially as follows:

(a) that the child has the right to be represented by counsel throughout proceedings on the petition;

(b) that the child has a right to counsel appointed by the court at no cost to the child if the child is unable to afford counsel;

(c) that representation by counsel includes the following:

(i) counsel cannot disclose to anyone else, without the consent of the child, the contents of any communication between counsel and the child.

(ii) counsel will discuss the charges with the child, with reference to the possible consequences of a finding of guilt, including the possibility of out-of-home placement as a consequence for failure to obey a court order;

(iii) counsel will review with the child both the evidence pointing toward guilt, and also evidence supporting possible defenses, including constitutional issues that might affect the ultimate decision of the court;

(iv) counsel will serve as an independent advocate for the child's interests as the child determines them to be;

(v) counsel will, if requested by the child, conduct discovery, investigation, trial preparation, negotiation, trial, and post-trial proceedings as in a criminal matter.

Counsel shall certify compliance with the requirements of this rule in person to the court according to the Right to Counsel Acknowledgment form in Appendix __.

Comments to Proposed Draft - Rule 4.01, Subd. 2

This rule is designed to provide three elements in an advisory to the child:

(1) the advisory will be done by an independent attorney, not by the court. This procedure ensures that the child will receive an adequate advisory of right to counsel and an attorney will be physically present who can be appointed to represent the child.

(2) the child's right to appointed counsel will not be based upon parental income. This is to avoid creating a conflict of interest between parent and child.

(3) the advisory includes not only a review of the charges and possible consequences, but also a review of the duties of appointed counsel. This ensures that in deciding whether to waive counsel under Rule 15.02, Subd. 1, B., the child actually knows what services the lawyer will provide in representing the child.

Proposed Draft - rule 15.02, Subd. 1

Standards for Waiver of Right to Counsel

A. In all proceedings on felony and gross misdemeanor charges, on misdemeanors which are subject to enhancement upon a second offense, or when out-of-home placement of the child is sought by a party, if the child is unable to afford counsel, the court shall appoint counsel for the child.

B. In all other delinquency proceedings, except for those traffic violations covered by Rule 36, the court may permit the child to waive counsel, provided that the court determines on the record that:

(1) The child has been given the advisory provided in Rule 4.01, subd. 2. The court shall review the Right to Counsel Acknowledgment Form, found in Appendix __, with the child.

(2) The child's decision to waive counsel is a knowing and voluntary one. This shall be determined by the court's review of the totality of the circumstances, including: the presence and competence of the child's parent(s), guardian or guardian ad litem, the child's age, maturity, intelligence, education, experience, and ability to comprehend; and other relevant factors.

(3) No party to the proceeding seeks an out-of-home placement of the child.

C. If the court accepts a child's waiver of right to counsel as provided by Rule 15.02B, the court may reserve the right to place the child out-of-home. However, if the court, at disposition, orders out-of-home placement, the child may withdraw the admission and counsel shall be appointed as in Rule 15.02 A. If the court in a subsequent review or modification of disposition hearing recommends out-of-home placement, counsel shall be appointed but the plea admission not be withdrawn.

Comments to Proposed Draft - Rule 15.02, Subd. 1

A. This language is based on Rule 5.02, subd. 1, Rules of Criminal Procedure. The Comment to that rule provides that if the defendant wishes to proceed pro se in accordance with Faretta v. California, 422 U.S. 806 (1975), then "the appointed counsel would remain available for assistance and consultation if requested by the defendant." Thus the proposed Rule seeks to provide, with respect to felonies and gross misdemeanors, the same level of representation given to adults.

The proposed Rule adds appointed counsel for "enhanceable misdemeanors," and in this respect gives the child a greater right to appointed counsel than an adult would have. This is appropriate because of the following considerations:

(1) the most common enhanceable misdemeanors are DWI, prostitution, and assault in the fifth degree. These charges suggest that the child involved may have some fairly serious problems. Also they are the misdemeanors which would most likely lead to out-of-home placement.

(2) the child is unlikely to be able to understand the concept of enhancement of subsequent offenses.

B. The "other misdemeanors and offenses" described here include over 50% of a typical juvenile court's caseload: shoplifting, disorderly conduct, truancy, absenting, beer drinking, etc. In these cases, where no out-of-home placement is contemplated, waiver of counsel after a Rule 4 advisory is permissible. Note, however, that the attorney who does the Rule 4 consultation must verify on the record that the proper advisory was given.1 In these cases, it is the responsibility of the court to make sure that none of the parties are seeking out-of-home placement. If such placement is later sought on the basis of one of these offenses, admitted in court without counsel, counsel will then be appointed.

TRAFFIC OFFENSES

Proposed Draft - Rule 36.02, Subd. 3

Subd. 3. Counsel for Child. Appointment of counsel is not required for a child charged with a minor traffic offense punishable only by a fine of not more than $200. In all other proceedings on traffic offenses, the court shall appoint counsel, subject to waiver as provided in Rule 15.02, subd. 1.

CHILD PROTECTION MATTERS

Proposed Draft - Rule 50.01, Subd. 1

Subd. 1. Standards. A person entitled to counsel pursuant to Rule 40 and to any other right pursuant to these rules may waive the right to counsel and any other right only if the waiver is voluntarily and intelligently made. If a party to the proceedings seeks out-of-home placement of the child, the court shall not permit waiver of the right of the child to counsel unless the child is 10 years or under and a guardian has been appointed. In all other proceedings where out-of-home placement is not sought, the court shall review, on the record, the totality of the circumstances, including the presence and competence of the child's parent(s), guardian or guardian ad litem, the child's age, maturity, intelligence, education, experience, and ability to comprehend; and other relevant factors in determining whether the child's decision to waive counsel is knowing and voluntary. If the child is not present or if the court determines in writing or on the record, based on the totality of the circumstances, that the child is incapable of understanding the proceedings or participating in the child's own behalf, the guardian ad litem may waive the right to counsel and any other right.

APPEALS

Proposed Draft - Rule 31.01, Subd. 1(C); Subd. 2(C) and adding Subd. 3.

Right to Appointed Counsel on Appeal and to Transcripts, Providing Notice in Delinquency Proceedings

RULE 31.01 APPEAL BY CHILD, PARENT(S), OR GUARDIAN OF THE CHILD

Subd. 1. Appealable Orders

***

(C) On appeal a child shall be entitled to be represented by counsel. Upon a determination by the trial court, according to accepted standards, of indigency of the child, appointment of counsel shall be at public expense.

Subd. 2. Procedure. The procedure upon appeal by the child or the parent(s) or guardian of the child shall be as follows.

***

(C) Transcript, Affidavits, Papers, Files, Exhibits. The Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals. Upon a determination by the trial court according to accepted standards, of indigency of the child, the transcript of the proceedings shall be provided to the child at public expense.

Subd. 3. The trial court shall inform the parties in writing or on the record immediately after judgment and disposition of the right to appeal and the right to court-appointed counsel and copies of any transcripts and records in the case of indigency.

Proposed Draft - Rule 63, Subd. 1(B); Subd. 2(C); and adding Subd. 4

Right to Appointed Counsel on Appeal and to Transcripts, Providing Notice in Child Protection Cases

Subd. 1. **(A) Appealable Orders.** Any person with the right to participate may appeal to the Court of Appeals from a final order of the court.

(B) Any person appealing shall be entitled to be represented by counsel. Upon determination by the trial court, according to accepted standards, of indigency of any party appealing, appointment of counsel for that party shall be at public expense.

Subd. 2. Procedure. The procedure upon appeal shall be as follows:

***

(C) Transcript, Affidavits, Papers, Files, Exhibits. The Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals. Upon a determination by the trial court, according to accepted standards, of indigency of the party appealing, the transcript of the proceedings shall be provided the party appealing at public expense.

***

Subd. 4. The trial court shall inform the parties in writing or on the record immediately after judgment and disposition of the right to appeal and the right to court-appointed counsel and copies of any transcripts and records in the case of indigency.

Comments to Proposed Draft of Rules 31 and 63.

Both rules extend the right to appointed counsel to juveniles on appeals and ensure that transcripts and other costs are covered according to the standards of indigency as determined by the trial court. The trial court also has the duty to inform the parties of the necessary information to facilitate the appeal process

REPORT OF THE JUVENILE REPRESENTATION STUDY COMMITTEE TO THE MINNESOTA SUPREME COURT

- EXHIBITS -

EXHIBIT 1

ARTICLES ON JUVENILE REPRESENTATION

BY PROF. BARRY FELD

"Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court," 69 Minnesota Law Review 141, pp. 169-190 (1984)

"In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court," 34 Crime and Delinquency, pp. 393-424 (1988)

"The Right to Counsel in Juvenile Court: Fulfilling Gault's Promise," prepared for Children, Families and Law Judicial Council, (1989)

An additional article, "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make," 79 Journal of Criminal Law and Criminology 1185 (1989) has been included in the materials, but is not reproduced here because of its length.

Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court

Barry C. Feld*

I. INTRODUCTION

The 1967 United States Supreme Court decision *In re Gault*[1] precipitated a procedural revolution that has transformed the juvenile court into a legal institution very different

* Professor of Law, University of Minnesota. I benefitted from the critical comments of a number of colleagues who reviewed an earlier draft of this Article, including Ms. Kathy Bishop and Professors Daniel Farber, Richard Frase, and Robert Levy. Of course, they bear no responsibility for my failure to heed their advice. This Article could not have been completed without the research contributions of a number of students whose assistance is gratefully acknowledged, including Maria Wyant Cuzzo, Gadi Hill, Elizabeth Neufeld-Smith, Polly Peterson, Jeff Saunders, Agnes Schipper, Ann Underbrink, and Mary Ann Wray.

1. 387 U.S. 1 (1967).

care and regenerative treatment postulated for children."[90]

III. WAIVER OF THE RIGHT TO REMAIN SILENT AND THE RIGHT TO COUNSEL

When the Supreme Court in *In re Gault* made the privilege against self-incrimination applicable to juvenile court proceedings,[91] the procedural safeguards developed in *Miranda v. Arizona*[92] also became applicable to juveniles. Accordingly, the validity of a minor's waiver of fifth amendment rights, the voluntariness of any confession obtained, and the waiver of any other constitutional right were determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances."[93] Prior to *Miranda*, only the "voluntariness" of a confession was determined by judicial review of the totality of the circumstances.[94]

90. Kent v. United States, 383 U.S. 541, 556 (1966).

91. 387 U.S. 1, 42-57 (1967); *see supra* notes 46-47 and accompanying text.

92. 384 U.S. 436 (1966). The *Gault* Court cited *Miranda* as authority for the assertion that persons, even juveniles, cannot be compelled to testify against themselves. *See In re* Gault, 387 U.S. at 50 n.87, 56 n.97. Because *Miranda* rights attach whenever an accused is in custody, presumably *Gault* extends those same rights to juveniles, even though the decision itself was concerned with adjudicatory rights. *See id.* at 13. Although the Supreme Court has never explicitly held that *Miranda* applies to juvenile proceedings, the Court, in Fare v. Michael C., 442 U.S. 707 (1979), "assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceedings." *Id.* at 717 n.4.

93. *Miranda*, 384 U.S. at 444; *see also* Brady v. United States, 397 U.S. 742 (1970) (guilty pleas); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of counsel). *See generally* Y. KAMISAR, *A Dissent from the* Miranda *Dissents*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41-76 (1980) (inadequacy of "totality of circumstances" evaluations of voluntariness); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 214-16 (1977) (discussing the distinction between "voluntarily" and "knowingly").

In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court first established the "totality of the circumstances" test to determine the validity of a waiver of rights:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id. at 464.

94. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 543-44 (1961); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944); Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195, 196 (1976). *See generally Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 954-1030 (1966) (general discussion of the "voluntariness" issue prior to *Miranda*).

Since *Miranda*, however, the validity of waivers of both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel are evaluated under this test as well.[95]

Even before *Miranda* and *Gault*, the United States Supreme Court instructed trial courts to be particularly solicitous of the effects that a youth's age and inexperience may have on the validity of waivers and the voluntariness of confessions.[96] *In re Gault* reiterated and reemphasized that "admis-

---

95. *Miranda*, 384 U.S. 436, 475-77 (1966); *see also* Mincey v. Arizona, 437 U.S. 385, 396-402 (1978) (detailing the circumstances of police interrogation of hospitalized accused that demonstrated that accused's will was overcome).

96. In Haley v. Ohio, 332 U.S. 596 (1948), a fifteen-year-old "lad" was interrogated by police in relays beginning shortly after midnight, denied access to counsel, and confronted by confessions of codefendants before he finally confessed at five o'clock a.m. The Supreme Court reversed his conviction, ruling that a confession obtained under these circumstances was involuntary:

> What transpired would make us pause for careful inquiry if a mature man was involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.
>
> . . . .
>
> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction.

Id. at 599-601.

In Gallegos v. Colorado, 370 U.S. 49 (1962), the confession was obtained from "a child of 14." The Court reiterated that the youth of the accused is a special circumstance that may affect the voluntariness of a confession, and it reemphasized the vulnerability of youth:

> But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . [W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Id. at 54. It then added:

> A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Id.

sions and confessions of juveniles require special caution."[97] In *Fare v. Michael C.*,[98] however, the Court seemed to retreat somewhat from its solicitude for age, at least when the defendant was a 16-year-old with several arrests and considerable experience with the police and had served "time" in a youth camp.[99] *Fare* reaffirmed the "totality of the circumstances" test as the appropriate standard for evaluation of the validity of waivers of rights and the admissibility of juvenile confessions. It held that the juvenile's request to speak with his probation officer while subjected to custodial interrogation was neither a per se invocation of his *Miranda* privilege against self-incrimination nor the functional equivalent of a request to consult with counsel, which would have required the cessation of further interrogation.[100]

The Minnesota Supreme Court has followed the "totality of the circumstances" standard in determining the validity of a juvenile's waiver of *Miranda* rights, other constitutional rights, and the voluntariness of any statement, both in its decisions and in its rules.[101] In *State v. Nunn*,[102] for example, the Minnesota Supreme Court specifically rejected the argument that no confession by a juvenile should be admitted unless a parent or guardian was present at the time that the juvenile waived his rights.[103] The court in *Nunn* quoted the Supreme Court deci-

97. *Gault*, 387 U.S. at 45.

98. 442 U.S. 707 (1979).

99. *See id.* at 726-27.

100. *See id.* at 722-24. Analytically, *Fare* is not even a juvenile case, but simply an interpretation of *Miranda* focusing on whether a request to consult with a probation officer is the equivalent of a request to meet with an attorney. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981) (police cannot continue interrogation after an accused has requested counsel until counsel is made available). In holding that a child's request to speak with someone other than an attorney was simply one of many factors in determining the validity of a *Miranda* waiver, the *Fare* Court expressly declined to give children greater protection than adults. *See Fare*, 442 U.S. at 724-27; *see also* Rosenberg, *supra* note 42, at 686-90 (analyzing effect of *Fare*'s presumption that *Miranda* rights extend to delinquency actions).

101. *See, e.g., In re* M.A., 310 N.W.2d 699 (Minn. 1981); *In re* Welfare of S.W.T., 277 N.W.2d 507 (Minn. 1979); State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973). The Minnesota Supreme Court's contribution to the jurisprudence of juvenile confessions primarily consists of the recognition that juveniles interrogated in the informal atmosphere of the juvenile court may be lulled into confessions, which may be to their detriment. As the *Loyd* court noted, however, as long as it is made clear to juveniles that the questioning authorities are not operating as their friends, but as their adversaries, the confidential atmosphere of the juvenile court poses no danger. 297 Minn. at 450, 212 N.W.2d at 676-77.

102. 297 N.W.2d 752 (1980).

103. *See id.* at 755. The court characterized the presence of parents simply

sion in *Fare* with approval and reaffirmed its own adherence to the "totality" approach in determining the validity of a waiver of *Miranda* rights by a juvenile.[104]

Minnesota's new rules also reflect this stance. Rule 6 provides that confessions, admissions, or statements obtained from a child in custody will be admissible only to "the extent a statement is admissible against an adult defendant in a criminal matter"[105] and requires, as a prerequisite to admissibility, that a child receive *Miranda* warnings "to the same extent that an adult in a criminal matter is advised prior to custodial interrogation."[106] Rule 15 governs waivers of the right to counsel and constitutional rights other than the privilege against self-incrimination. In determining whether a child "voluntarily and intelligently" confessed or waived the right to counsel, Rules 6 and 15 require the court to look at the "totality of the circumstances," which is defined as including but not limited to "the presence and competence of the child's parent(s) or guardian, the child's age, maturity, intelligence, education, experience, and ability to comprehend."[107]

In adopting this standard, the Minnesota Supreme Court affirmed the principle that juveniles are legally capable of waiving the fifth amendment right against self-incrimination, the sixth amendment right to counsel, or any other constitutional right when the circumstances indicate that they did so knowingly, intelligently, and voluntarily. The court's position is also consistent with the legislature's judgment that youths twelve years of age or older are capable of making informed decisions regarding waiver of rights without parental concurrence.[108]

---

as one factor in the totality of the circumstances bearing on the voluntariness issue. *See id.* The Minnesota Supreme Court had, on previous occasions, rejected defendants' requests that parental presence be an absolute prerequisite for the admissibility of statements obtained from juveniles:

> Although we recognize that the presence of parents and their guidance during interrogation of a juvenile is desirable, we reject the absolute rule that every minor is incapable and incompetent as a matter of law to waive his constitutional rights. In determining whether a juvenile has voluntarily and intelligently waived his constitutional rights, parental presence is only one factor to consider and is not an absolute prerequisite.

State v. Hogan, 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973).

104. *See Nunn*, 297 N.W.2d at 755 (quoting with approval Fare v. Michael C., 442 U.S. 707, 725-26 (1979)).

105. MINN. R.P. JUV. CT. 6.01.

106. MINN. R.P. JUV. CT. 6.01(1).

107. MINN. R.P. JUV. CT. 6.01(2); 15.02(1); 15.03.

108. Minnesota law provides:

> Waiver of any right which a child has under this chapter must be an express waiver intelligently made by the child after the child has been

There are problems, however, in applying such standards. When evaluating the validity of a waiver under the totality of the circumstances, courts tend to focus on characteristics of the juvenile, such as age, education, and I.Q., and on circumstances surrounding the interrogation, such as methods and length of the interrogation and any subsequent repudiation of the statement.[109] Courts have identified factors relevant to the determination of "voluntariness" but have declined to give controlling weight to any particular factor, instead remitting the weighing of different factors to the unfettered discretion of the trial court.[110] Consequently, there are "no clear-cut rules which could protect a child who is not as mature or knowledgeable as an adult, [and] courts are left without clear touchstones by which to evaluate a particular confession."[111] Similarly, the police who interrogate a juvenile may be unable to determine in advance whether a waiver will be admissible at trial. Indeed, the factors invoked in the "totality of the circumstances" test have been characterized as "amorphous, illusive, and largely unreviewable."[112]

Despite the judicial determinations, both by decision and

---

fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

MINN. STAT. § 260.155(8) (1982).

109. *See, e.g.*, West v. United States, 399 F.2d 467, 469 (5th Cir. 1968), *cert. denied*, 393 U.S. 1102 (1969); People v. Lara, 67 Cal. 2d 365, 376-77, 432 P.2d 202, 217-18, 62 Cal. Rptr. 586, 599 (1967), *cert. denied*, 392 U.S. 945 (1968); State v. White, 494 S.W.2d 687, 691 (Mo. Ct. App. 1973). The factors that emerge from the cases include the age of the juveniles, their education, the "criminal sophistication" and experience of the youths that bear on their knowledge of their rights, whether the youths were questioned incommunicado, whether the interrogation occurred before or after the filing of formal charges, the methods and length of interrogation, and whether the youths subsequently repudiated their statements. *See, e.g.*, *West*, 399 F.2d at 469.

110. *See, e.g.*, Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1138-39 (1980). "There is no case law, however, which suggests how to evaluate all the considerations systematically. The manner in which the factors are weighed and combined has always been a matter of judicial discretion." *Id.* at 1138.

111. Comment, *supra* note 94, at 202. Professor Thomas Grisso, after surveying all of the relevant juvenile waiver decisions between 1948 and 1979 to identify whether a youth's characteristics affected a court's ruling on the validity of a waiver, concluded that no single variable is determinative since constellations of variables are usually cited in conjunction with one another. He notes that confessions obtained from juveniles 12 years of age or younger frequently are excluded, as well as those from juveniles with I.Q. scores below 75, but that no single factor is treated by courts as conclusive. *See* Grisso, *supra* note 110, at 1138 n.24.

112. *See* Y. KAMISAR, *supra* note 93, at 43-44, 64-76; *see also* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-71 (1981) (reviewing Y.

by rule, that the "totality of the circumstances" test is an adequate tool for assessing a youth's ability to understand and waive constitutional rights, considerable doubt remains as to whether a typical juvenile's waiver is, or even can be, "knowing, intelligent, and voluntary." Empirical studies evaluating juveniles' understanding of their *Miranda* rights indicate that most juveniles who receive the *Miranda* warning may not understand it well enough to waive their constitutional rights in a "knowing and intelligent" manner.[113] Such lack of comprehension by minors raises questions about the adequacy of the *Miranda* warning as a safeguard. The *Miranda* warning was

---

KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980)).

This emphasis on discretion parallels Packer's Crime Control Model, *see supra* note 88, which accepts the legitimacy of police interrogation, particularly in the initial stages of an investigation, and which emphasizes the reliability and trustworthiness of statements obtained rather than the interrogation circumstances that produced them. *See* H. PACKER, *supra* note 88, at 187-88. Accordingly, "no hard and fast rule can be laid down about how long the police should be permitted to interrogate the suspect . . . [nor] about what kinds of police conduct are coercive. It is a factual question in each case . . . ." *Id.* at 188-89. The Due Process Model, on the other hand, would oppose such discretion. It would suggest that custodial interrogation conflicts with the premises of an adversary process that imposes the burden on "the state to make its case against a defendant without forcing him to cooperate in the process, and *without capitalizing on his ignorance of his legal rights*." *Id.* at 191 (emphasis added). The goals of the Due Process Model are achieved through "the substitution of broad, quasi-legislative rules of administration for the more traditional case-by-case adjudication;" greater equality between the state and the accused, primarily through the assistance of counsel; and "restriction[s] on law enforcement discretion." *Id.* at 194. The Due Process Model would favor a per se rule, preferably one mandating consultation with counsel prior to police interrogation, to avoid the discretionary problems associated with case-by-case adjudications of the admissibility of confessions. *Id.* at 201.

113. *See, e.g.*, T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 54 (1970); Grisso, *supra* note 110, at 1160. One study found that over 90% of the juveniles interrogated waived their rights, that an equal number did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects. Ferguson & Douglas, *supra*, at 53. Another study found that the problems of understanding and waiving rights were particularly acute for younger juveniles:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension . . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.

Grisso, *supra* note 110, at 1160. Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, left much to be desired. *See id.* at 1157.

designed to inform and educate a defendant to assure that subsequent waivers would indeed be "knowing and intelligent."[114] If most juveniles lack the capacity to understand the warning, however, its ritual recitation hardly accomplishes that purpose.[115]

Empirical research also suggests that juveniles are simply not as competent as adults to waive their rights in a "knowing and intelligent" manner. Indeed, it is this "developmental fact" that accounts for many of the legal disabilities imposed upon children.[116] The alternative policies that might respond to this

---

114. *Miranda* requires advising the accused of his or her constitutional rights in order to assure that any subsequent waiver is made in a knowing, intelligent, and voluntary manner. The Court reasoned that unless the protective warning is given to dispel "the compulsion inherent in custodial surroundings," no statement could be truly voluntary. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966). By providing for an automatic advisory, courts also were relieved from examining the facts and circumstances surrounding each confession to determine whether its maker "knew" of his or her rights. Thus, *Miranda* not only introduced a mandatory, "per se" procedure, but focused judicial scrutiny on the issue of waiver. *See, e.g.*, Comment, *supra* note 94, at 197.

115. "The purpose of the *Miranda* warnings is to convey information to the suspect. Plainly, one who is told something he does not understand is no better off than one who is told nothing at all." United States v. Frazier, 476 F.2d 891, 900 (D.C. Cir. 1973) (Bazelon, C.J., dissenting), *cert. denied*, 414 U.S. 911 (1973).

116. The recognition that children stand on a different legal footing than adults is reflected in the host of legal disabilities imposed on children for their own protection. As one court noted:

> The concept of establishing different standards for a juvenile is an accepted legal principle since minors generally hold a subordinate and protected status in our legal system. There are legally and socially recognized differences between the presumed responsibility of adults and minors. . . . [M]inors are unable to execute a binding contract . . ., unable to convey real property . . ., and unable to marry of their own free will . . . . It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages . . ., or even donate their own blood . . ., should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.

Lewis v. State, 259 Ind. 431, 437-38, 288 N.E.2d 138, 141-42 (1972) (citations omitted). The same factors of age and relative immaturity that have resulted in various legal doctrines to protect minors from their own incapacity would appear to apply to waivers of constitutional rights and their attendant consequences as well. If children are legally incapable of making a contract, executing a valid will, or entering into a marriage, the disability seemingly would also attend the making of incriminating statements. *See, e.g.*, Bailey & Soderling, *Born to Lose—Waiver of Fifth and Sixth Amendment Rights by Juvenile Suspects*, 15 CLEARINGHOUSE REV. 127, 129 (1981). Courts have, however, indulged the view that minors can intelligently waive their rights, at least to incriminate themselves, because the judiciary views confessions as an important tool of law enforcement. *See, e.g.*, Comment, *supra* note 94, at 201; *see also* People v. Lara, 67 Cal. 2d 365, 379-81, 432 P.2d 202, 212-13, 62 Cal. Rptr. 586, 596-97 (1967), *cert. denied*, 392 U.S. 945 (1968).

difficulty, however, raise other troublesome issues.[117] The option adopted by the Minnesota Supreme Court[118] is to continue to use a "totality of the circumstances" test, raise judicial awareness about the particular vulnerabilities of youth, and hope that juvenile court judges conscientiously reviewing waivers under the totality of the circumstances will be able to distinguish between competent and incompetent waivers and confessions by juveniles.[119] This solution, however, is weakened by the multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations that make almost every case unique. These factors result in virtually unlimited and unreviewable judicial discretion.[120] Thus, when the "totality" test is viewed in its procedural context, it appears to exclude only the most egregiously obtained confessions and then only on a haphazard basis.[121]

---

117. For example, one commentator identifies five policy strategies for assessing the validity of a juvenile's waiver: 1) continued adherence to the adult "totality of the circumstances" test; 2) exclusion of confessions obtained from a juvenile who is under juvenile court jurisdiction from admission in an adult criminal prosecution following waiver; 3) an "Atmospheric Requisite Standard," or a requirement that the relationship between the juvenile and the interrogator be sufficiently adversarial, so that the youth would not be lulled into confessing by the informal atmosphere of the juvenile court; 4) a statutory requirement that parents be promptly called or a youth promptly arraigned as a prerequisite to police interrogation; and 5) a mandatory requirement of parental presence during police interrogation. *See* Comment, *supra* note 94, at 201-07.

118. *See supra* notes 101-07.

119. *See* MINN. R.P. JUV. CT. 6.01; *cf.* Commonwealth v. Roane, 494 Pa. 389, 396-98, 329 A.2d 286, 289-90 (1974) (Eagen, J., dissenting) (parental presence requirement is "a prophylactic rule [that] is unrealistic").

120. *See, e.g.*, Y. KAMISAR, *supra* note 93, at 43-44, 64-76; Comment, *supra* note 94, at 202. Grisso notes that "[t]he degree to which judges can weigh these factors consistently, however, is difficult to discern. There are numerous combinations of factors possible and no guidelines as to how they should be weighed and balanced. This results in almost unlimited judicial discretion." Grisso, *supra* note 110, at 1138-39. Indeed, in Fare v. Michael C., 442 U.S. 707 (1979), in which the United States Supreme Court upheld the applicability of the totality of the circumstances test, there were substantial divisions within the Court over its meaning as applied to the facts of the case itself. Both dissenting opinions concluded that the youth did not understand the rights he purportedly waived. *Compare id.* at 724-27 (the youth made an intelligent waiver) *with id.* at 733-34 (Powell, J., dissenting) (discussing evidence suggesting that the youth did not understand his rights) *and id.* at 730 & n.1 (Marshall, J., dissenting) (the police did not attempt to allay the youth's concern that the police would erroneously tell him that a police officer was an attorney in order to elicit information).

121. Even a cursory review of the cases suggests the extreme facts required to find that a juvenile's waiver is invalid. *See, e.g.*, People v. Baker, 9 Ill. App. 3d 654, 292 N.E.2d 670 (1973) (15-year-old, I.Q. of 72, first grade reading level, non-

In light of the difficulties of the "totality" test, several jurisdictions have attempted to develop some concrete guidelines or per se rules requiring the presence of an "interested" adult, such as a parent or an attorney, at the interrogation of a juvenile before the confession or waiver can be valid.[122] The per se approach, as advocated by commentators and adopted by courts, excludes any waiver or confession made by a juvenile without adherence to the requisite procedural safeguards.[123]

Courts and commentators have advanced a variety of reasons for such a per se requirement. In *In re Dino*,[124] for example, the Louisiana Supreme Court asserted that

> the rights which a juvenile may waiver [sic] before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or advisor so relatively simple and well established as a safeguard against a juvenile's improvident judicial acts, that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights.[125]

---

functional student). Juvenile's confessions typically are admitted by trial courts, and only extreme facts will overturn those admissions on appeal. For examples of the facts required to overturn a confession, see, e.g., Thomas v. State, 447 F.2d 1320 (4th Cir. 1971) (15-year-old, I.Q. of 72, fifth grade dropout, 19 hours of incommunicado interrogation, not taken before a judge for two days, and not given adequate explanation of his constitutional rights); *In re* Estrada, 1 Ariz. App. 348, 403 P.2d 1 (1965) (14-year-old, low education and literacy, serious and complex charges, hasty proceedings); *In re* P., 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972) (14-year-old, retarded, immature, first offender).

122. *See, e.g.*, Lewis v. State, 259 Ind. 431, 288 N.W.2d 138 (1972) (parental presence an absolute prerequisite to admissibility); *In re* Dino, 359 So. 2d 586 (La.) (same), *cert. denied*, 439 U.S. 1047 (1978). *See generally* Levy & Skacevic, *What Standard Should be Used to Determine a Valid Juvenile Waiver*, 6 PEPPERDINE L. REV. 767 (1979); Note, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543 (1973); Note, *Waiver of* Miranda *Rights by Juveniles: Is Parental Presence a Necessary Safeguard?*, 21 J. FAM. L. 725 (1982); Comment, *The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule*, 17 DUQ. L. REV. 659 (1978).

123. The difference between the totality test and the per se approach reflects the tensions between the Crime Control and Due Process Models. *See supra* note 88. The totality approach allows courts discretion to consider a youth's maturity, but imposes minimal interference with police investigative work. The per se approach assumes that most juveniles are immature and hence require special protections to assure their understanding of the process. Although the per se requirement greatly simplifies the role of courts in the administration of the juvenile process, *see* Allen, *supra* note 48, at 532, it may provide unnecessary protection for the occasional sophisticated youth in order to afford adequate protection for the vast majority of unsophisticated juveniles, *see* Grisso, *supra* note 110, at 1135.

124. 359 So. 2d 586 (La. 1978), *cert. denied*, 439 U.S. 1047 (1978).

125. *Id.* at 592. The *Dino* court also observed that reliance on the "totality of the circumstances" test

> tends to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them in adult cases. Although the *Miranda* court did not express itself specifically on the spe-

The perceived virtues of a per se parental presence requirement include mitigating the dangers of untrustworthiness, reducing coercive influences, providing an independent witness who can testify in court as to any coercion that was present, assuring the accuracy of any statements obtained, and relieving police of the burden of making subjective judgments on a case-by-case basis about the competency of the youths they are questioning.[126] Indiana[127] and Georgia[128] also have judicially created per se requirements, as did Pennsylvania until very re-

---

cial needs of juveniles confronted with police interrogation, the reasons given for making the warning an absolute prerequisite to interrogation point up the need for an absolute requirement that juveniles not be permitted to waive constitutional rights on their own.

Id. at 591.

126. The problem of the inability of police to anticipate in advance whether a statement obtained from a juvenile will be admissible has been a concern of other courts as well. As the Indiana Supreme Court noted in Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972):

> The authorities seeking to question a juvenile enter into an area of doubt and confusion when the child appears to waive his rights to counsel and against self-incrimination. They are faced with the possibility of taking a statement from him only to have a court later find that his age and the surrounding circumstances precluded the child from making a valid waiver. There are no concrete guidelines for the authorities to follow in order to insure that the waiver will be upheld. The police are forced to speculate as to whether the law will judge this accused juvenile on the same plane as an adult in regard to the waiver of his constitutional rights, or whether the court will take cognizance of the age of the child and apply different standards. . . .
>
> . . . .
>
> . . . Clearly defined procedures should be established in areas which lend themselves to such standards in order to assure both efficient police procedure and protection of the important constitutional rights of the accused. Age is one area which lends itself to clearly defined standards.

Id. at 436-37, 288 N.E.2d at 141; *see also Dino*, 359 So. 2d at 591.

127. *See* Lewis v. State, 259 Ind. 431, 439, 288 N.E.2d 138, 142 (1972) (requiring the presence of a parent or guardian is a safeguard that recognizes "the inherent differences between adults and minors" and ensures that any waiver is truly voluntary). The *Lewis* court emphasized that it was not erecting a bar to juvenile confessions, but rather establishing a procedure by which to gauge their admissibility:

> The rule adopted here does not mean that a minor's confession is per se inadmissible but merely holds that, as a result of the age of the accused, the law requires certain specific and concrete safeguards to insure the voluntariness of a confession. The long standing tradition that juveniles can waive their right to silence or to an attorney is continued, but at the same time another long termed tradition, that such waivers require special precautions to insure it be done knowingly and intelligently, is recognized.

Id. at 440, 288 N.E.2d at 142-43.

128. *Cf.* Freeman v. Wilcox, 119 Ga. App. 325, 329, 167 S.E.2d 163, 167 (1969) (both parent and child must be advised of the child's right to have counsel present during interrogation).

cently.[129] The California Supreme Court created a slightly dif-

129. The Pennsylvania Supreme Court has come full circle on its view of the procedural safeguards required at the interrogation of a juvenile. Initially, the standard for determining the admissibility of a juvenile's waiver and confession was the traditional totality of the circumstances test. *See, e.g.*, Commonwealth v. Porter, 449 Pa. 153, 159, 295 A.2d 311, 317 (1972); Commonwealth v. Moses, 446 Pa. 350, 354, 287 A.2d 131, 133 (1971). It then created a per se "interested adult" rule which provided that juveniles could not waive their right to silence or to the assistance of counsel without first being provided opportunity to consult with an "interested adult," who is informed of the juvenile's rights and is interested in the welfare of the child. *See, e.g.*, Commonwealth v. Markle, 475 Pa. 266, 269, 380 A.2d 346, 348 (1977); Commonwealth v. McCutchen, 463 Pa. 90, 93, 343 A.2d 669, 670 (1975), *cert. denied*, 424 U.S. 934 (1976), *overruled*, People v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983); Commonwealth v. Starkes, 461 Pa. 178, 185-86, 335 A.2d 698, 701 (1975); Commonwealth v. Roane, 459 Pa. 389, 394-95, 329 A.2d 286, 289-90 (1974).

In *Roane*, 459 Pa. 389, 329 A.2d 286 (1974), the Pennsylvania Supreme Court relied upon language in Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962), *see supra* note 96, suggesting that an immature youth needs the opportunity to consult with a lawyer or other adult. The court excluded a juvenile's confession because a request by the boy's mother for counsel for her son was ignored. *Roane*, 459 Pa. at 394-95, 329 A.2d at 288. In *Markle*, 475 Pa. 266, 380 A.2d 346 (1977), the court emphasized the per se nature of the parental consultation requirement. "When a juvenile has not been given this opportunity for consultation, we need not look to the totality of the circumstances to determine the voluntariness of the confession." *Id.* at 270, 308 A.2d at 348. Then, in Commonwealth v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983), the Pennsylvania Supreme Court retreated from its "overly protective and unreasonably paternalistic" per se rule in order to give "more adequate weight to the interests of society." *Id.* at 223, 465 A.2d at 992. According to the *Christmas* formulation, there is a rebuttable presumption of a juvenile's incompetence to waive his or her rights.

> [W]e presume that a juvenile is incompetent to waive his rights without opportunity for consultation with an informed and interested adult; this presumption must be tested against the totality of the circumstances surrounding a given waiver to determine whether the particular juvenile might in fact be competent to waive his rights without such opportunity.

Id. at 223, 465 A.2d at 992.

Because the prosecution already bears the burden of establishing the voluntariness of confessions, *see, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972), it is unclear how a presumption of incompetence differs from a requirement that the prosecution affirmatively establish the validity of a waiver under the totality of the circumstances. *See, e.g.*, Commonwealth v. Christmas, 502 Pa. at 225-26, 465 A.2d at 993 (Larsen, J., concurring). Finally, in Commonwealth v. Williams, — Pa. —, 475 A.2d 1283 (1984), the Pennsylvania Supreme Court repudiated the rebuttable presumption it had created in *Christmas*, and returned to the traditional totality of the circumstances analysis.

> The requirements of due process are satisfied, and the protection against the use of involuntary confessions which law and reason demand is met by application of the totality of circumstances analysis to all questions involving the waiver of rights and the voluntariness of confessions made by juveniles. All of the attending facts and circumstances must be considered and weighed in determining whether a juvenile's confession was knowingly and freely given. Among those factors are the juvenile's youth, experience, comprehension, and the presence or absence of an interested adult.

Id. at —, 475 A.2d at 1288.

ferent per se rule in *People v. Burton*,[130] treating a juvenile's request to see his parents as the functional equivalent of an invocation of the fifth amendment privilege and analogous to a request to consult with an attorney.[131] A number of other states have enacted statutes that make the opportunity for a youth to consult with an interested adult a prerequisite to the admissibility of any confession.[132]

The Minnesota Supreme Court's Juvenile Justice Study Commission, hoping to achieve a similar result, proposed a per se rule requiring parents or guardians to be present at any interrogation and to agree in writing to any waiver of rights by the juvenile.[133] Without such an adult presence, no statement

---

130. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

131. *See id.* at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6; *see also* People v. Randall, 1 Cal. 3d 948, 954, 464 P.2d 114, 117-18, 83 Cal. Rptr. 658, 661-62 (1970) ("'If the individual [in an adult criminal case] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendmant privilege . . . .'") (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)). The California Supreme Court held in *Burton* that when a child who is in custody and who is interrogated without the presence of counsel requests to see one of his or her parents, further questioning must cease. That holding presaged the United States Supreme Court's decision in Fare v. Michael C., 442 U.S. 707 (1979). *See supra* notes 98-100 and accompanying text. In *In re* Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978), *rev'd sub nom.*, Fare v. Michael C., 442 U.S. 707 (1979), the California Supreme Court extended *Burton*'s "parental request" rule to a youth's request to consult with his or her probation officer. The California court reasoned that because the probation officer is a "trusted guardian figure" who exercises the parens patriae authority of the state, a minor's request for his or her probation officer is the same as a request to consult with parents during an interrogation which, under *Burton*, constitutes an invocation of the fifth amendment privilege. *See id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361. The United States Supreme Court rejected this position in Fare v. Michael C., 442 U.S. 707 (1979), distinguishing the role of counsel from that of probation officers in the *Miranda* process. *See id.* at 718-24.

132. *See, e.g.*, COLO. REV. STAT. § 19-2-102(3)(c)(I) (1978); CONN. GEN. STAT. ANN. § 46b-137(a) (West Supp. 1984); N.M. STAT. ANN. § 32-1-27(E)(8) (1978); OKLA. STAT. ANN. tit. 10, § 1109(A) (West Supp. 1983-1984).

133. The proposed rules that the Juvenile Justice Study Commission originally submitted to the Minnesota Supreme Court recommended a per se requirement that parents or guardians be present at any juvenile's interrogation and also would have required that the parents agree to any waiver of rights. *See In re* Proposed Rules of Procedure for Juvenile Court, *supra* note 86, Rule 6.02 ("[A] waiver made out of court must be in writing and signed by the child *and* the child's parent(s) or guardian.") (emphasis added). Proposed Rule 15.02, governing the waiver of counsel, included a similar per se parental concurrence requirement. The Proposed Rules' inclusion of a per se parental presence requirement was one of the philosophical and procedural issues dividing the Rules Drafting Task Force and the Juvenile Justice Study Commission. The Minnesota Supreme Court's reinstatement of the totality of the circumstances test represents one of the instances in which the court had a clear choice between providing an additional safeguard that recognized the immatur-

by the juvenile would have been admissible.[134] The proponents of the rule, like the jurisdictions requiring per se parental presence, viewed juveniles as neither mature enough to understand their rights nor competent enough to waive them without prior consultation with a knowledgeable adult. Advocates of parental presence believe that it reduces the juvenile's sense of isolation, pressure, and fear in the interrogation process and provides legal advice about the consequences of a waiver that the juvenile otherwise might not appreciate.

A per se requirement assumes both that the presence of parents would benefit the child, because of an identity of interests, and that parents can adequately understand their child's legal rights and function as effective advisors. Such assumptions, however, may not be valid. Requiring parental presence during interrogation may not benefit the child because it may increase rather than decrease the coercive pressures to which the youth is subjected.[135] The parents' potential conflict of interest with the child, their emotional reactions to their child's arrest, or their own intellectual or social disabilities may make them unable to play the envisioned supportive role for the child.[136] One study found that most parents did not directly advise their children about the waiver decision and that those that did almost always urged the child to waive rights.[137] Moreover, research on the extent to which adults understand and intelligently waive their own *Miranda* rights casts doubt on whether even well-intentioned parents can provide much assistance; they seldom have legal training and may not understand the problems facing the child.[138] Indeed, the case law is

---

ity and lack of capacity of most juveniles, or treating youths like adult criminal defendants, and chose the latter course.

134. *In re* Proposed Rules of Procedure for Juvenile Court, *supra* note 86, Rule 6.03.

135. One critic of the parental presence requirement noted:

> [Will] the presence of this "friendly adult" . . . create the intended results[?] Parents, possibly ashamed and/or angered that their child is in custody, may further coerce the child into owning up to the alleged offense, instead of affording the youth shelter. Moreover, a parent may be no more knowledgable than the juvenile about constitutional rights and the consequences of a confession.

Comment, *supra* note 94, at 205.

136. *See* Grisso, *supra* note 110, at 1142; Comment, *supra* note 94, at 205.

137. T. Grisso, *supra* note 113, at 187, 200. This empirical observation was bolstered by questionnaire surveys that found that a substantial majority of the parents felt that juveniles should never be allowed to withhold from police any information about their involvement in a crime. *Id.* at 175, 179.

138. Professor Grisso explained:

> The most serious objections to this [parental presence] alternative concern the ability of laymen to provide effective assistance in a

replete with instances of parents coercing their children into confessing to the police.[139] Rather than mitigating the pressures of interrogation, parents appear predisposed to coercing their children to waive the right to silence.

The Minnesota Supreme Court ultimately rejected the Study Commission's proposed per se rule requiring parental presence. The court's decision seems wise, because the proposed rule would not adequately safeguard a child's rights and

---

> preinterrogation setting. Commentators have observed that many parents do not care, and that "[o]ften the parents are, at best, only equal in capacity to the child and therefore poorly equipped to comprehend the complexities confronting them." In one recent empirical study, nearly three-quarters of a sample of parents disagreed with the premise that children should be allowed to withhold information from the police when suspected of a crime. In another study, more than two-thirds of the parents present during actual preinterrogation waiver proceedings offered no comments or advice to their children. When these findings are coupled with those of the instant studies, which indicate that many adults do not themselves adequately understand their *Miranda* rights, the "interested adult" alternative becomes even less attractive.

Grisso, *supra* note 110, at 1163 (quoting McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 570 (1970)); *see also* T. GRISSO, *supra* note 113, at 170-82; Grisso & Ring, *Parents' Attitudes Toward Juvenile's Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 224 (1979) (citing studies that suggest "that parental guidance in such matters often is not an adequate substitute for the advice of trained legal counsel").

Research evaluating the extent to which adults understand and intelligently waive their *Miranda* rights raises the question whether parents can provide their children with much technical, legal assistance. *See, e.g.*, Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59 (1968) ("even highly educated men may make incriminating admissions simply because they fail to comprehend the legal significance of their remarks"); Griffith & Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300, 305-10 (1967) (even sophisticated subjects failed to understand the nature and function of their constitutional rights); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1372-75 (1968) ("ratings indicated that 15 percent of the eighty-five 'post-*Miranda* defendants' failed to understand the warning of the right to presence of counsel, and 24 percent failed to understand the warning of the right to appointed counsel"); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1613 (1967) ("Warnings are not useless, but neither can they eliminate whatever 'inherently coercive atmosphere' the police station may have.").

139. *See, e.g.*, United States v. Fowler, 476 F.2d 1091, 1093 (7th Cir. 1973). Some courts have held that when a child responds to a question from his or her parent in the presence of police officers, he or she is not subjected to custodial interrogation and *Miranda* does not apply. *See, e.g., In re* C.P.D., 367 A.2d 133, 135 (D.C. 1976). Others have ignored reality in order to avoid finding coercion. *See, e.g.*, Anglin v. State, 259 So. 2d 752, 752 (Fla. Dist. Ct. App. 1972) (mother repeatedly urged her fifteen-year-old boy "to tell the truth" or "she would clobber him," but the court concluded that "the motherly concern for . . . the basic precepts of morality are to be commended. . . . [and there was no] threat or coercion on [her] part").

might even aggravate the problem. Moreover, it would have introduced an additional tier of litigable issues, requiring courts to determine whether the parent was informed of the juvenile's rights, whether the parent understood those rights, and whether the parent and child had an adequate opportunity to confer. This might have diverted judicial attention from an assessment of the validity of the confession itself to a mechanical inquiry into the parents' presence and understanding. The court's decision to reinstate the "totality of the circumstances" test is hardly an adequate alternative, however, because of the inability to adequately consider the child's immaturity and because appellate courts are unable to continually monitor the discretionary decisions of trial judges.[140] In addition, the new Minnesota rules on waivers of rights may constitute a regression from the safeguards previously afforded juveniles. The previous juvenile rules of procedure used in the nonmetropolitan counties prohibited a child from waiving the "right to counsel at a hearing to determine whether a delinquency cause shall be referred for prosecution, when the cause involves an alleged act by the child that would be a felony if committed by an adult" and required that the child have access to counsel at reasonable times whenever in custody or detention.[141]

Although the preceding discussion has focused on waivers of *Miranda* rights during police interrogation, similar problems exist with respect to analyzing waivers of the right to counsel under Minnesota's Rule 15 as well. There is both a "fifth amendment right to counsel" and a sixth amendment right to the assistance of counsel at trial.[142] The Minnesota Rules of Procedure for Juvenile Court use the same "totality of the circumstances" to evaluate waivers of both types of rights. Although a waiver of *Miranda* rights may provide the state with additional evidence it would not otherwise have, a waiver of the right to counsel fundamentally alters both the structure and function of the entire juvenile justice process and the ability of a defendant to participate in adversarial proceedings. The need to insure that waiver of the right to counsel is "knowing" and "voluntary" is thus even more compelling than for waiver of *Miranda* rights.

Instead of relying on a discretionary review of the circum-

140. *See supra* notes 109-12 and accompanying text.

141. Minn. R. P. Prob.-Juv. Cts. 1-5(1).

142. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981) (fifth amendment right to have counsel present during custodial interrogation); United States v. Henry, 447 U.S. 264 (1980) (sixth amendment right to the assistance of counsel at trial).

stances, a better way to "assure that the constitutional rights of the child are protected and to promote the rehabilitation of the child"[143] would be the adoption of a per se rule that requires consultation with counsel and the presence of an attorney at every interrogation of a juvenile and prior to any waiver of the right to counsel.[144] Since waivers of both *Miranda* rights and the right to counsel involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any other alternative could be as effective. A per se requirement of consultation with counsel prior to a waiver takes account of the immaturity of youths and their lack of experience in law enforcement situations. In addition, however, it recognizes that attorneys rather than parents possess the skills and training necessary to assist the child in the adversarial process.[145] Both the Juvenile Justice Standards Project and the *Gault* and *Fare* Courts emphasized the importance of adequate legal counsel in situations where a juvenile's waiver of rights is likely to affect

---

143. MINN. R.P. JUV. CT. 1.02.

144. *See* T. GRISSO, *supra* note 113, at 200.

145. The Juvenile Justice Standards Project recommended that "[t]he right to counsel should attach as soon as the juvenile is taken into custody . . ., when a petition is filed . . ., or when the juvenile appears personally at an intake conference, whichever occurs first." JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 at 89. In addition, "[the juvenile] should have 'the effective assistance of counsel at all stages of the proceeding' " and this right to counsel is mandatory and nonwaivable. *Id.*

The commentary to the Standards does qualify the absolute, nonwaivable nature of the right to counsel. "In recommending that the respondent's right to counsel in delinquency proceedings should be nonwaivable, this standard is not intended to foreclose absolutely the possibility of *pro se* representation by a juvenile." JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEDURES, Standard 5.1 commentary at 93. The United States Supreme Court, in Faretta v. California, 422 U.S. 806 (1975), held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so. *Id.* at 835-36. The *Faretta* Court emphasized that the sixth amendment guarantees defendants the "assistance of counsel."

> It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820. The crucial issue for juveniles, as for adults, is whether such a waiver can occur "voluntarily and intelligently," particularly without prior consultation with counsel. It would be an extraordinary juvenile who should be able to persuade a court that he or she possesses sufficient maturity and legal sophistication to effect pro se representation and still obtain a fair trial.

the result of a proceeding.[146] Mandatory, nonwaivable representation by counsel not only protects the rights of the juvenile, but also helps the courts by assisting in the efficient handling of cases and assuring that any waivers that the juvenile is entitled to make are in fact made knowingly and intelligently.[147]

146. The Supreme Court in *Gault* mandated the right to counsel because "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *In re* Gault, 387 U.S. 1, 36 (1967). Because the decision to waive the privilege against self-incrimination and confession often is determinative of the outcome of the proceeding, "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings . . . . The child 'requires the guiding hand of counsel *at every step* in the proceedings against him.'" *Id.* at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)) (emphasis added).

The *Gault* Court noted that the President's Crime Commission recommended that "in order to assure 'procedural justice for the child,' it is necessary that '[c]ounsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.'" *Id.* at 38 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)). The Court also observed that the Commission emphasized that the right to counsel was the cornerstone of the entire procedural apparatus of juvenile justice, "the keystone of the whole structure of guarantees that a minimum system of procedural justices requires." *Id.* at 38 n.65 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967)).

Similarly, the Supreme Court in Fare v. Michael C., 442 U.S. 707 (1979), based its decision that a request for a probation officer was not a per se invocation of the right to counsel on the crucial role of counsel in the criminal and juvenile processes. "It is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend." *Id.* at 722. The *Fare* Court elaborated on the crucial role of counsel by noting that

> the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence.
>
> The per se aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.

Id. at 719 (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)).

147. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 commentary at 92. Commentators

The requirements of assistance of counsel, nonwaivability of counsel, and consultation with counsel prior to the waiver of other rights is not just the "idealistic" recommendation of policy groups and commentators. For several years, the Texas Family Code had a provision invalidating juvenile waivers of rights made without assistance of counsel.[148] The Texas courts interpreted the legislation to include an absolute right to counsel unless the child waived the right with the assistance of an attorney.[149] One court concluded that

> the Legislature was taking every precaution to protect the rights of minors from those who might unintentionally or perhaps in some cases intentionally take advantage of one who is young, inexperienced and perhaps unable to exercise his constitutional rights until he finds it is too late to have those rights protected.[150]

Legislative amendments in 1975 eliminated the absolute assistance of counsel, substituting instead the conventional *Miranda*

---

have suggested other advantages that could follow from mandatory representation of juveniles. Professor Grisso, for example, has observed:

> [W]hile defense counsel would almost always advise a client to remain silent until the attorney has had the opportunity to review the case fully, the per se proposal would not always reduce the amount of information the police acquire about juvenile offenses. In some instances, the lawyer might assist the suspect to explain clearly his noninvolvement in the incident; in other cases, the lawyer might help the juvenile make a statement that is not susceptible to an inaccurate or adverse interpretation by the police. At all events, since information gathered from police interrogations of juveniles is often inaccurate and therefore useless, the proposed per se rule could only serve to increase the accuracy of any information imparted.

Grisso, *supra* note 110, at 1163-64.

148. The Texas law provided that:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
> (1) the waiver is made by the child and the attorney for the child;
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
> (3) the waiver is voluntary; and
> (4) the waiver is made in writing or in court proceedings that are recorded.

TEX. FAM. CODE ANN. § 51.09 (Vernon 1975) (amended 1975); *see infra* note 151 and accompanying text; *see also* Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH L. REV. 509, 524-25 (1974) (the Texas legislature felt that the child's attorney is the only appropriate adult who may effectively concur with a waiver of a right by a child); Comment, *Waiver of Constitutional Rights by a Juvenile Under the Texas Family Code: The 1975 Amendments to Section 51.09*, 17 S. TEX. L.J. 301, 303 (1975) (the Texas statute gave rise to the most progressive provisions of juvenile law before its scope was limited by the 1975 amendments).

149. *See, e.g., In re* S.E.B., 514 S.W.2d 948, 950 (Tex. Civ. App. 1974); *In re* R.E.J., 511 S.W.2d 347, 349 (Tex. Civ. App. 1974).

150. *In re* S.E.B., 514 S.W.2d 948, 950-51 (Tex. Civ. App. 1974).

warning/waiver formula.[151] Several other jurisdictions, however, including Iowa and Wisconsin, maintain significant restrictions on the circumstances under which a juvenile may waive either *Miranda* rights or the right to the assistance of counsel in all stages of the juvenile process.[152] These states have also recognized that uncounseled delinquency convictions cannot lead to out-of-home dispositions of such youths.[153]

Affording mandatory, nonwaivable counsel to juveniles during interrogation and at all court proceedings is not, however, a panacea. Attorneys may not be capable of or committed to representing juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case," or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court.[154] Although *Gault* was premised on the ability of

151. *See* TEX. FAM. CODE ANN. § 51.09(b) (Vernon Supp. 1975-1983). The legislative changes provoked one writer to note:

> Under the new amendment, the child is subjected to the same pressure and police chicanery that has diluted the protection of *Miranda* for adults, but the juvenile does not have the same presence of mind as the more mature adult violator. The juvenile's right to counsel, which was so effectively safeguarded by prior § 51.09, has now been denied him . . . . One might surmise that the amendment is worded to ensure swift and easy confessions and, therefore, convictions.

Comment, *supra* note 148, at 310.

152. *See* IOWA CODE ANN. § 232.11 (West Supp. 1984-1985); WIS. STAT. ANN. § 48.23 (West 1983). Iowa prohibits the waiver of counsel at interrogation by any youth under sixteen years of age without written parental concurrence. Regardless of any *Miranda* waivers, no child of any age may waive the assistance of counsel at any of the various stages and hearings of the juvenile justice process. IOWA CODE ANN. § 232.11. Alabama has also experimented with measures to secure effective legal advice to juveniles prior to interrogation. *See* ALA. CODE § 12-15-57 (1975) (repealed 1981).

153. *See, e.g.*, WIS. STAT. ANN. § 48.23(1)(a) (West Supp. 1983-1984); *cf.* Scott v. Illinois, 440 U.S. 367 (1979) (no indigent defendant may be imprisoned unless the state has afforded him the assistance of appointed counsel).

154. The co-optation of defense attorneys in the adult criminal process has been described in Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 15, 19-20. Blumberg argues that certain institutional pressures and the need to maintain stable, cooperative relationships with other personnel in the system are inconsistent with effective advocacy and an adversary position. Defense attorneys are involved in ongoing relations with prosecutors and judges and become dependent on their cooperation. Similarly, prosecutors and the court depend on defense attorneys to cooperate in order to expedite a large volume of cases. The result is a system of informal relationships in which maintaining organizational stability may become more important than the representation of any given client. *See id.* at 18-24. The same analysis has been applied to the role of attorneys in juvenile court. *See, e.g.*, A. PLATT, *supra* note 2, at 163-75. *See gen-*

lawyers to manipulate formal procedures for the benefit of their clients, many commentators have noted that this does not always happen in juvenile proceedings.[155] Indeed, there are some indications that representation of juveniles by lawyers in more traditional "therapeutic" juvenile courts may actually redound to the disadvantage of the client in adjudications or dispositions.[156]

A rule mandating nonwaivable assistance of counsel for juveniles prior to interrogation as well as throughout the process would have substantial implications for the juvenile court. It would probably restrict the ability of police to obtain waivers from and interrogate youths who are criminally sophisticated as well as those too immature to protect themselves. Indeed, courts have decried the effects that procedural safeguards and per se rules would have on the efficient repression of crime. "It is apparent most courts, required to deal pragmatically with an ever-mounting crime wave in which minors play a disproportionate role, have considered society's self-preservation interest

---

erally Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 548-53 (1971) (juveniles with counsel are more likely to be incarcerated than juveniles without counsel); Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1184 (1968) (private lawyers do not enhance juveniles' bargaining power or rights); Platt, Schechter & Tiffany, *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 629 (1968) (informal relationships in juvenile court influence judges to dispose of cases based on their personal feelings about counsel). Other studies have questioned whether lawyers can actually perform as adversaries in a system rooted in parens patriae and benevolent rehabilitation. *See, e.g.*, W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 37-39 (1972); Fox, *supra* note 2, at 1236; Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 587-93 (1978); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1410 (1973); Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491, 561 (1969); Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 430-34; *see also* Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 411 (1971) (it is sometimes the proper role of counsel to seek the least serious disposition rather than to defend zealously); McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 597-98 (1970) (role of counsel as advocate unclear when placement appears to be best for the child).

155. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY 171-219 (1977); W. STAPLETON & L. TEITELBAUM, *supra* note 154, at 63-96; Fox, *supra* note 2, at 1236.

156. *See, e.g.*, D. HOROWITZ, *supra* note 155, at 191-94; W. STAPLETON & L. TEITELBAUM, *supra* note 154, at 63-96; Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 304-06 (1980).

in rejecting a blanket exclusion for juvenile confessions."[157] Such an exclusion would impose substantial burdens on the delivery of legal services in rural areas.[158]

The response to all of these objections, however, is that every defendant is already entitled by *Gault* and *Miranda* to the assistance of counsel during interrogation and at every critical stage of the process, that only "an inexperienced person in the toils of the law" will cooperate with the police to the person's own detriment, and that only an attorney can redress the imbalance between a vulnerable youth and the state.[159] The issue is not one of entitlement, but rather the ease or difficulty with which waivers of counsel are found, which in turn has the enormous implications for the entire administration of the juvenile justice process discussed above.

Despite these difficulties, however, the one inescapable fact of juvenile justice administration in Minnesota is that a majority of all youths prosecuted as delinquents are not represented by counsel during the process.[160] Nearly half the juveniles charged with felonies and more than a quarter of those sentenced to correctional facilities had no lawyer,[161] and the county-by-county variations in rates of representation suggest that nonrepresentation reflects judicial policies rather than

---

157. *In re* Thompson, 241 N.W.2d 2, 5 (Iowa 1976); *see also* Commonwealth v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983) (adopting a presumption that no person under eighteen years of age is competent to waive the right to counsel).

158. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 commentary at 93 (inadequate availability of legal services in rural areas may make compliance with mandatory counsel recommendation difficult).

159. *See* H. PACKER, *supra* note 88, at 203. As Professor Grisso explained:

> The beneficial effects of a per se requirement of counsel in juvenile waiver proceedings should be enhanced as the juvenile justice system increases its own support of a strong advocacy role for these attorneys. At a minimum, the requirement provides a reasonable level of protection for younger juveniles; without this protection, they would be subjected to the very circumstances that Miranda sought to eliminate.

Grisso, *supra* note 110, at 1164.

160. "In the majority of delinquency/status offense cases (62%) there is not representation." K. FINE, OUT OF HOME PLACEMENT OF CHILDREN IN MINNESOTA: A RESEARCH REPORT 48 (1983).

161. Data collected in 1983, which does not include Hennepin County, indicates that juveniles appear without counsel in 48% of delinquency adjudications and 68% of status adjudications. Data provided by Dr. Stephen Coleman, Stastical Analysis Center of the Minnesota State Planning Agency 1 (1984) (a copy of the tables is on file with the author). Forty-five percent of the youths adjudicated for the felony of burglary were convicted without counsel, and 28% of the youths sentenced to juvenile correctional facilities had no lawyers. *Id.* at 2.

youthful competencies.[162] Although national statistics are not available, surveys of representation by counsel in other jurisdictions suggest that "there is reason to think that lawyers still appear much less often than might have been expected."[163] There may be several reasons so many youths are unrepresented—parental reluctance to retain an attorney, inadequate public-defender legal services in nonurban areas, a judicial encouragement of and readiness to find waivers of counsel in order to ease judges' administrative burdens, or a judicial predetermination of dispositions with nonappointment of counsel where probation is the anticipated outcome. Whatever the reason, and despite *Gault*'s requirement of a right to counsel for juveniles facing potentially coercive action,[164] most youths never see a lawyer, waive their rights without any appreciation of the legal consequences, and thus face the prosecutorial powers of the State alone and unaided.

The constitution does not require mandatory, nonwaivable counsel for minors, or prohibit minors from waiving their fifth amendment rights without prior consultation with their attorneys, or prevent minors from confronting the coercive power of the state without the assistance of counsel. These requirements and prohibitions are nonetheless policy options available to the courts. The Minnesota Supreme Court's rejection of a parental presence requirement in the Proposed Rule in favor of the "totality of the circumstances" analysis is constitutional as well as clearly consistent with the law of Minnesota and a majority of other jurisdictions. As a matter of policy, however, the court's choice to put juvenile offenders on the same procedural footing as adult criminal defendants ignores the juveniles' relative immaturity, inexperience, and vulnerability to adult coercion.

---

162. There are enormous county-by-county variations in the rates of nonrepresentation, ranging from a high of over 90% to a low of less than 10%. *Id.* at 2.

163. D. HOROWITZ, *supra* note 155, at 185. Although the rates of representation vary widely from county to county within a state, Horowitz' survey of the available data failed to find one state in which even 50% of the juveniles were represented by counsel. *Id.* at 185-86; *see also* Clarke & Koch, *supra* note 156, at 297 (in 1976, the Juvenile Defender Project represented 22.3% of all juvenile cases in Winston-Salem, N.C. and 45.8% in Charlotte).

164. *See In re* Gault, 387 U.S. 1, 41 (1967).

Henry III, William A. 1986. "Reporting the Drug Problem: Have Journalists Overdosed on Print and TV Coverage?" *Time* (October 6):73.
Howe, Steven R. 1987. *The Ohio Poll: Ohioans Divided on Issue of Drug Testing*. Cincinnati: University of Cincinnati, Institute for Policy Research.
Inciardi, James A. 1986. *The War on Drugs: Heroin, Cocaine, Crime, and Public Policy*. Palo Alto, CA: Mayfield.
Lamar Jr., Jacob V. 1986. "Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs." *Time* (September 22):25-26.
McEwen, J. Thomas, Barbara Manili, and Edward Connors. 1986. "Employee Drug Testing Policies in Police Departments." In *NIJ Research in Brief*. Washington, DC: National Institute of Justice.
Morganthau, Tom, Mary Hager, Mark Miller, Kim Willenson, Karen Springen, and Andrew Murr. 1986. "A Question of Privacy: Drug Tests Raise a Host of Constitutional Issues." *Newsweek* (September 29):18, 21.
National Institute of Justice. 1986. "Testing to Detect Drug Use." In *NIJ Technology Assessment Program Alert*. Washington, DC: Author.
———1987. "New Legislation Supports Expanded Anti-Drug Abuse Efforts." *NIJ Reports* (March/April):8-10.
O'Connor, Colleen and Mark Miller. 1986. "The Military Says 'No': A Tough Program Cleans Up Drugs in the Services." *Newsweek* (November 10):26.
Oldendick, Robert W., Susan B. Sorenson, Alfred J. Tuchfarber, and George F. Bishop. 1985. "Last Birthday Respondent Selection in Telephone Surveys: A Further Test." Paper presented at the annual meeting of the Midwestern Association for Public Opinion Research, Chicago.
O'Rourke, Diane and Johnny Blair. 1983. "Improving Random Respondents Selection in Telephone Surveys." *Journal of Marketing Research* 20:428-432.
Packer, Herbert. 1968. *The Limits of the Criminal Sanction*. Palo Alto: Stanford University Press.
"Presidential Documents: Executive Order 12564, Drug-Free Federal Workplace." 1986. *Federal Register* 51 (180, September 17):32889-32893.
Rosenblatt, Roger. 1986. "The Enemy Within: A Nation Wrestles with the Dark and Dangerous Recesses of Its Soul." *Time* (September 15):59.
Ross, H. Laurence. 1984. *Deterring the Drinking Driver: Legal Policy and Social Control*. Revised and Updated Edition. Lexington, MA: Lexington Books.
Scheingold, Stuart A. 1984. *The Politics of Law and Order: Street Crime and Public Policy*. New York: Longman.
Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. 1988. "Prison Crowding: Public Attitudes Toward Strategies of Population Control." *Journal of Research in Crime and Delinquency* 25 (May): 150-169.
Stinchcombe, Arthur L., Rebecca Adams, Carol A. Heimer, Kim Lance Scheppele, Tom W. Smith, and D. Garth Taylor. 1980. *Crime and Punishment: Changing Attitudes in America*. San Francisco: Jossey-Bass.
Thomas, Evan. 1986. "America's Crusade: What Is Behind the Latest War on Drugs." *Time* (September 15):60-68.
Weisman, Adam Paul. 1986. "I Was a Drug-Hype Junkie: 48 Hours on Crock Street." *New Republic* (October 6):14-17.

In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court

Barry C. Feld

This article uses data from six states to analyze the availability of and the effects of counsel on delinquency and status offenses cases in juvenile courts. In three of the states, nearly half or more of delinquent and status offenders did not have lawyers, including many youths who received out-of-home placement and secure confinement dispositions. In all the jurisdictions, each legal variable—seriousness of present offense, detention status, and prior referrals—that was associated with more severe dispositions was also associated with higher rates of representation. However, while legal variables enhance the probabilities of representation, the presence of an attorney appeared to exert an additional, independent effect on the severity of dispositions. The article then explores the policy implications of these findings.

More than twenty years ago in *In re Gault*, the U.S. Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. The *Gault* Court mandated the right to counsel because "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution" (*Gault*, 1967, p. 36). *Gault* also decided that juveniles were entitled to the privilege against self-incrimination and the right to confront and cross-examine their accusers at a hearing. Without the

BARRY C. FELD is Professor of Law, University of Minnesota Law School, Minneapolis, MN 55455.

The data used in this article are housed in and made available by the National Juvenile Court Data Archive, which is maintained by the National Center for Juvenile Justice in Pittsburgh, Pennsylvania, and supported by the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice. The California Bureau of Criminal Statistics and Special Services, the Minnesota Supreme Court Judicial Information System, the Nebraska Commission on Law Enforcement and Criminal Justice, the New York Office of Court Administration, the North Dakota Office of State Court Administrator, and the Pennsylvania Juvenile Court Judges' Commission collected the

CRIME & DELINQUENCY, Vol. 34 No. 4, October 1988 393-424

assistance of counsel, these other rights could be negated. "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings.... The child 'requires the guiding hand of counsel at every step in the proceedings against him'" (*Gault*, 1967, p. 36). In subsequent opinions, the Supreme Court has reiterated the crucial role of counsel in the juvenile justice process. In *Fare v. Michael C.*, the Court noted that "the lawyer occupies a critical position in our legal system.... Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts" (*Fare*, 1979, p. 719).

In the two decades since *Gault*, the promise of counsel remains unrealized. Although there is a scarcity of data, in many states less than 50% of juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled (Feld, 1984, pp. 187-190). Although national statistics are not available, surveys of representation by counsel in several jurisdictions suggest that "there is reason to think that lawyers still appear much less often than might have been expected" (Horowitz, 1977, p. 185).

In the immediate aftermath of *Gault*, Lefstein, Stapleton, and Teitelbaum (1969) examined institutional compliance with the decision and found that juveniles were neither adequately advised of their right to counsel nor had counsel appointed for them. In a more recent evaluation of legal representation in North Carolina, Clarke and Koch (1980, p. 297) found that the juvenile defender project represented only 22.3% of juveniles in Winston-Salem, NC, and only 45.8% in Charlotte, NC. Aday (1986) found rates of representation of 26.2% and 38.7% in the jurisdictions he studied. Bortner's (1982, p. 139) evaluation of a large, midwestern county's juvenile court showed that "over half (58.2%) [the juveniles] were not represented by an attorney." Evaluations of rates of representation in Minnesota also indicated that a majority of

original data. Neither the respective state agencies nor the National Center for Juvenile Justice bear any responsibility for the analyses or interpretations presented herein. I was fortunate to have the opportunity to use these data through the National Juvenile Court Data Archive's Visiting Scholar Program, which was supported by OJJDP. I received exceptional support and assistance in assembling, organizing, and interpreting the states' data from Dr. Howard Snyder, NCJJ Director of Systems Research, Ms. Ellen Nimick, NCJJ Research Associate, and Mr. Terry Finnegan, NCJJ Computer Programmer. Sheldon Krantz and Don Gibbons provided constructive critiques of an earlier draft of this article. This article was presented at the 1987 annual meeting of the American Society of Criminology, Montreal, Canada.

youths are unrepresented (Feld, 1984, p. 189; Fine, 1983, p. 48). Feld (1984, p. 190) reported enormous county-by-county variations within the state in the rates of representation, ranging from a high of over 90% to a low of less than 10%. A substantial minority of youths removed from their homes or confined in state juvenile correctional institutions lacked representation at the time of their adjudication and disposition (Feld, 1984, p. 189).

There are a variety of possible explanations for why so many youths appear to be unrepresented: parental reluctance to retain an attorney; inadequate public-defender legal services in nonurban areas; a judicial encouragement of and readiness to find waivers of the right to counsel in order to ease administrative burdens on the courts; a continuing judicial hostility to an advocacy role in a traditional, treatment-oriented court; or a judicial predetermination of dispositions with nonappointment of counsel where probation is the anticipated outcome (Feld, 1984, p. 190; Bortner, 1982, pp. 136-147; Lefstein, Stapleton, and Teitelbaum, 1969; Stapleton and Teitelbaum, 1972). Whatever the reason and despite *Gault's* promise of counsel, many juveniles facing potentially coercive state action never see a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel, and face the prosecutorial power of the state alone and unaided.

Even when juveniles are represented, attorneys may not be capable of or committed to representing their juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case," or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court (Stapleton and Teitelbaum, 1972; Lefstein, Stapleton, and Teitelbaum, 1969; Fox, 1970; Platt and Friedman, 1968; Ferster, Courtless, and Snethen, 1971; McMillian and McMurtry, 1970; Kay and Segal, 1973; Bortner, 1982; Clarke and Koch, 1980; Blumberg, 1967). Institutional pressures to maintain stable, cooperative working relations with other personnel in the system may be inconsistent with effective adversarial advocacy (Lefstein, Stapleton, and Teitelbaum, 1969; Stapleton and Teitelbaum, 1972; Bortner, 1982; Blumberg, 1967).

Several studies have questioned whether lawyers can actually perform as advocates in a system rooted in *parens patriae* and benevolent rehabilitation (Stapleton and Teitelbaum, 1972; Fox, 1970). Indeed,

there are some indications that lawyers representing juveniles in more traditional "therapeutic" juvenile courts may actually disadvantage their clients in adjudications or dispositions (Stapleton and Teitelbaum, 1972, pp. 63-96; Clarke and Koch, 1980, pp. 304-306; Bortner, 1982). Duffee and Siegel (1971, pp. 548-553), Clarke and Koch (1980, pp. 304-306), Stapleton and Teitelbaum (1972), Hayeslip (1979), and Bortner (1982) all reported that juveniles with counsel are more likely to be incarcerated than juveniles without counsel. Bortner (1982, pp. 139-140), for example, found that "when the possibility of receiving the most severe dispositions (placement outside the home in either group homes or institutions) is examined, those juveniles who were represented by attorneys were more likely to receive these dispositions than were juveniles not represented (35.8% compared to 9.6%). Further statistical analysis reveals that, *regardless of the types of offenses with which they were charged*, juveniles represented by attorneys receive more severe dispositions."

THE PRESENT STUDY

The present study provides the first opportunity to analyze systematically variations in rates of representation and the impact of counsel in more than one juvenile court or even one jurisdiction. It analyzes variations in the implementation of the right to counsel in six states—California, Minnesota, New York, Nebraska, North Dakota, and Pennsylvania, as well as Philadelphia. These statistical analyses provide the first comparative examination of the circumstances under which lawyers are appointed to represent juveniles, the case characteristics associated with rates of representation, and the effects of representation on case processing and dispositions.

This study uses data collected by the National Juvenile Court Data Archive (NJCDA) to analyze the availability of and effects of counsel in delinquency and status offense cases disposed of in 1984.[1] While 30 states now contribute their annual juvenile court data tapes to the NJCDA, the six states included in this study were selected solely because their data files included information on representation by counsel.

Because of the many hazards and pitfalls in using juvenile court data, an overview of the juvenile justice process and a description of the individual state's data precedes the cross-state comparisons. The

NJCDA's unit of count is "cases disposed" of by a juvenile court.[2] Typically, juvenile delinquency cases begin with a referral to a county's juvenile court or a juvenile probation or intake department. Many of these referrals are closed at intake with some type of *informal* disposition: dismissal, counseling, warning, referral to another agency, or probation. These referrals, whether disposed of informally or petitioned to the juvenile court, also generate county record-keeping activities that are reported to the state agency responsible for compiling juvenile justice data.

The sample in this study consists exclusively of *petitioned* delinquency and status offense cases. It excludes all juvenile court referrals for abuse, dependency, or neglect, as well as routine traffic violations. Only formally *petitioned* delinquency and status cases are analyzed because the right to counsel announced in *Gault* attaches only after the formal initiation of delinquency proceedings.[3]

The filing of a petition—the formal initiation of the juvenile process—is comparable legally to the filing of a complaint, information, or indictment in the adult criminal process (Feld, 1984, p. 217). Since different county intake or probation units within a state, as well as the various states, use different criteria to decide whether or not to file a formal delinquency petition, the cross-state comparisons reported here involve very different samples of delinquent populations. The common denominator of all these cases is that they were formally processed in their respective jurisdictions. As indicated in Table 1, the proportion of referred cases to petitioned cases differs markedly, from a high of 62.8% in Nebraska to a low of 10.7% in North Dakota.

In most jurisdictions, a juvenile offender will be arraigned on the petition. Since the constitutional right to counsel attaches in juvenile court only after the filing of the petition, it is typically at this stage, if at all, that counsel will be appointed to represent a juvenile (Feld, 1984). At the arraignment, the juvenile admits or denies the allegations in the petition. In many cases, juveniles may admit the allegations of the petition at their arraignment and have their case disposed of without the presence of an attorney.

The types of underlying offenses represented in the formally filed delinquency petitions differ substantially; the large urban jurisdictions confront very different and more serious delinquency than do the more rural, midwestern states (Nimick et al., 1985). In this study, the offenses reported by the states are regrouped into six analytical categories.[4] The "felony/minor" offense distinction provides both an indicator of seriousness and is legally relevant for the right to counsel *(Gideon v.*

Wainwright, 1963; *Scott v. Illinois*, 1979). Offenses are also classified as person, property, other delinquency, and status. Combining person and property with the felony and minor distinctions produces a six-item offense scale for cross-state comparisons.[5] When a petition alleges more than one offense, the youth is classified on the basis of the most serious charge. This study also uses two indicators of the severity of dispositions: out-of-home placement and secure confinement.[6] The data were originally collected by the California Bureau of Criminal Statistics and Special Services,[7] the Minnesota Supreme Court Judicial Information System,[8] the Nebraska Commission on Law Enforcement and Criminal Justice,[9] the New York Office of Court Administration,[10] the North Dakota Office of State Court Administrator,[11] and the Pennsylvania Juvenile Court Judges' Commission.[12]

DATA AND ANALYSIS

Part of these analyses treat the availability and role of counsel as a dependent variable using case characteristics and court processing factors as independent variables. Other parts treat counsel as an independent variable, assessing its relative impact on juvenile court case processing and dispositions. These analyses attempt to answer the interrelated questions regarding when lawyers are appointed to represent juveniles, why they are appointed, and what difference does it make whether or not a youth is represented?

Petitions and offenses. Initially, the appearance of counsel must be placed in the larger context of juvenile justice administration in the respective states. Table 1 introduces the six states' juvenile justice systems, reports the total number of referrals where available, the total number of petitions, the percentage of referrals to petitions, and the types of offenses for which petitions were filed.

The juvenile courts in the various states confront very different delinquent populations. In part, these differences reflect the nature of the prepetition screening. While California, Nebraska, and Pennsylvania courts formally petition approximately half of their juvenile court referrals, North Dakota juvenile courts only charge about 10.7% of their referrals. The numbers of petitions involved also differ substantially. The large, urban states handle far more cases than the rural midwestern states. Indeed, Philadelphia alone processes more delinquency petitions than Nebraska and North Dakota together.

TABLE 1: Petitions and Petitioned Offenses

	California	*Minnesota*	*Nebraska*	*New York*	*North Dakota*	*Pennsylvania*	*Philadelphia*
Number of Referrals	147422	–	6091	–	7741	18926	–
Number of Petitions	68227	15304	3830	21383	831	10168	6812
% Referrals/ Petitions	46.3%		62.8%		10.7%	53.7%	
Felony Offense							
Against %	8.7	2.2	1.0	8.2	.2	13.0	38.1
Person N	(5946)	(338)	(39)	(1784)	(2)	(1320)	(2592)
Felony Offense							
Against	27.2	14.3	11.1	14.9	15.8	25.9	19.7
Property	(18571)	(2196)	(427)	(3192)	(131)	(2653)	(1339)
Minor Offense							
Against	6.1	5.0	3.7	6.6	2.8	12.5	3.7
Person	(4166)	(766)	(143)	(1414)	(23)	(1275)	(255)
Minor Offense							
Against	17.1	29.9	43.9	18.8	29.8	24.9	24.9
Property	(11700)	(4574)	(1680)	(4019)	(248)	(2532)	(1694)
Other	38.7	20.6	9.5	7.6	16.7	23.5	13.7
Delinquency	(26376)	(3148)	(364)	(1631)	(139)	(2386)	(932)
Status	2.2	28.0	30.7	43.8	34.7	N/A	N/A
Offense	(1468)	(4282)	(1177)	(9383)	(288)		

The nature of the offenses petitioned also differs substantially among the states. Felony offenses against the person—homicide, rape, aggravated assault, and robbery—are much more prevalent in the large, urban states. In Philadelphia, for example, 38.1% of the juvenile court's caseload involves violent offenses against the person, primarily robbery. By contrast, a substantial portion of the midwestern states' caseloads consists of minor property offenses such as theft and shoplifting.

The states also differ markedly in their treatment of status offenders. Pennsylvania/Philadelphia juvenile courts do not have jurisdiction over status offenders. Similarly, status offenders in California appear to be referred to juvenile courts only as a last resort. By contrast, in the midwestern states, status offenses are the second most common type of delinquency cases handled. The maximum age of juvenile court jurisdiction in New York is 16 years of age, rather than 18 as in the other states. The New York juvenile justice system deals with a significantly younger population, which includes a substantially larger proportion of status offenders.

Rates of representation. Table 2 shows the overall rates of representation by counsel in the respective states, the percentages of private attorneys and public attorneys—court appointed or public defender—and the rates of representation by type of offense. Although *Gault* held that *every* juvenile was constitutionally entitled to "the guiding hand of counsel at every step of the process," *Gault's* promise remains unrealized in half of these jurisdictions.

The large, urban states are far more successful in assuring that juveniles receive the assistance of counsel than are the midwestern states. Overall, between 85%-95% of the juveniles in the large, urban states receive the assistance of counsel as contrasted with between 37.5% and 52.7% of the juveniles in the midwestern states. Indeed, these data may actually understate the urban state/rural state disparities. The California Bureau of Criminal Statistics and Special Services cautions that a coding error may be responsible for some of the juveniles who were reported to be unrepresented.[13]

The first rows of Table 2 report the percentages of private attorneys and public attorneys (court appointed or public defenders) reflected in the overall rates of representation. In every jurisdiction and regardless of the overall rate of representation, public attorneys handle the vast bulk of delinquency petitions by ratios of between 3:1 and 10:1.

Table 2 clearly shows that it is possible to provide very high levels of defense representation to juveniles adjudicated delinquent. More than 95% of the juveniles in Philadelphia and New York state, and 85% or

TABLE 2: Representation by Counsel (Private, Public Defender/Court Appointed)

	California	*Minnesota*	*Nebraska*	*New York*	*North Dakota*	*Pennsylvania*	*Philadelphia*
% Counsel	84.9[1]	47.7	52.7	95.9	37.5	86.4	95.2
Private	7.6	5.3	13.3	5.1	10.5	14.5	22.0
CA/PD[a]	77.3	42.3	39.4	90.8	27.1	71.9	73.2
Felony Offense							
Against Person	88.7	66.1	58.8	98.5	100.0	91.4	96.3
Private	11.2	9.9	14.7	4.3	–	22.0	29.9
CA/PD	77.5	56.3	44.1	94.2	100.0	69.4	66.4
Felony Offense							
Against Property	86.8	60.6	59.9	98.1	38.9	87.1	95.0
Private	9.0	6.2	14.4	8.3	12.2	15.1	20.5
CA/PD	77.8	54.4	45.5	89.7	26.7	72.0	74.5
Minor Offense							
Against Person	86.7	73.5	41.3	99.0	47.8	89.3	96.1
Private	8.6	7.3	14.9	9.5	17.4	16.4	22.4
CA/PD	78.1	66.1	26.4	89.5	30.4	72.9	73.7
Minor Offense							
Against Property	83.8	46.8	49.6	96.2	38.3	85.5	94.7
Private	6.1	5.3	14.1	6.5	12.5	11.9	16.1
CA/PD	77.7	41.4	35.5	89.7	25.8	73.6	78.7
Other Delinquency	83.4	56.5	48.9	96.8	33.1	82.1	93.2
Private	6.4	5.9	16.0	8.0	10.8	10.8	12.3
CA/PD	77.0	49.6	32.8	88.7	22.3	71.4	80.9
Status Offense	74.1	30.7	56.1	93.8	37.2	N/A	N/A
Private	3.3	3.9	10.3	2.3	7.3		
CA/PD	70.8	26.9	46.3	91.6	29.9		

a. Court Appointed, Public Defender.
1. The California Bureau of Criminal Statistics and Special Services cautions that this rate may understate the actual rate of representation, that is, that an even larger percentage of California's juveniles are represented. See note 13 for explanation.

more in Pennsylvania and California were represented. Since the large urban states process a greater volume of delinquency cases, their success in delivering legal services is all the more impressive. While it may be more difficult to deliver legal services easily in all parts of the rural midwestern states, county by county analysis in Minnesota shows substantial disparities within the state; even the largest county in the state with a well-developed public defender system provides representation to less than half the juveniles (Feld, 1984, pp. 189-190). These variations suggest that rates of representation reflect deliberate policy decisions.

Table 2 also shows the rates of representation by type of offense. One pattern that emerges in all of the states is a direct relationship between the seriousness of the offense and the rates of representation. Juveniles charged with felonies—offenses against person or property—and those with offenses against the person generally have higher rates of representation than the state's overall rate. These differences in representation by offense are typically greater in the states with lower rates of representation than in the those with higher rates because of the latters' smaller overall variation. In Minnesota, for example, while only 47.7% of all juveniles are represented, 66.1% of those charged with felony offenses against the person, 73.5% of those charged with minor offenses against the person, and 60.6% of those charged with felony offenses against property are represented.

A second and similar pattern is the appearance of larger proportions of private attorneys on behalf of juveniles charged with felony offenses—person and property—and offenses against the person than appear in the other offense categories. Perhaps the greater seriousness of those offenses and their potential consequences encourage juveniles or their families to seek the assistance of private counsel. Conversely, private attorneys are least likely to be retained by parents to represent the status offenders with whom the parents are often in conflict.

Offense and disposition. There is extensive research on the determinants of juvenile court dispositions (Fagan, Slaughter, and Hartsone, 1987; McCarthy and Smith, 1986; Dannefer and Schutt, 1982; Thomas and Cage, 1977). However, "even a superficial review of the relevant literature leaves one with the rather uncomfortable feeling that the only consistent finding of prior research is that there are no consistencies in the determinants of the decision-making process" (Thomas and Sieverdes, 1975, p. 416). In general, the seriousness of the present offense and the length of the prior record—the so-called "legal variables"—

explain most of the variance that can be accounted for in juvenile sentencing, with some additional influence of race (Fagan, Slaughter, and Hartsone, 1987; McCarthy and Smith, 1986). However, in most of these studies, the legal variables account for only about 25% to 30% of the variance in dispositions (Thomas and Cage, 1977; Clarke and Koch, 1980; McCarthy and Smith, 1986; Horwitz and Wasserman, 1980).

Although this cross-state comparison cannot identify fully the determinants of dispositions, the data lend themselves to an exploration of the relationships among offenses, dispositions, and representation by an attorney. Table 3 uses two measures of juvenile court dispositions: (1) out-of-home placements, and (2) secure confinement. These categories provide clear-cut delineations that lend themselves to cross-state comparisons. They also have legal significance for the appointment of counsel, since the Supreme Court has held, at least for adults, that all persons charged with felonies must be afforded the right to counsel (*Gideon v. Wainwright*, 1963), and that no person convicted of a misdemeanor may be incarcerated unless he or she was afforded the assistance of counsel (*Scott v. Illinois*, 1979).

Table 3 shows both the overall rates of out-of-home placements and secure confinement in the respective states as well as by categories of offenses. The states differ markedly in their overall use of out-of-home placements and secure confinement, ranging from a high of 30.8%/14.5% in California to a low of 10.3%/1.1% in Philadelphia. The ratio of out-of-home placement to secure confinement also varies from 17:1 in Pennsylvania to about 2:1 in California.

As expected, the seriousness of the present offense substantially alters a youth's risk of removal and confinement. In every state, felony offenses against the person garner both the highest rates of out-of-home placement and secure confinement, typically followed either by minor offenses against the person or felony offenses against property, for example, burglary. Conversely, minor property offenses—primarily petty theft, shoplifting—and status offenses have the lowest rates of removal or confinement.

Offense and disposition by counsel. Table 4 adds the counsel variable to the information contained in Table 3. Within each offense category of youths who receive out-of-home or secure dispositions, Table 4 shows the disposition rates for those youths who had counsel and those who did not. Thus Table 3 shows that when juveniles commit felonies against the person in California, 39.5%/20.4% receive out-of-home placement and secure confinement dispositions. The same cell in Table 4 shows that youths *with counsel* were somewhat more likely to receive severe

TABLE 3: Present Offense and Disposition: Out-of-Home Placement/Secure Confinement

		California	*Minnesota*	*Nebraska*	*New York*	*North Dakota*	*Pennsylvania*	*Philadelphia*
Overall:								
Home	%	30.8	17.2	15.2	16.1	28.0	22.1	10.3
	N =	(21048)	(2631)	(584)	(3256)	(233)	(2213)	(628)
Secure	%	14.5	3.3	5.2	7.1	9.6	1.3	1.1
	N =	(9902)	(504)	(199)	(1423)	(80)	(132)	(76)
Felony Offense Against Person:								
Home		39.5	30.2	28.2	22.3	50.0	28.7	12.6
Secure		20.4	9.5	15.4	19.2	50.0	2.5	1.7
Felony Offense Against Property:								
Home		31.2	27.4	18.5	18.6	35.1	21.3	11.3
Secure		15.7	9.2	12.2	12.0	17.6	.9	.8
Minor Offense Against Person:								
Home		25.8	21.5	21.7	12.7	39.1	13.5	5.7
Secure		11.5	3.3	9.1	9.6	13.0	.2	.4
Minor Offense Against Property:								
Home		24.3	14.6	8.5	14.1	28.6	18.8	5.9
Secure		11.5	3.5	9.1	9.6	8.1	.6	.6
Other Delinquency:								
Home		32.5	20.2	15.9	16.1	27.3	27.5	11.4
Secure		15.2	1.9	8.8	10.6	14.4	2.4	1.0
Status Offense:								
Home		27.9	10.7	22.3	15.6	23.8	N/A	N/A
Secure		1.0	0.5	1.8	1.3	4.5	–	–

dispositions than those *without counsel*—40.0% versus 35.5% out of home and 21.0% versus 15.4% secure confinement.

Except for North Dakota, with its very small numbers and low rates of representation, a comparison of the two columns in each state and at each offense level reveals that youths with lawyers receive more severe dispositions than do those without lawyers. With twelve possible comparisons in each state—six offense categories times two dispositions—represented youths received more severe dispositions than unrepresented youth in every category in Minnesota, New York, and Pennsylvania, in all but one in California and Philadelphia, and in all but two in Nebraska. Even in the highest representation jurisdictions—New York and Philadelphia—this pattern prevails; there was virtually no secure confinement of unrepresented juveniles in these locales.

While the relationship between representation and more severe disposition is consistent in the different jurisdictions, the explanation of this relationship is not readily apparent. It may be that presence of lawyers antagonizes traditional juvenile court judges and subtly influences the eventual disposition imposed (Clarke and Koch, 1980). However, the pattern also prevails in the jurisdictions with very high rates of representation where the presence of counsel is not unusual. Perhaps judges discern the eventual disposition early in the proceedings and appoint counsel more frequently when an out-of-home placement or secure confinement is anticipated. Conversely, judges may exhibit more leniency if a youth is not represented. Or, still another possibility is that other variables besides the present offense may influence both the appointment of counsel and the eventual disposition.

Detention by offense. Table 5 shows the overall percentage of juveniles against whom petitions were filed who were detained, as well as the rates of pretrial detention by offense category. *Detention,* as used here, refers to a juvenile's custody status following referral but prior to court action. It is important to note, however, that detention is coded differently in various jurisdictions. In California, for example, which appears to have a very high rate of pretrial detention, any juvenile brought to a detention facility is logged-in and counted as detained, even if he or she is held only for a short while until a parent arrives. By contrast, Minnesota, which appears to have a very low rate of pretrial detention, uses a very conservative definition of detention. Juveniles in Minnesota are coded as detained only if a detention hearing is held, which normally occurs 36 hours—about two court days—after apprehension (Feld, 1984). Thus the data in Table 5, while suggestive, are not

TABLE 4: Representation by Counsel and Disposition (Home/Secure)

	California		*Minnesota*		*Nebraska*		*New York*		*North Dakota*		*Pennsylvania*		*Philadelphia*	
Counsel ⇒	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*
Felony Offense Against Person:														
Home	40.0	35.5	32.8	21.4	25.0	28.6	22.6	0.0	50.0	–	31.0	16.8	12.9	4.9
Secure	21.0	15.4	9.5	4.9	15.0	21.4	19.5	0.0	50.0		2.8	.9	1.7	2.1
Felony Offense Against Property:														
Home	32.0	26.1	31.6	19.1	24.9	11.1	19.0	0.0	47.1	27.5	24.9	8.2	11.7	4.8
Secure	16.5	10.6	10.4	5.0	16.2	7.8	12.2	0.0	11.8	21.3	1.1	0.0	0.9	0.0
Minor Offense Against Person:														
Home	26.8	19.2	22.3	14.9	20.0	28.2	12.7	7.1	45.5	33.3	22.0	7.8	5.5	10.0
Secure	12.3	6.1	3.5	1.1	12.0	9.9	9.7	0.0	9.1	16.7	0.4	0.0	0.4	0.0
Minor Offense Against Property:														
Home	25.5	17.9	18.8	9.6	12.5	5.7	14.6	0.0	38.9	22.2	24.9	4.8	5.9	6.3
Secure	10.8	6.4	4.2	2.0	7.3	2.4	9.1	0.0	8.4	7.8	0.8	0.0	0.7	0.0
Other Delinquency:														
Home	34.4	22.8	28.1	9.8	24.2	9.0	16.7	0.0	32.6	24.7	37.6	17.4	11.4	11.1
Secure	16.5	9.1	2.2	.8	13.3	2.2	11.0	0.0	13.0	15.1	3.5	0.9	0.6	6.3
Status Offense:														
Home	30.4	20.8	16.5	7.6	34.1	14.2	16.6	1.0	32.7	18.2	N/A		N/A	
Secure	6.3	7.1	.9	.4	2.1	1.4	1.4	0.0	1.9	6.7				

directly comparable. Unfortunately, Philadelphia does not provide information on a juvenile's pretrial detention status.

Regardless of the jurisdictional definition of detention, its use follows similar patterns. Juveniles committing felonies against the person are the most likely to be detained, followed either by those committing minor offenses against the person or felony offenses against property. Since the evidentiary distinctions between a felony and a minor offense against the person, for example, the degree of injury to the victim, may not be apparent at the time of detention, these patterns are not surprising.

Detention and counsel. Table 6 examines the relationship between a youth's detention status and representation by counsel. Detention, particularly if it continues for more than a day, is a legally significant juvenile court intervention that also requires the assistance of counsel (Feld, 1984, pp. 191-209; *Schall v. Martin*, 1984). Every jurisdiction provides for a prompt detention hearing to determine the existence of probable cause, the presence of grounds for detention, and the child's custody status pending trial (Feld, 1984, pp. 191-209).

Table 6 reports the rate of representation at each offense level for those youths who were detained and for those who were not detained. For example, in Minnesota, 66.1% of the juveniles charged with felony offenses against the person were represented (Table 2) and 24.6% of them were detained (Table 5). However, 75.0% of those who were detained were represented as contrasted with 63.8% of those who were not detained.

For each state, a comparison of the two columns reveals a consistent pattern—youths who were held in detention had higher rates of representation than did juveniles who were not. In four of the six states at every level of offense, detained youths were more likely to be represented. In Nebraska, in five of the six levels of offenses, detained youths were more likely to be represented. Again, only in North Dakota, with its small numbers and low rates of representation, does the pattern break down.

While the differences between detained and nondetained youths are smaller in the three jurisdictions with the highest rates of representation, in Minnesota and Nebraska they are substantial, especially as the seriousness of the offense decreases. Comparing the overall rate of representation at different offense levels (Table 2) with the rates of representation for detained youths (Table 6) shows that detention provides a significant additional impetus for the appointment of counsel, particularly for less serious offenders.

TABLE 5: Present Offense and Pretrial Detention Status

	California	Minnesota	Nebraska	New York	North Dakota	Pennsylvania
% Detained	54.0	9.4	12.6	18.0	14.7	29.0
Overall N =	(36100)	(1443)	(483)	(3841)	(122)	(2946)
Felony Offense Against Person	68.1	24.6	46.2	22.3	50.0	43.6
Felony Offense Against Property	56.6	15.0	20.1	17.5	15.3	30.6
Minor Offense Against Person	52.0	16.1	25.2	15.2	21.7	22.0
Minor Offense Against Property	45.5	7.1	9.8	16.1	11.3	27.4
Other Delinquency	54.7	10.6	13.7	20.2	20.1	24.7
Status Offense	24.1	5.8	10.9	18.1	13.9	N/A

Detention and dispositions. Several studies have examined the determinants of detention and the relationship between a child's pretrial detention status and subsequent disposition (Krisberg and Schwartz, 1983; Frazier and Bishop, 1985; Clarke and Koch, 1980; McCarthy, 1987). These studies report that while several of the same variables affect both rates of detention and subsequent disposition, after appropriate controls, detention per se exhibits an independent effect on dispositions.

While this study cannot control for all variables simultaneously, Table 7 shows the relationship among a youth's offense, detention status, and eventual disposition. Table 7 reports the percentages of youths within each offense category who were detained and who were not detained who received out-of-home placement and secure confinement. Again, the results are remarkably consistent; in five of the six jurisdictions and at every offense level, youths who were detained received more severe dispositions than those who were not. Even in North Dakota with its small numbers, the relationship between detention and secure confinement appears in most offense categories.

What Table 7 shows, then, is that the same factors that determine the initial detention decision appear to influence the ultimate disposition as well. However, when one compares the zero-order relationship between offense and disposition (Table 3) with the relationship between offense/detention and disposition (Table 7), it is apparent that detained youths are significantly more at risk for out-of-home placement and secure confinement than are nondetained youths. Generally, pretrial detention more than doubles a youth's probability of receiving a secure confinement disposition.

Counsel, detention, and disposition. Table 5 reported the percentages of youths who were detained at each offense level. Table 6 examined the relationship between detention status and representation and reported that detention increased the likelihood of representation. Table 7 examined the relationship between detention status and disposition and showed that detention also increased the likelihood of a youth receiving more severe dispositions.

Table 8 reports the relationship between detention and disposition when youth are represented by counsel to see whether the presence or absence of counsel affects their dispositions. Table 8 indicates that a detained youth who is represented by counsel is more likely to receive a severe disposition than a detained youth who is not represented. In New York, California, and Pennsylvania, which had very high rates of representation, the represented/detained youths consistently received more severe dispositions than the small group of unrepresented/de-

TABLE 6: Pretrial Detention and Representation by Counsel

	California		*Minnesota*		*Nebraska*		*New York*		*North Dakota*		*Pennsylvania*	
Detention ⇒	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*
Felony Offense Against Person	90.8	84.9	75.0	63.8	46.7	68.4	99.7	98.1	100.0	100.0	96.4	87.4
Felony Offense Against Property	90.2	83.5	72.7	58.9	65.4	58.6	99.8	97.7	30.0	40.5	94.0	83.8
Minor Offense Against Person	89.9	84.2	82.4	72.2	47.2	38.8	99.5	98.9	80.0	38.9	95.0	86.4
Minor Offense Against Property	87.5	82.1	74.6	45.2	68.9	47.0	99.1	95.7	35.7	38.6	95.4	80.8
Other Delinquency	89.1	79.1	78.5	53.2	72.1	44.3	99.4	96.1	17.9	36.9	92.5	77.6
Status Offense	88.4	72.1	70.3	28.5	89.7	51.1	99.4	92.6	32.5	37.9	N/A	

tained juveniles, as was also the case in Nebraska. Only in Minnesota and North Dakota was the presence of counsel not an "aggravating" factor at the sentencing of detained youth. Again, this may simply be the result of dwindling numbers, or perhaps the factors that influenced the initial detention decision took precedence over the presence of counsel in those states.

The data in Table 8 in New York and Pennsylvania further reinforce the findings reported in Table 4; there was virtually no removal from the home or incarceration of unrepresented youths. By contrast, substantial numbers and proportions of youths in the midwestern states were being detained and/or removed from their homes and placed in secure confinement without the assistance of counsel.

Prior referrals. Another legal variable that affects a juvenile's eventual disposition is a prior history of delinquency referrals (Clarke and Koch, 1980; Henretta, Frazier, and Bishop, 1986). The next analyses assess the relationships among prior referrals and dispositions, prior referrals and representation by counsel, and prior referrals, representation by counsel, and dispositions.

Nebraska is the only state in this six state sample that routinely records information about a juvenile's prior referrals at the time of a current referral. However, the other states' data tapes include youth identification numbers. By combining several years of annual data tapes and matching the county/youth identification number across years, it is possible to reconstruct a youth's prior record of offenses and dispositions.

The Minnesota data reported in Tables 9-11 are from a different data set than reported heretofore. These data represent juveniles disposed of in 1986 with their prior records acquired in 1984, 1985, and 1986. In 1986, 45.3% of Minnesota's juveniles were represented, as compared with 47.7% in 1984 (Table 2), and the pattern of representation by offense was similar: felony offense against the person, 77.3%; felony offense against property, 63.0%; minor offenses against the person, 62.4%; minor offenses against property, 44.6%; other delinquency, 44.9%; and status offenses, 26.9%. The distribution of offenses in Minnesota in 1986 was also similar to that recorded in 1984 (Table 1): felony offenses against persons, 4.0%; felony offenses against property, 14.4%; minor offenses against person, 5.2%; minor offenses against property, 32.3%; other delinquency, 16.6%; and status, 27.0%. Using these Minnesota data permits a cross-state comparison of the relationship among prior referrals, dispositions, and the presence of counsel. In both Minnesota and Nebraska, the records of prior referrals were recoded as 0, 1 or 2, 3 or 4, and 5 or more.[14]

TABLE 7: Impact of Pretrial Detention on Disposition (Home/Secure)

	California		Minnesota		Nebraska		New York		North Dakota		Pennsylvania	
Detention ⇒	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Felony Offense Against Person:												
Home	51.3	14.9	53.0	22.7	55.6	4.8	57.6	11.9	0.0	100.0	50.3	11.9
Secure	26.3	8.0	20.5	5.9	33.3	0.0	50.3	10.1	0.0	100.0	5.2	.4
Felony Offense Against Property:												
Home	42.2	17.1	46.5	24.0	51.2	10.3	49.6	11.7	30.0	36.0	47.0	10.0
Secure	19.6	11.0	22.5	6.9	36.0	6.2	32.0	7.5	30.0	15.3	2.2	0.3
Minor Offense Against Person:												
Home	38.9	11.6	46.3	16.8	41.7	15.0	45.4	6.8	60.0	33.3	40.4	5.9
Secure	16.6	6.3	6.5	2.6	22.2	4.7	39.0	4.3	60.0	5.6	0.7	0.1
Minor Offense Against Property:												
Home	37.1	13.7	40.2	12.7	35.8	5.5	45.4	7.9	28.6	28.6	48.5	7.5
Secure	12.8	8 2	15.3	2.6	22.4	2.5	31.5	4.3	7.1	8.2	2.0	0.1
Other Delinquency:												
Home	44.3	18.6	43.9	17.4	50.0	10.5	44.2	8.9	28.6	27.0	55.4	18.3
Secure	17.9	12.5	7.5	1.3	24.0	6.4	31.1	5.4	17.9	13.5	5.8	1.3
Status Offense:												
Home	31.5	25.4	37.2	9.1	59.4	17.7	40.2	10.2	17.5	24.6	N/A	
Secure	8.6	6.1	4.0	0.3	7.8	1.0	2.8	1.0	5.0	4.4		

Prior referrals and disposition. Table 9 reports the relationship between prior referrals and out-of-home placements and secure confinement dispositions. Within each offense level, there is a nearly perfect linear relationship between additional prior referrals and the likelihood of more severe dispositions. For example, in Minnesota, 35.7% of those juveniles with no prior record who commit a felony offense against the person receive an out-of-home placement, as compared with 51.9% of those with one or two priors, 84.8% of those with three or four priors, and 100.0% of those with five or more priors. The same pattern obtains for secure confinement dispositions. A similar direct relationship between prior referrals and dispositions is evident in Nebraska as well. Clearly, then, after controlling for the seriousness of the present offense, the addition of a prior record strongly influences the sentencing practices of juvenile courts.

Prior referrals and rates of representation. It will be recalled from Table 2 that overall, 52.7% of youths in Nebraska and 47.7% of youths in Minnesota (45.3% in 1986) were represented by counsel. Table 10 shows, within each offense level, the relationship between prior delinquency referrals and the likelihood of representation.

The aggregate rates of representation reported in Table 2 are the composite of juveniles with and without prior referrals. For example, in Minnesota, in 1986, 77.3% of all juveniles charged with felony offenses against the person were represented. However, this proportion of representation consisted of 73.6% with no priors, 81.5% with one or two, 89.3% with three or four, and 100.0% with five or more priors. A similar relationship between prior referrals and rates of representation prevails in Minnesota at all offense levels. Thus in Minnesota prior referrals increase both the likelihood of out-of-home placement and secure confinement (Table 9) as well as the appointment of counsel (Table 10). In Nebraska, by contrast, the relationship between prior referrals and rates of representation is not nearly as consistent. The major difference in rates of representation occurs between youths with no prior referrals and those with one or two priors. Perhaps this is because in Nebraska, prior referrals include informal as well as formal referrals, whereas in Minnesota, prior referrals consist exclusively of previously petitioned cases (see note 14).

Disposition by attorneys by priors. Tables 9 and 10 show that prior referrals are associated with receiving more severe dispositions as well as with the likelihood of having an attorney. Table 11 examines the relationship between prior referrals and receiving an out-of-home placement or secure confinement disposition when an attorney is

TABLE 8: Representation by Attorney for Detained Juveniles and Disposition (Home/Secure)

	California		*Minnesota*		*Nebraska*		*New York*		*North Dakota*		*Pennsylvania*	
Attorney ⇒	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*	*Yes*	*No*
Felony Offense Against Person:												
Home	51.3	51.5	52.1	62.5	57.1	50.0	57.7	0.0	–	–	50.6	42.9
Secure	27.0	19.9	18.8	12.5	42.9	37.5	50.4	0.0			5.2	4.8
Felony Offense Against Property:												
Home	42.9	36.1	47.2	42.4	60.8	40.7	49.6	0.0	16.7	35.7	47.7	35.4
Secure	20.9	8.3	18.8	22.7	37.3	37.0	32.0	0.0	16.7	35.7	2.4	0.0
Minor Offense Against Person:												
Home	39.5	34.0	44.0	50.0	41.2	42.1	45.6	0.0	50.0	100.0	41.4	21.4
Secure	17.5	8.8	5.3	12.5	29.4	15.8	39.2	0.0	25.0	100.0	0.7	0.0
Minor Offense Against Property:												
Home	38.5	26.8	37.6	35.6	40.4	23.4	45.8	0.0	40.0	22.2	49.4	29.0
Secure	14.0	4.1	11.0	11.9	25.0	14.9	31.8	0.0	0.0	11.1	2.1	0.0
Other Delinquency:												
Home	45.4	35.3	44.3	37.9	58.1	33.3	44.5	0.0	60.0	21.7	57.9	25.0
Secure	19.2	7.0	3.8	8.6	29.0	8.3	31.3	0.0	40.0	13.0	6.0	2.3
Status Offense:												
Home	32.0	28.2	36.5	34.8	61.9	41.7	40.2	44.4	30.8	11.1	N/A	
Secure	9.4	2.6	3.2	6.1	3.8	33.3	2.9	0.0	0.0	7.4		

TABLE 9: Prior Referrals and Dispositions (Home/Secure)

	Minnesota					*Nebraska*				
Prior Referrals ⇒	0	1-2	3-4	5+		0	1-2	3-4	5+	
Felony Offense Against Person:										
Home	35.7	51.9	84.8	100.0		18.8	20.0	50.0	66.7	
Secure	22.9	33.3	60.6	100.0		6.3	13.3	–	50.0	
Felony Offense Against Property:										
Home	21.7	46.4	76.5	72.0		7.7	25.2	40.0	48.3	
Secure	16.0	31.9	67.0	54.0		2.1	19.1	30.0	44.8	
Minor Offense Against Person:										
Home	14.2	38.5	62.2	73.3		9.8	26.0	23.8	70.0	
Secure	8.0	22.6	40.5	66.7		3.3	12.0	9.5	30.0	
Minor Offense Against Property:										
Home	10.4	27.3	49.0	65.2		4.7	12.8	19.0	25.3	
Secure	6.6	18.8	39.5	52.2		1.5	7.5	14.3	16.9	
Other Delinquency:										
Home	12.4	31.5	46.9	55.0		8.7	25.3	36.8	18.2	
Secure	6.7	19.2	31.9	50.0		1.7	18.9	21.1	9.1	
Status Offense:										
Home	8.7	19.3	38.9	48.8		19.8	27.7	31.8	47.6	
Secure	1.6	5.8	23.5	30.2		0.9	3.6	6.8	9.5	

present or absent. The percentages within offense categories, dispositions, and priors are those for youths receiving an out-of-home placement or secure confinement when an attorney is present and when one is not.

As can be seen by row comparisons at each offense level and type of disposition across priors, youths with attorneys are more likely to receive out-of-home placement and secure confinement than are those without counsel. In effect, controlling for present offense and prior record simultaneously, larger proportions of youths with lawyers receive out-of-home placements and secure confinement than do those without. In Minnesota, with 48 possible comparisons—6 offenses times

TABLE 10: Rates of Representation by Prior Referrals

	Minnesota				Nebraska			
Prior Referrals ⇒	0	1-2	3-4	5+	0	1-2	3-4	5+
Felony Offense Against Person	73.6	81.5	89.3	100.0	76.9	64.3	50.0	–
Felony Offense Against Property	57.1	71.2	78.2	84.1	59.6	67.9	65.4	26.1
Minor Offense Against Person	55.0	69.5	88.9	71.4	51.0	26.8	38.9	50.0
Minor Offense Against Property	39.5	58.8	75.1	82.6	46.8	57.6	53.0	35.9
Other Delinquency	38.9	59.2	75.0	89.7	46.3	53.4	60.0	28.6
Status Offense	23.3	40.3	62.9	66.7	57.7	58.5	34.4	43.8

2 dispositions times 4 priors—represented youths received more severe dispositions in 44 instances. In Nebraska, represented youths received more severe dispositions in 39 comparisons.

DISCUSSION AND CONCLUSION

Nearly twenty years after *Gault* held that juveniles are constitutionally entitled to the assistance of counsel, half of the jurisdictions in this study are still not in compliance. In Nebraska, Minnesota, and North Dakota, nearly half or more of delinquent and status offenders do not have lawyers (Table 2). Moreover, many juveniles who receive out-of-home placement and even secure confinement were adjudicated delinquent and sentenced without the assistance of counsel (Table 4). One may speculate whether the midwestern states are more representative of most juvenile courts in other parts of the country than are the large urban states. In light of the findings from other jurisdictions (Clarke and Koch, 1980; Bortner, 1982; Aday, 1986), it is apparent that many juveniles are unrepresented.

TABLE 11: Dispositions (Home/Secure) by Attorney by Priors

		Minnesota				Nebraska			
Prior Referrals ⇒		0	1-2	3-4	5+	0	1-2	3-4	5+
Attorney									
Felony Offense Against Person:									
Home	Yes	39.5	49.5	84.0	100.0	10.0	33.3	100.0	–
	No	23.1	54.5	66.7	–	–	–	–	80.0
Secure	Yes	24.3	32.0	56.0	100.0	10.0	22.2	–	–
	No	15.4	31.8	66.7	–	–	–	–	60.0
Felony Offense Against Property:									
Home	Yes	25.2	53.4	76.9	75.0	10.8	35.5	58.8	100.0
	No	15.2	27.7	68.2	42.9	2.3	8.3	22.2	47.1
Secure	Yes	18.9	37.2	66.7	55.6	3.1	26.3	41.2	100.0
	No	10.4	16.8	54.5	28.6	1.1	5.6	22.2	41.2
Minor Offense Against Person:									
Home	Yes	19.4	41.5	65.6	90.0	–	36.4	42.9	60.0
	No	7.5	31.7	50.0	50.0	20.0	30.0	18.2	80.0
Secure	Yes	11.1	22.2	40.6	80.0	–	18.2	28.6	40.0
	No	3.5	21.7	50.0	50.0	8.0	13.3	–	20.0
Minor Offense Against Property:									
Home	Yes	14.8	32.8	50.7	68.4	7.6	17.2	31.8	17.4
	No	7.5	20.1	37.8	50.0	2.2	5.8	10.3	36.6
Secure	Yes	9.1	23.8	39.1	57.9	3.0	9.7	29.5	17.4
	No	4.9	11.7	33.3	25.0	0.2	3.6	2.6	19.5
Other Delinquency:									
Home	Yes	20.2	39.3	59.0	55.9	16.0	38.5	44.4	–
	No	6.8	20.1	14.8	50.0	5.7	8.8	16.7	40.0
Secure	Yes	11.6	23.5	42.3	50.0	4.0	30.8	22.2	–
	No	3.1	11.5	7.4	50.0	–	2.9	–	20.0
Status Offense:									
Home	Yes	17.3	30.0	53.4	64.3	32.2	38.8	36.4	57.1
	No	6.5	13.8	19.2	14.3	11.1	16.4	23.8	44.4
Secure	Yes	3.2	10.6	30.7	42.9	1.2	1.9	18.2	28.6
	No	1.1	2.8	13.5	7.1	1.2	1.4	4.8	–

Clearly, it is possible to provide counsel for the vast majority of young offenders. California, Pennsylvania and Philadelphia, and New York do so routinely. What is especially impressive in those jurisdictions is the very low numbers of uncounseled juveniles who receive out-of-home placement or secure confinement dispositions (Tables 4 and 8). While this study shows substantial differences in rates of representation

among the different states, it cannot account for the greater availability of counsel in some of the jurisdictions than in others.

There are direct legislative policy implications of the findings reported here. In those states in which juveniles are routinely unrepresented, legislation mandating the automatic and nonwaivable appointment of counsel at the earliest stage in delinquency proceeding is necessary (Feld, 1984, pp. 184-190). As long as it is possible for a juvenile to waive the right to counsel, juvenile court judges will find such waivers. Short of mandatory and nonwaivable counsel, a prohibition on waivers of counsel without prior consultation with and the concurrence of counsel would assure that any eventual waiver was truly "knowing, intelligent, and voluntary" (Feld, 1984, pp. 186-187). Moreover, a requirement of consultation with counsel prior to waiver would assure the development of legal services delivery systems that would then facilitate the more routine representation of juveniles. At the very least, legislation should prohibit the removal from home or incarceration of any juvenile who was not provided with counsel. Such a limitation on dispositions is already the law for adult criminal defendants (*Gideon v. Wainwright*, 1963; *Scott v. Illinois,* 1979), for juveniles in some jurisdictions (Feld, 1984, p. 187) and apparently the informal practice in New York and Pennsylvania where virtually no unrepresented juveniles were removed or confined.[15]

Apart from simply documenting variations in rates of representation, this research also examined the determinants of representation. It examined the relationship between "legal variables"—seriousness of offense, detention status, prior referrals—and the appointment of counsel. In each analysis, it showed the zero-order relationship among the legal variables and dispositions, the legal variables and the appointment of counsel, and the effect of representation on dispositions.

There is obviously multicollinearity between the factors producing more severe dispositions and the factors influencing the appointment of counsel. Each legal variable that is associated with a more severe disposition is also associated with greater rates of representation. And yet, within the limitations of this research design, it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition. When controlling for the seriousness of the present offense, unrepresented juveniles seem to fare better than those with lawyers (Tables 3 and 4). When controlling for offense and detention status, unrepresented juveniles again fare better than those with representation (Tables 7 and 8). When controlling for the seriousness of the present offense and prior referrals, the presence of

counsel produces more severe dispositions (Table 10 and 11). In short, while the legal variables enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

Although this phenomenon has been alluded to in other studies (Bortner, 1982; Clarke and Koch, 1980), this research provides the strongest evidence yet that representation by counsel redounds to the disadvantage of a juvenile. Why? One possible explanation is that attorneys in juvenile court are simply incompetent and prejudice their clients' cases (Stapleton and Teitelbaum, 1972; Lefstein, Stapleton, and Teitelbaum, 1969; Fox, 1970; Platt and Friedman, 1968; Ferster, Courtless, and Snethen, 1971; McMillian and McMurtry, 1970; Kay and Segal, 1973; Bortner, 1982; Clarke and Koch, 1980). While systematic evaluations of the actual performance of counsel in juvenile court are lacking, the available evidence suggests that even in jurisdictions where counsel are routinely appointed, there are grounds for concern about their effectiveness. Public defender offices in many jurisdictions assign their least capable lawyers or newest staff attorneys to juvenile courts to get trial experience, and these neophytes may receive less adequate supervision than their prosecutorial counterparts. Similarly, court appointed counsel may be beholden to the judges who select them and more concerned with maintaining an ongoing relationship with the court than vigorously protecting the interests of their clients. Moreover, measuring defense attorney performance by dispositional outcomes raises questions about the meaning of effective assistance of counsel. What does it take to be an effective attorney in juvenile court? Why do fewer defense attorneys appear at dispositions than at adjudications? How might attorneys for juveniles become more familiar with dispositional alternatives?

Perhaps, however, the relationship between the presence of counsel and the increased severity of dispositions is spurious. Obviously, this study cannot control simultaneously for all of the variables that influence dispositional decision making. It may be that early in a proceeding, a juvenile court judge's greater familiarity with a case may alert him or her to the eventual disposition that will be imposed and counsel may be appointed in anticipation of more severe consequences (Aday, 1986). In many jurisdictions, the same judge who presides at a youth's arraignment and detention-hearing will later decide the case on the merits and then impose a sentence. Perhaps, the initial decision to appoint counsel is based upon the same evidence developed at those earlier stages that also influences later dispositions.

Another possible explanation is that juvenile court judges may treat more formally and severely juveniles who appear with counsel than those without. Within statutory limits, judges may feel less constrained when sentencing a youth who is represented. Such may be the price of formal procedures. While not necessarily punishing juveniles who are represented, judges may incline toward leniency toward those youths who appear unaided and "throw themselves on the mercy of the court." At the very least, further research, including qualitative studies of the processes of initial appointment of counsel in several jurisdictions, will be required to untangle this complex web.

NOTES

1. Many state juvenile court systems maintain automated reporting or case management information systems. Beginning in 1978, the National Center for Juvenile Justice (NCJJ), the research division of the National Council of Juvenile and Family Court Judges, obtained support from the Office of Juvenile Justice and Delinquency Prevention to collect and store the computerized case records developed by the individual states. Each year, data contributed to the National Juvenile Court Data Archive (NJCDA) are merged to create a national data set containing detailed descriptions of cases handled in the states by the nation's juvenile courts. Although the individual states collect, code, and report different types of information about a case, the NCJDA has developed a standardized, national coding format that enables them to recode the raw data provided by the states into a more uniform format. Since the states collect different information, this study is constrained by the available data. Moreover, a cross-state comparative analysis necessarily imposes a least common denominator on the numbers and types of variables that can be examined.

2. The NJCDA unit of count is "case disposed." Each "case" represents a youth whose case is disposed of by the juvenile court for a new delinquency/status referral. A case is "disposed" when some definite action is taken, whether dismissal, warning, informal counseling or probation, referral to a treatment program, adjudication as a delinquent with some disposition, or transfer to an adult criminal court (Nimick et al., 1985, p. 3). As a result of multiple referrals, one child may be involved in several "cases" during a calendar year. Moreover, each referral may contain more than one offense or charge. The multiple referrals of an individual child may tend to overstate the numbers of youths handled annually. Multiple charges in one petition may appear to understate the volume of delinquency in a jurisdiction. Because the unit of count is case disposed, one cannot generalize from these data either the number of individual youths who are processed by the court or the number of separate offenses charged to juveniles.

3. In *Fare v. Michael C.* (1979), the U.S. Supreme Court held that a juvenile has a right to counsel even prior to the formal initiation of delinquency proceedings if he or she is subjected to custodial interrogation. The *Gault* decision involved a juvenile charged with conduct that would be criminal for an adult and that could result in institutional confinement (Feld, 1984). The Supreme Court has never decided whether status offenders have a constitutional right to counsel.

4. The National Juvenile Court Data Archive has developed a 78-item coding protocol that recodes the raw offense data provided by the states into a uniform format. This permits delinquency offense data from several different original formats to be recoded for analysis using a single conversion program.

5. The "felony offenses against person" generally correspond to the FBI's Uniform Crime Report classification of Part I violent felonies against the person—homicide, rape, robbery, and aggravated assault. "Felony offenses against property" generally include Part I property offenses—burglary, felony theft, and auto theft. "Minor offenses against person" consist primarily of simple assaults, and "minor offenses against property" consist primarily of larceny, shoplifting, or vandalism. "Other delinquency" includes a mixed-bag of residual offenses—drug offenses, public order offenses, and the like. "Status" offenses are the juvenile offenses that are not criminal for adults—runaway, truancy, curfew, ungovernability, and the like.

6. The NJCDA has developed a 22-item conversion program that transforms the state-specific dispositions into a uniform national format. NJCDA staff talk directly with the state data collectors and reporters to determine how specific dispositions or programs should be classified—out of home and secure—within the national format.

7. California's Bureau of Criminal Statistics and Special Services (the Bureau) compiles and publishes California's juvenile court data (NJCDA, 1986a). The Bureau, through its Juvenile Court and Probation Statistical System (JCPSS), collects information as a juvenile progresses through the juvenile justice system from referral to probation intake to a final court disposition. Case processing begins with a referral to a county juvenile probation department. Many delinquency and status cases are handled informally at the intake level and proceed no further. These cases are reported to the Bureau as "referral" actions. All formally petitioned delinquency and status offense cases are reported only after the court's disposition is known. The data collected by the Bureau include the date of referral, the county and source of referral, the referral offense(s), the offense(s) for which the youth was ultimately adjudicated, the youth's detention status, whether the prosecutor filed a petition, the nature of the juvenile's defense representation, the eventual disposition, the juvenile's birth date, race, sex, prior delinquency status, and current status at the conclusion of the proceedings.

8. The Minnesota Supreme Court's Judicial Information System (SJIS) compiles statewide statistical data on juvenile delinquency and status petitions filed annually. The data are based on the petitions filed; there is no data base that includes the cases referred to intake, county probation, or juvenile courts that were handled informally. The data collected on a case-specific basis are similar to those collected in California and include offense behavior, representation by counsel, court processing information, entries each time a court activity occurs, any continuation or change in the status of a case, and types of dispositions. In most counties, this information is obtained from the juvenile courts' own automated computer system and is entered by court administrators in each county who are trained by the state court administrator. Since the juvenile courts themselves rely upon this computerized information for record keeping, scheduling hearings, maintaining court calendars, and monitoring cases, it is generally reliable.

9. The Nebraska Commission on Law Enforcement and Criminal Justice (the Commission), through its Juvenile Court Reporting System, collects data from the state's juvenile justice agencies (NJCDA, 1986b). The county courts that handle juvenile cases as well as the separate juvenile courts report to the Commission monthly by completing a

Juvenile Court Statistical (JCS) Form when a case is disposed. Except for Douglas and Sarpy Counties, which report only petitioned cases, the Nebraska data include both cases processed formally with a petition as well as those handled informally. In addition to the information that is collected in California and Minnesota, the Nebraska records also include a youth's school attainment, living arrangements at referral, number of prior referrals, and manner of handling (formal/informal). Where a referral involves more than one offense, the most serious offense is recorded. The Commission reviews the JCS forms forwarded from the counties for internal validity. When errors are discovered, the submitting court is contacted and the error corrected.

10. The New York Office of Court Administration (OCA) collects data from the sixty-two Family Courts statewide that handle petitioned delinquency and status (PINS) cases (NJCDA, 1986c). The courts report to the OCA after the disposition of a case by completing disposition reporting cards. The records include the same information collected in California and Minnesota. Upon receipt of the disposition reports, the OCA checks the data for internal validity and contacts the submitting court to correct any errors found. New York, like Minnesota, only records petitioned cases; there is no reporting of delinquency or status referrals that are handled informally by county probation departments.

11. The 53 counties in North Dakota report all delinquency and status referrals to the Office of State Court Administrator (OSCA) on a weekly or bimonthly basis. The county juvenile probation offices complete a juvenile court face sheet form, which includes the filing information, social history, and disposition of each case referred to the juvenile court as well as a separate change of status form. While the social history information is not entered in the OSCA's computers, the other information collected is similar to that obtained in California and Minnesota.

12. Juvenile court data in Pennsylvania are collected by the Juvenile Court Judges' Commission (JCJC). A statistical card is submitted when a referral is received by the county probation department, if a youth is detained, and when the case is finally disposed. Like the other jurisdictions, the unit of count is the case disposed, a referral disposed of informally by the probation department or formally by the court. In addition to the types of offender and offense information collected by California and Minnesota, the JCJC reporting forms also include substantial information on a juvenile's educational status, family status, living arrangements, family income, and additional indicators of offense seriousness such as injury to victim, use of weapons, or the total value of property stolen or damaged. Philadelphia uses a separate reporting system from the rest of Pennsylvania. It records information only on petitioned cases, and does not include the information collected by the other Pennsylvania counties on school attainment, family status or income, the additional offense seriousness indicators, or a youth's pretrial detention status.

13. According to the Bureau, the coding forms used in 1984 classified defense representation as (1) none, (2) private counsel, (3) court appointed counsel, and (4) public defender. In some instances, although a juvenile may have been represented, the court personnel who completed the forms reported "none" if they did not know which type of counsel appeared. The reporting form was revised in 1986 to include an additional category of "unknown."

14. In Minnesota, the prior record consists exclusively of previously petitioned cases. In Nebraska, the prior referrals include both formally petitioned cases and those referred to intake that were disposed of informally. As indicated in Table 1, 62.8% of referrals in Nebraska result in formal petitions.

15. The law in all six states formally requires the appointment of counsel in some or all circumstances. See, for example, Calif. Welf. & Inst. Code 317, 318; Minn. Stat. Ann. 260.155 Subd. 2; Nebraska Stat. 43-272; N.Y. Fam. Ct. 320.3; N. Dak. Cent. Code 27-20-26; 42 Pa. C.S.A. 6337.

REFERENCES

Aday, David P., Jr. 1986. "Court Structure, Defense Attorney Use and Juvenile Court Decisions." *Sociological Quarterly* 27:107-119.

Blumberg, Abraham. 1967. "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession." *Law and Society Review* 1:15-30.

Bortner, M. A. 1982. *Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice*. New York: New York University Press.

Cicourel, Aaron V. 1968. *The Social Organization of Juvenile Justice*. New York: John Wiley.

Clarke, Stevens H. and Gary G. Koch. 1980. "Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?" *Law and Society Review* 14:263-308.

Dannefer, Dale and Russell Schutt. 1982. "Race and Juvenile Justice Processing in Court and Police Agencies." *American Journal of Sociology* 87:1113-1132.

Duffee, David and Larry Siegel. 1971. "The Organization Man: Legal Counsel in the Juvenile Court." *Criminal Law Bulletin* 7:544-553.

Emerson, Robert M. 1969. *Judging Delinquents: Context and Process in Juvenile Court*. Chicago: Aldine.

Fagan, Jeffrey, Ellen Slaughter, and Eliot Hartstone. 1987. "Blind Justice? The Impact of Race on the Juvenile Justice Process." *Crime & Delinquency* 33:224-258.

Feld, Barry C. 1984. "Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court." *Minnesota Law Review* 69:141-276.

Ferster, Elyce Zenoff, Thomas F. Courtless, and Edith Nash Snethen. 1971. "The Juvenile Justice System: In Search of the Role of Counsel." *Fordham Law Review* 39:375-391.

Fine, Kerry. 1983. *Out of Home Placement of Children in Minnesota: A Research Report*. St. Paul: Minnesota House of Representatives.

Fox, Sanford J. 1970. "Juvenile Justice Reform: An Historical Perspective." *Stanford Law Review* pp. 1187-1239.

Frazier, Charles and Donna Bishop. 1985. "The Pretrial Detention of Juveniles and Its Impact on Case Dispositions." *Journal of Criminal Law & Criminology* 76:1132-1152.

Hayeslip, David. 1979. "The Impact of Defense Attorney Presence on Juvenile Court Dispositions." *Juvenile and Family Court Journal* 30:9-15.

Henretta, John C., Charles E. Frazier, and Donna M. Bishop. 1986. "The Effects of Prior Case Outcomes on Juvenile Justice Decision-Making." *Social Forces* 65:554-562.

Horowitz, David. 1977. *The Courts and Social Policy*. New York.

Horwitz, Allan and Michael Wasserman. 1980. "Some Misleading Conceptions in Sentencing Research." *Criminology* 18:411-424.

Kay, Richard and Daniel Segal. 1973. "The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach." *Georgetown Law Journal* 61:1401-1424.

Krisberg, Barry and Ira Schwartz. 1983. "Rethinking Juvenile Justice." *Crime & Delinquency* 29:333-364.

Lefstein, Norman, Vaughan Stapleton, and Lee Teitelbaum. 1969. "In Search of Juvenile Justice: *Gault* and Its Implementation." *Law and Society Review* 3:491-562.
Matza, David. 1964. *Delinquency and Drift*. New York: John Wiley.
McCarthy, Belinda R. 1987. "Preventive Detention and Pretrial Custody in the Juvenile Court." *Journal of Criminal Justice* 15:185-200.
———and Brent L. Smith. 1986. "The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions." *Criminology* 24:41-64.
McMillian, Theodore and Dorothy Lear McMurtry. 1970. "The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?" *St. Louis University Law Journal* 14:561-603.
National Juvenile Court Data Archive. 1986a. *California Juvenile Court Case Records 1980-1985: User's Guide*. Pittsburgh, PA: Author.
———1986b. *Nebraska Juvenile Court Case Records 1975-1985: User's Guide*. Pittsburgh, PA: Author.
———1986c. *New York Juvenile Court Case Records 1977-1985: User's Guide*. Pittsburgh, PA: Author.
Nimick, Ellen H., Howard N. Snyder, Dennis P. Sullivan, and Nancy J. Tierney. 1985. *Juvenile Court Statistics 1983*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention.
Platt, Anthony and Ruth Friedman. 1968. "The Limits of Advocacy: Occupational Hazards in Juvenile Court." *University of Pennsylvania Law Review* 116:1156-1184.
Stapleton, W. Vaughan, and Lee E. Teitelbaum. 1972. *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Court*. New York: Russell Sage.
Thomas, Charles W. and Robin Cage. 1977. "The Effects of Social Characteristics on Juvenile Court Dispositions." *Sociological Quarterly* 18: 237-252.
Thomas, Charles W. and Christopher M. Sieverdes. 1975. "Juvenile Court Intake: An Analysis of Discretionary Decision-Making." *Criminology* 12:413-433.

CASES

Fare v. Michael C., 442 U.S. 707 (1979).
In re Gault, 387 U.S. 1 (1967).
Gideon v. Wainwright, 372 U.S. 335 (1963).
Schall v. Martin, 104 S.Ct. 2403 (1984).
Scott v. Illinois, 440 U.S. 367 (1979).

The New Mathematics of Imprisonment

Franklin E. Zimring
Gordon Hawkins

This article examines recently published claims that increased use of imprisonment will produce dramatic economic savings. Part I shows that applying the estimates generated in "Making Confinement Decisions" to trends in the United States produces anomalous results. If the study estimates were correct, criminal justice expenditures would have decreased recently and crime rates would have dropped toward zero as the U.S. prison population has doubled. Part II of the article discusses some of the factors that produced wild overestimates of the incapacitative potential of expanding imprisonment.

Students of correctional policy have recently been given a view of the bright side of prison overcrowding. In "Making Confinement Decisions," Dr. Edwin Zedlewski, an economist on the staff of the federal government's National Institute of Justice, presents an assessment of the costs and benefits of increasing levels of imprisonment that might come as a surprise to many observers who are concerned about the increasing numbers in our nation's prisons.

Introducing this publication, James K. Stewart, Director of the National Institute of Justice, makes reference to the difficult choices confronting policymakers faced with a prison population of 500,000 that is growing at a rate of 1,000 a week and says:

> Dr. Zedlewski's findings suggest that arguments that confinement is too expensive may not be valid when weighed against the value of crimes prevented through incapacitation and crimes deterred by the threat of imprisonment.

In fact, that description understates the claims for cost effectiveness that the study makes. The bottom line estimates presented in this

FRANKLIN E. ZIMRING is a Professor of Law and Director, Earl Warren Legal Institute, School of Law, University of California at Berkeley. **GORDON HAWKINS** is a Senior Fellow, Earl Warren Legal Institute, School of Law, University of California at Berkeley.

CRIME & DELINQUENCY, Vol. 34 No. 4, October 1988 425-436

The Right To Counsel In Juvenile Court:

Fulfilling Gault's Promise

Barry C. Feld
Professor of Law
University of Minnesota

Prepared for
Children, Families and Law Judicial Council

April 7, 1989

EXECUTIVE SUMMARY

More than twenty years ago in In re Gault, the United States Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. On the basis of the available data, it appears that Gault's promise of counsel remains unrealized. In many states, less than half of all juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled including many youths who are removed from their homes or confined in juvenile correctional institutions. Moreover, juveniles with lawyers appear to receive more severe sentences than do their unrepresented counterparts.

The high rates of non-representation implicate several legal issues: the validity of waivers of counsel by unrepresented juveniles; the incarceration of unrepresented youths; and the use of prior, uncounselled juvenile convictions to enhance the subsequent sentences of both juvenile and adult defendants. The United States Supreme Court has condemned both incarceration without representation and enhancements of penalties for unrepresented adult defendants. Thus, the questionable validity of many juveniles' waiver of their constitutional right to counsel has enormous consequences for the quality of procedural justice in juvenile courts.

The recent research on the delivery and effectiveness of legal services in juvenile courts indicates that changes in legislative and judicial policies are necessary. Instead of

relying upon discretionary review of the "totality of the circumstances" to assess the validity of a youth's waiver of counsel, legislation or judicial rules of procedure should mandate the automatic and non-waivable appointment of counsel at the earliest stage in a delinquency proceedings. Short of mandatory and non-waivable counsel, a prohibition on waivers of counsel without prior consultation with and the concurrence of counsel would provide greater assurance than does the current practice that any eventual waiver was truly "knowing, inelligent, and voluntary". Either automatic appointment or a requirement of consultation with counsel prior to waiver would assure the development of legal services delivery systems that would facilitate the routine representation of juveniles. It would also preclude collateral attacks on dispositions or subsequent enhanced sentences on the grounds that the juvenile lacked representation at the time of the original delinquency adjudication. Finally, only the presence of counsel can assure the quality of procedural justice in juvenile courts and fulfill Gault's promise. In light of the high rates of unrepresentation and the absence of data in most jurisdictions, many states need to modify their juvenile justice information systems in order to facilitate the monitoring of the delivery of legal services.

The Right To Counsel In Juvenile Court: Fulfilling Gault's Promise

Barry C. Feld

Introduction

More than twenty years ago in In re Gault, the United States Supreme Court held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings. The Gault Court mandated the right to counsel because "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution" (Gault, 1967:36). Gault also decided that juveniles were entitled to the privilege against self-incrimination and the right to confront and cross-examine their accusers at a hearing. Without the assistance of counsel, these other rights could be negated. "[T]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings....The child 'requires the guiding hand of counsel at every step in the proceedings against him'"(Gault, 1967:36). In subsequent opinions, the Supreme Court has reiterated the crucial role of counsel in the juvenile justice process. In Fare v. Michael C., the Court noted that "the lawyer occupies a critical position in our legal system.... Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his

defender project represented only 22.3% of juveniles in Winston-Salem, N.C., and only 45.8% in Charlotte, N.C. Aday (1986) found rates of representation of 26.2% and 38.7% in the southeastern jurisdictions he studied. Walter and Ostrander (1982) observed that only 32% of the juveniles in a large north central city were represented by counsel. Bortner's (1982:139) evaluation of a large, midwestern county's juvenile court showed that "Over half (58.2 percent) [the juveniles] were not represented by an attorney." Evaluations of rates of representation in Minnesota also indicate that a majority of youths are unrepresented (Feld, 1984; 1988; 1989). Feld (1989) reported enormous county-by-county variations in rates of representation within Minnesota, ranging from a high of 100% to a low of less than 5%. A substantial minority of youths removed from their homes (30.7%) and those confined in state juvenile correctional institutions (26.5%) lacked representation at the time of their adjudication and disposition (Feld, 1989:1236-38). The most comprehensive study to date reports that in half of the six states surveyed, only 37.5%, 47.7%, and 52.7% of juveniles charged with delinquency were represented (Feld, 1988:401). In short, it appears that Gault's promise of counsel remains unkept for most juveniles in most states.

Insert Table 1 Here

One pattern that emerges in all of the states is a direct

counsel where probation is the anticipated outcome (Feld, 1984: 190; 1989: 216-17; Bortner, 1982:136-147; Lefstein et al., 1969; Stapleton and Teitelbaum, 1972). In many instances, juveniles may plead guilty at their arraignment and have their disposition imposed at the same hearing without benefit of counsel. Whatever the reason and despite Gault's promise of counsel, many juveniles facing potentially coercive state action never see a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel, and face the prosecutorial power of the State alone and unaided.

Waiver of Counsel

The most commonly offered explanation of nonrepresentation is that juveniles waive their right to counsel. In most jurisdictions, the validity of relinquishing a constitutional right is determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances." (Johnson, 1938; Fare, 1979; Feld, 1984) The judicial position that a young minor can "knowingly and intelligently" waive constitutional rights unaided is consistent with most legislatures' judgment that a youth can make an informed waiver decision without parental concurrence or consultation with an attorney.

The right to waive counsel and appear as a pro se defendant follows from the United States Supreme Court's decisions in Johnson v. Zerbst (1938) and Faretta v. California (1975), where the Court held that an adult defendant in a state criminal trial

demonstrated significantly poorer comprehension of the nature and significance of the Miranda rights (Grisso, 1980:1160).

Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, was inadequate (Grisso, 1980:1157). While several jurisdictions recognize this "developmental fact" and prohibit uncounselled waivers of the right to counsel or incarceration of unrepresented delinquents (Iowa, 1985; Wisconsin, 1983; Juvenile Justice Standards, 1980), the majority of states allow juveniles to waive their Miranda rights as well as their Gault right to counsel in delinquency proceedings without an attorney's assistance.

Uncounselled Convictions and Enhanced Sentences

The questionable validity of many juveniles' waivers of the right to counsel raises collateral legal issues as well. In Argersinger v. Hamlin (1972), the Court considered whether an indigent defendant who was charged with and imprisoned for a minor offense was entitled to the appointment of counsel. In Scott v. Illinois (1979), the Court held that in misdemeanor proceedings, whether the trial judge actually ordered a sentence of incarceration determined whether counsel must be appointed for the indigent. Thus, unless validly waived, counsel must be appointed for any juvenile charged with conduct that would be a

> counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right (Burgett, 1967:115).

Moreover, the principle of Baldasar, Tucker, and Burgett that prior convictions obtained without representation by counsel or a valid waiver should not be used to enhance subsequent sentences has been applied in several sentencing contexts involving uncounselled prior juvenile convictions.[1]

While juvenile court judges in most states neither follow formal sentencing guidelines nor numerically weigh a youth's prior record, their use of prior uncounselled adjudications when sentencing juveniles for a subsequent conviction implicate the same issues that Baldasar and Burgett condemned for adults. "It makes little difference whether an enhanced penalty provision mandates an increased term or imprisonment or whether a judge imposed it exercising his sentencing discretion. As long as the

---

[1]. In Stockwell v. State, 59 Wis. 2d 21, 207 N.W.2d 883 (Wisc. 1973), the Wisconsin Supreme Court applied Tucker to Gault and held that juvenile adjudications in which the juvenile was denied the right to counsel could not be considered in subsequent sentencing proceedings. Similarly, in Majchszak v. Ralston, 454 F. Supp. 1137 (1978), where the defendant was denied parole release based on a salient factor score which included prior uncounselled delinquency adjudications, the Court remanded for resentencing. See also, Wren v. United States Parole Board, 389 F. Supp. 938 (N.D. Ga. 1975); United States v. Lufman, 457 F.2d 165 (7th Cir. 1972). In Commonwealth v. Rivens, 486 A.2d 984, 986 (Pa. 1985), the court reversed the defendant's sentence when the sentencing judge used juvenile convictions obtained without the assistance of counsel in computing his adult criminal history score. And, in Rizzo v. United States, 821 F. 2d 1271 (7th Cir. 1987), the Court remanded for resentencing an adult defendant whose sentence was based, at least in part, on prior uncounselled juvenile adjudications.

occurs because in many jurisdictions Gault is deemed to apply only to deliquency matters; status offenders are not provided with counsel at their initial adjudication (Feld, 1988). Although the initial status adjudication and not the later contempt proceeding is the "critical stage", courts have approved the initial denial of counsel as long as counsel is provided at the contempt proceeding that actually leads to confinement (Walker, 1972).

The Performance of Counsel in Juvenile Court

Even when juveniles are represented, attorneys may not be capable of or committed to representing their juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case", or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court (Stapleton and Teitelbaum, 1972; Lefstein et al., 1969; Fox, 1970; Platt and Friedman, 1968; Ferster et al., 1971; McMillian and McMurtry, 1970; Kay and Segal, 1973; Bortner, 1982; Clarke and Koch, 1980; Knitzer and Sobie, 1984; Blumberg, 1967). Institutional pressures to maintain stable, cooperative working relations with other personnel in the system may be inconsistent with effective

---

But see contra, In re Ballanger, 357 So. 2d 634 (La. App. 1978); C.A.H. v. Strickler, 162 W.Va. 535, 251 S.E.2d 222 (1979); In re Tasseing H., 281 Pa. Super. 400, 422 A.2d 530 (1980); In re Dina N., 455 A.2d 318 (R.I. 1983).

which they were charged, juveniles represented by attorneys receive more severe dispositions." Similarly, Feld's (1988:393) evaluation of the impact of counsel in six states' delinquency proceedings reported that:

> it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition....In short, while the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

Insert Table 2 Here

A second study by Feld (1989:1306) also concluded that while the relationships between the factors producing more severe dispositions and the factors influencing the appointment of counsel are complex, the presence of counsel appears to be an aggravating factor in the sentencing of juvenile offenders. The multiple regression equations reported in Table 2 indicate that the presence of an attorney increases the severity of a juvenile's disposition, accounting for about 1.5% of the variance in home removal and about .6% of the variance in secure confinement. While the overall explained variance is small, the beta coefficient indicates that the presence of an attorney has more influence on a youth's removal from home than does the

guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all....Further, in 35% of the cases, the law guardians did not talk to, or made only minimal contact with their clients during the court proceedings....In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians.

Public defender offices in many jurisdictions often assign their least capable lawyers or newest staff attorneys to juvenile courts to get trial experience and these neophytes may receive less adequate supervision than their prosecutorial counterparts (Flicker, 1983:2). Similarly, court appointed counsel may be beholden to the judges who select them and more concerned with maintaining an ongoing relationship with the court than vigorously protecting the interests of their frequently changing young clients (Flicker, 1983:4). In either event, the conditions of employment in juvenile court are not conducive to quality representation and are unlikely to attract and retain the most competent attorneys. Long hours, low pay, inadequate resources, crushing caseloads, and difficult clients are likely to discourage all but the most dedicated lawyers from devoting their professional careers to advocacy on behalf of children.

Measuring defense attorney performance by dispositional outcomes raises additional questions about the meaning of

Minnesota, for example, nearly one-third of all juveniles removed from their homes and more than one-quarter of those incarcerated in secure institutions were not represented (Feld, 1989:1254-56). In the sixty-eight of Minnesota's eighty-seven counties where only 19.3% of juveniles had lawyers, more than half of all the juveniles who were removed from their homes and who were incarcerated were not represented (Feld, 1989:1255). Since larger proportions of juveniles charged with serious offenses are represented, the primary impact of non-representation falls on the majority of juveniles who are charged with minor offenses. These very high rates of home removal and incarceration of unrepresented youths constitute an indictment all of the participants in the juvenile justice process -- the juvenile court bench, the prosecuting attorneys, the organized bar, the legislature, and especially the state supreme courts that have supervisory and administrative responsibility for states' juvenile courts.

Eliminating Waivers of Counsel

The United States Supreme Court held in Scott (1979) that it was improper to incarcerate an adult offender, even one charged with a minor offense, without either the appointment of counsel or a valid waiver of counsel. Moreover, both state and the United States Supreme Courts have described the type of penetrating inquiry that must precede a "knowing, intelligent, and voluntary" waiver of the right to counsel (Faretta, 1975; Fare, 1979). Whether the typical Miranda advisory which is then

to inform and educate a defendant to assure that subsequent waivers would indeed be "knowing and intelligent." If most juveniles lack the capacity to understand the warning, however, its ritual recitation hardly accomplishes that purpose (Feld, 1984:174-75).

No doubt, many juvenile court judges concluded that the majority of unrepresented juveniles, including those removed from their homes or confined, waived their right to counsel in delinquency proceedings. Are the majority of the young juveniles in many states who waive their rights to counsel really that much more competent and legally sophisticated than the adult defendants for whom Johnson (1938) and Faretta (1975) pose a significant constraint on waivers of counsel? Continued judicial and legislative reliance on the "totality of the circumstances" test clearly is unwarranted and inappropriate in light of the multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations that make every case unique. These factors result in virtually unlimited and unreviewable judicial discretion to deprive juveniles of their most fundamental procedural safeguard -- the right to counsel.

Only the cynical or myopic can contend that immature and impressionable young juveniles can waive their right to counsel alone and unaided. Can so many young juveniles be so mature and sophisticated as to make "knowing, intelligent, and voluntary"

delinquency proceeding (Iowa, 1985:§232.11; New Mexico, 19--:22(d); Rubin, 1977:12).

> In view of the inability of most juveniles to protect themselves from the consequences of the waiver of rights, or from the forces impelling them to effect a waiver, and because of the difficulties in placing substantial reliance on parental assistance, it may be argued that a minor should not, except in the most unusual circumstances [such as prior consultation with counsel], be held to a waiver of the right to counsel, nor an uncounseled minor to a waiver of the rights to silence, confrontation, and cross examination (Lefstein, et al, 1969:553).

As long as it is possible for a juvenile to waive the right to counsel, juvenile court judges will continue to find such waivers on a discretionary basis under the "totality of the circumstances." The very fact that it is legally possible for a juvenile to waive counsel itself may discourage some youths from exercising their right if asserting it may be construed as an affront to the presiding judge. Handler notes that

> if the program of rights is to be effective, it must deal with the problem of waiver -- waiver by those who do not understand and waiver by those who, rightly or wrongly, think, or have been coerced into thinking that they have more to gain by playing ball or by manipulation. Waiver under either circumstance should not be allowed. . . . [T]he community's interest here is greater than that which the

negative. Obviously, full representation of all juveniles would eliminate any variations in sentencing or processing associated with the presence of attorneys. Full representation would "wash out" the apparently negative effects of representation. Clearly, a full representation model is quite compatible with contemporary juvenile justice administration as evidenced by the experiences in California, Pennsylvania, and New York, as well as in several counties in Minnesota (Feld, 1988; 1989). The experiences there indicate that juvenile justice administration does not grind to a halt if juveniles are routinely represented. The systematic introduction of defense counsel would provide the mechanism for creating trial records which could be used on appeal and which could provide an additional safeguard to assure that juvenile court judges adhere more closely to the formal procedures that are now required. Moreover, eliminating waivers of counsel would lead to greater numbers of public defenders in juvenile justice cases. An increased cadre of juvenile defenders would get education, support and encouragement from statewide asociation with one another similar to the post-Gideon revolution in criminal justice that resulted from the creation of statewide defender systems.

More fundamentally, however, since the Gault decision, the juvenile court is first and foremost a legal entity engaged in social control and not simply a social welfare agency. As a legal institution exercising substantial coercive powers over young people and their families, safeguards against state

services to juveniles already exist. Moreover, despite any possible fiscal or administrative concerns, every juvenile is already entitled by Gault to the assistance of counsel at every critical stage in the process and only an attorney can redress the imbalance between a vulnerable youth and the state. As the Supreme Court said in Gault, "the condition of being a boy does not justify a kangaroo court (Gault, 1967:28)", especially if the justification proferred for such a proceeding is simply the state's fiscal convenience. The issue is not one of entitlement, since all are entitled to representation, but rather the ease or difficulty with which waivers of counsel are found, which in turn has enormous implications for the entire administration of juvenile justice.

Short of mandatory and non-waivable counsel, a prohibition on waivers of counsel without prior consultation and the concurrence of counsel would provide greater assurance than the current practice that any eventual waiver was truly "knowing, intelligent, and voluntary." Since waivers of rights, including the right to counsel, involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any less stringent alternative could be as effective. A per se requirement of consultation with counsel prior to a waiver takes account of the immaturity of youths and their lack of experience in law enforcement situations. In addition, it recognizes that only attorneys possess the skills and training necessary to

juvenile court may provide a partial explanation for their negative impact, the apparent relationship between the presence of counsel and the increased severity of disposition may be spurious. It may be that early in a proceeding, a juvenile court judge's familiarity with a case alerts him or her to the eventual disposition that will be imposed if the child is convicted and counsel may be appointed in anticipation of more severe consequences (Aday, 1986; Feld, 1989:347). In many states and counties, the same judge who presides at a youth's arraignment and detention hearing will later decide the case on the merits and then impose a sentence (Feld, 1984:240-241). Perhaps, the initial decision to appoint counsel is based upon the evidence developed at those earlier stages which also influences later dispositions. In short, perhaps judges attempt to conform to the dictates of Argersinger and Scott, try to predict, albeit imperfectly, when more severe dispositions will be imposed and then appoint counsel in such cases. Even if this explains somewhat the greater severity of sentences of represented juveniles than unrepresented ones, it remains the case that the requirements of Scott are not being fulfilled since many unrepresented juveniles are removed from their homes and incarcerated as well. A fundamental dilemma posed by Scott is how to obtain the information necessary to determine, before the fact, whether the eventual sentence will result in incarceration and thus will require the appointment of counsel without simultaneously prejudging the case and prejudicing the interests

remains problematic. Although most states have the computer capability of monitoring rates of representation, in many jurisdictions the information simply is not collected routinely (Feld, 1988). County and state court administrators should modify the juvenile court judicial information systems in order to collect information on a host of important legal and socio-demographic variables. Because this information is already included in most juveniles' social services records or court files, expanding the judicial information code forms to incorporate data summeraries would entail minor additional administrative burdens but would greatly increase the information available for policy analysis.

Qualitative studies of the processes of initial appointment and performance of counsel in several jurisdictions are necessary to determine what attorneys actually do in juvenile court proceedings. Once an attorney is actually present, the role he or she adopts is often fraught with difficulties. A number of commentators have questioned whether attorneys can function as adversaries in juvenile courts and, yet, whether there is any utility to their presence in any other role (Ferster, et al., 1971; Platt & Friedman, 1968; Lefstein, et al., 1969; Kay & Segal, 1973; McMillian & McMurtry, 1970). The reluctance of many attorneys to simply apply the role of counsel established in adult criminal courts to juvenile proceedings stems from the perceived differences in sentencing policies and the more "therapeutic" orientation of juvenile courts. Thus, many

enhancement of sentences occurs both formally by statute or guideline and informally as an exercise of judicial discretion. Not only are many unrepresented juveniles routinely adjudicated delinquent and removed from their homes or incarcerated, but their earlier dispositions substantially influence later ones (Feld, 1988; 1989; Henretta, et al., 1986).

Having decided to consider juveniles' prior records for sentencing both as juveniles and as adults, sentencing authorities must now confront the reality of the quality of procedural justice in juvenile courts. If juvenile adjudications are to be used to enhance sentences for juveniles or adults, then a mechanism must be developed to assure that only constitutionally obtained prior convictions are considered. Again, automatic and mandatory appointment of counsel in all cases is the obvious device to assure the validity of prior convictions. Anything less will subject a juvenile or young adult's sentence to direct or collateral attack, produce additional appeals, and impose a wasteful and time-consuming burden on the prosecution to establish the validity of prior convictions.

Until provisions for the mandatory appointment of counsel are implemented, jurisdictions where juveniles are not routinely represented should create a presumption that all prior juvenile convictions were obtained <u>without</u> the assistance of counsel with the burden on the prosecution to establish that such prior convictions were obtained validly. This takes cognizance of the

REFERENCES

Aday, David P. Jr. 1986. "Court Structure, Defense Attorney Use, and Juvenile Court Decisions." Sociological Quarterly 27:107-119.

Blumberg, Abraham. 1967. "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession." Law and Society Review 1:15-30.

Bortner, M. A. 1982. Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice. New York: New York University Press.

Carrington, Peter J. and Sharon Moyer. 1988a. "Legal Representation and Workload in Canadian Juvenile Courts," (Ottawa: Department of Justice, Canada).

Carrington, Peter J. and Sharon Moyer. 1988b. "Legal Representation and Dispositions in Canadian Juvenile Courts," (Ottawa: Department of Justice, Canada).

Clarke, Stevens H. and Gary G. Koch. 1980. "Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?", Law and Society Review 14:263-308.

Costello, Jan and Nancy Worthington. 1981. "Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act," 16 Harv. C.R.-C.L. L.Rev. 41.

Duffee, David and Larry Siegel. 1971. "The Organization Man: Legal Counsel in the Juvenile Court." Criminal Law Bulletin 7:544-553.

Feld, Barry C. 1984. "Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court." Minnesota Law Review 69:141-276.

Feld, Barry C. 1988. "In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court," 34 Crime & Delinquency 393-424.

Feld, Barry C. 1989. "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make," 79 J. Criminal L. & Criminology 1185 - 1346.

Ferster, Elyce Zenoff, and Thomas F. Courtless. 1972. "Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court," 7 Law & Society Rev. 195-222.

Ferster, Elyce Zenoff, Thomas F. Courtless and Edith Nash

Rudstein, 1982. "The Collateral Use of Uncounselled Misdemeanor Convictions after Scott and Baldasar, 34 U. Fla. L. Rev. 517.

Schartz, Ira. 1989. (In)Justice for Juveniles: Rethinking the Best Interests of the Child.

Stapleton, W. Vaughan and Lee E. Teitelbaum. 1972. In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts. New York: Russell Sage.

Walter, James D. and Susan A. Ostrander. 1982. "An Observational Study of a Juvenile Court," Juvenile & Family Court J. 53 (August, 1982).

CASES

Argersinger v. Hamlin, 407 U.S. 25 (1972).
Baldasar v. Illinois, 446 U.S. 222 (1980).
Burgett v. Texas, 389 U.S. 109, 114 (1967).
Fare v. Michael C., 442 U.S. 707 (1979).
Faretta v. California, 422 U.S. 806 (1975).
In re Gault, 387 U.S. 1 (1967).
In re Walker, 191 S.E.2d 702 (N.C., 1972)
Gideon v. Wainwright, 372 U.S. 335 (1963).
Johnson v. Zerbst, 304 U.S. 458 (1938).
Scott v. Illinois, 440 U.S. 367 (1979).
United States v. Tucker, 404 U.S. 443 (1972).

STATUTES

Iowa Code Ann. § 232.11 (West Supp. 1985).
New Mexico Children's Court Rule 22(d)
Wisconsin Stat. Ann. § 48.23 (West 1983).

TABLE 2
REGRESSION MODEL OF FACTORS INFLUENCING
OUT-OF HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS
MINNESOTA, 1986

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
		OUT-OF-HOME PLACEMENT		
PRIOR HOME REMOVAL DISPOSITION	.422*	.357*	.422	.179
DETENTION	-.265*	-.175*	.467	.218
ATTORNEY	.229*	.107*	.483	.233
OFFENSE SEVERITY	.157*	.077*	.490	.240
NUMBER OF OFFENSES AT DISPOSITION	-.084*	-.060*	.494	.244
AGE	.039*	.018**	.494	.244
PRIOR RECORD	-.282*	-.019***	.494	.244
GENDER	.023**	-.014***	.494	.245
		SECURE CONFINEMENT		
PRIOR SECURE CONFINEMENT DISPOSITION	.414*	.354*	.414	.171
OFFENSE SEVERITY	.191*	.120*	.445	.198
DETENTION	-.194*	-.115*	.462	.214
ATTORNEY	.197*	.081*	.469	.220
NUMBER OF OFFENSES AT DISPOSITION	-.086*	-.050*	.471	.222
PRIOR RECORD	-.260*	-.040*	.473	.223
AGE	-.023**	-.040***	.474	.224

* $p < .001$
** $p < .01$
*** $p < .05$

Source, Feld, 1989:1306

EXHIBIT 2

A COMPARATIVE LISTING OF THE JUVENILE REPRESENTATION STATUTES OF OTHER STATES

Koch

REPRESENTATION RIGHTS OF JUVENILES IN DELINQUENCY HEARINGS

The following provides a schematic overview of statutory requirements related to the manner of implementing a minor's right to counsel in juvenile hearings in the various states.

In the chart attached, the numbers opposite each state correspond to the particular statutory provision described below.

1. Court required to inform minor of right to counsel and inquire specifically as to validity of waiver;

2. Valid waiver requires prior consultation with attorney (or parent or guardian);

3. Minor presumed incapable of valid waiver;

4. Minor presumed indigent without reference to income of parent; or public defender statutorily required to provide representation;

5. Waiver may be withdrawn at any point in proceedings;

6. Provision for independent representation for minor where conflict appears with parent or parents fail to retain counsel for minor;

7. Waiver not allowed;

8. Court has discretionary power to appoint counsel for minor in interest of justice;

9. Court required to appoint counsel where unrepresented minor appears.

Note: This survey is general and not exhaustive. Relevant case law has not been researched nor have all possible statutory overlays been detailed.

As in category #1, it can probable be assumed that in every jurisdiction the juvenile court authority makes known the right to counsel at some point prior to a hearing and judgement. However, in this survey, category #1 has been entered only when a statute expressly requires

the court to inform a juvenile of the right to counsel.

ALABAMA	- 1,4 (if commitment possible), 8
ALASKA	- 1,2 (felony only)
ARIZONA	- 2,5,6
*ARKANSAS	- 1,2,4,6,7 (where commitment is possible)
*CALIFORNIA	- 1,2 (for detention hearing), 4,6
COLORADO	- 1
CONNECTICUT	- 1,8
DELAWARE	- 1 (specifies waiver on the record), 6 (fees to parent), 8
*FLORIDA	- 1,8,9, (it is required that child be represented at all stages of proceedings)
GEORGIA	- 9,6,1
HAWAII	- 1
IDAHO	- 8,1,6
ILLINOIS	- 1
*INDIANA	- 6,2,1
*IOWA	- 7 (at any stage after police interrogation), 3 (for minor under 16 for police interrogation), 6
KANSAS	- 1,9,8 (an appointed attorney shall continue to represent juvenile at all subsequent proceedings unless relieved by the court upon a showing of good cause)
KENTUCKY	- 1
LOUISIANA	- 8,1 (child must be represented at the transfer hearing)
MAINE	- 1, 6,8 (child shall be advised of right to counsel at every stage of proceedings)
MARYLAND	- 1,2,6,8

MASSACHUSETTS	- 1,9,8
MICHIGAN	- 8
MINNESOTA	- 1,2 (parents may waive for minor under 12), 8
MISSISSIPPI	- No statute located expressing minor's right to counsel
MISSOURI	- Statute only expresses that minor has the right to counsel if facing commitment.
*MONTANA	- 1,2,7 (if commitment of more than 6 months may result from hearing)
NEBRASKA	- 1
NEVADA	- 1,4
NEW HAMPSHIRE	- Right to counsel same as for adult defendant.
NEW JERSEY	- 4
NEW MEXICO	- 1,6
*NEW YORK	- 3 (commentary indicates a valid waiver of counsel is "unlikely, if not impossible" under this statute)
NORTH CAROLINA	- 1,4,9
NORTH DAKOTA	- 1,6,8 (fees to parents), 9
OHIO	- 1,6,9
OKLAHOMA	- 2,8
OREGON	- 9 (under same criteria for adult defendant)
PENNSYLVANIA	- 1,2 (parent may not waive if conflict with minor exists), 6
RHODE ISLAND	- 1,6,8

SOUTH CAROLINA - 1 (notice by mail of right made prior to hearing)

SOUTH DAKOTA - 1, 8

TENNESSEE - 1,2 (in writing and on the record)

TEXAS - 1

UTAH - 1,8

VERMONT - 6,8

VIRGINIA - 1,2,4

WASHINGTON - 1,2 (if under 12 years), 4

WEST VIRGINIA - 4

WISCONSIN - 4,7 (for minor under 15 years), 8

WYOMING - 1,4 (fees to parent), 8

DISTRICT OF COLUMBIA - 6, 8

M.O.W. v. State, Ct. App. Op. No. 4846, 645 P.2d 1229

47.10.050. Appointment of guardian ad litem or attorney. In the course of proceedings instituted under this chapter the court finds that the welfare of a minor will be promoted by the appointment of an attorney to represent the minor or an attorney appointed to serve as guardian ad litem, the court may make the appointment. Appointment of a guardian ad litem or attorney shall be made in the terms of AS 25.24.310.

In proceedings initiated under a petition for delinquency, a minor shall have the right to be represented by counsel and if indigent shall be appointed by the court. The court shall appoint counsel for the minor unless it makes a finding on the record that the minor has made a voluntary, knowing, and intelligent waiver of the right to counsel and a parent or guardian with whom the child resides or in whose care the child is before the filing of the petition concurs with the waiver. In proceedings in which it has been alleged that the minor has committed an act which would be a felony if committed by an adult, waiver of counsel may not be accepted unless the court is satisfied that the minor has consulted with an attorney before the waiver of counsel. (§ 8 art I ch 167 SLA 1957; am § 5 ch 167 SLA 1975; am §§ 11, 12 ch 63 SLA 1977)

Notes. — Section 33, ch. 63, SLA 1977 provides: "Section 12 of this Act is intended as a matter of adding to the court's authority under Rules 14 and 15, Alaska Rules of Children's Procedure, by requiring the court to appoint counsel for the minor unless the minor has made a voluntary, knowing and intelligent waiver, and in certain cases of delinquency where there has been a waiver of counsel to appoint counsel for the minor unless the court is satisfied that the minor consulted with an attorney before his waiver of counsel."

NOTES TO DECISIONS

Rule of Children's Procedure requiring presence of the guardian at a child hearing. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Cited in RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971); Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

References. — 39 Am. Jur. 2d Guardian and Ward, § 17; 42 Am. Jur. 2d Infants, § 173 et seq.

Recognition of foreign guardian as next friend or guardian ad litem, 94 ALR2d 211.

Who is minor's next of kin for guardianship purposes, 63 ALR3d 813.

(1) Place the child in the custody of a parent, guardian, custodian or any other person who the court deems proper or under the supervision of any agency or organization agreeing to supervise him;

(2) Place restrictions on the child's travel, association or place of abode during the period of his release; or

(3) Impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children specified in section 12-15-59, including a condition requiring that the child return to custody as required.

(b) An order releasing a child on any conditions specified in subsection (a) of this section may at any time be amended to impose additional or different conditions or of release or to return the child to custody for failure to conform to the conditions originally imposed. (Acts 1975, No. 1205, p. 2384, § 5-123.)

§ 12-15-63. Notification of children, parents, guardians, etc., of right to counsel; appointment of counsel by court.

(a) In delinquency and in need of supervision cases, a child and his parents, guardian or custodian shall be advised by the court or its representative at intake that the child has the right to be represented at all stages of the proceedings by counsel retained by them or, if they are unable to afford counsel, by counsel appointed by the court.

If counsel is not retained for the child in a proceeding in which there is a reasonable likelihood such may result in a commitment to an institution in which the freedom of the child is curtailed, counsel shall be appointed for the child.

The court may appoint counsel in any case when it deems such in the interest of justice.

(b) In dependency cases, the parents, guardian or custodian shall be informed of their right to be represented by counsel and, upon request, counsel shall be appointed where the parties are unable for financial reasons to retain their own.

The court shall also appoint counsel for the child in dependency cases where there is an adverse interest between parent and child or where the parent is an unmarried minor or is married, widowed, widowered or divorced and under the age of 18 years or counsel is otherwise required in the interests of justice. (Acts 1975, No. 1205, p. 2384, § 5-124.)

Cross references. — As to rules regarding appearance of counsel, see A.R.J.P., Rule 14. As to right to counsel in an appeal, see A.R.J.P., Rule 22.

This section extends to proceedings terminating parental rights. Kelley v. Licensed Foster Parents, 410 So. 2d 896 (Ala. 1981), cert. denied, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 537 (1984).

Due process requirements in proceedings terminating parental rights. — In proceedings terminating parental rights, due process requires that adequate written notice, at earliest practicable time, be afforded to child and his parents or guardian, informing them of specific issues they must meet to allow them to prepare a defense. Kelley v. Licensed Foster Parents, 410 So. 2d 896 (Ala. 1981), cert. denied, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 537 (1984).

Indigent parents have right to counsel in all proceedings. — Rule 11(C) A.R.J.P., pro-

ARIZONA

Notes of Decisions

1. State's responsibilities

Child is entitled to have his or her basic needs cared for, and if parent fails to furnish these needs, state may and should act on behalf of child. Matter of Appeal In Cochise County Juvenile Action No. 5666-J (1982) 133 Ariz. 157, 650 P.2d 459.

2. Search and seizure

Deputy sheriff who had been told that houseworker had found five-year-old child in parents' home with hands tied behind back, nose flattened, and head partially under hot water heater, had lawful duty to enter parents' premises and investigate, and evidence compiled by him against parents during the visit was not subject of unlawful search and seizure. State v. Hunt (1965) 2 Ariz.App. 6, 406 P.2d 208.

Deputy sheriff's lawful presence on parents' premises for purpose of protecting their child, who allegedly had been found by houseworker with hands tied behind her back and head underneath hot water heater in furnace room, gave deputy authority to obtain from the premises evidence admissible in criminal action against parents. Id.

3. Counsel

Neither probation officer, who was also superintendent of detention home, and whose role in adjudicatory delinquency hearing, by statute and in fact, was arresting officer and witness against child, nor judge presiding over delinquency hearing could represent or act as counsel for child. Application of Gault (1967) 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527.

§ 8-225. Counsel right of child, parent or guardian; waiver; appointment; reimbursement

A. In all proceedings conducted pursuant to this title and the Rules of Procedure for the Juvenile Court, a child has the right to be represented by counsel.

B. If a child, parent or guardian is found to be indigent, the juvenile court shall appoint an attorney to represent such person or persons unless counsel for the child is waived by both the child and the parent or guardian.

C. Prior to any court appearance which may result in detention, institutionalization or mental health hospitalization of a child, the court shall appoint counsel for the child if counsel has not been retained by or for the child, unless counsel is waived by both the child and a parent or guardian with whom the child resides or resided prior to the filing of a petition. The child, parent or guardian may withdraw the waiver of counsel at any time.

D. Waiver of counsel pursuant to this section is subject to the provisions of rule 6, subsection (c) of the Rules of Procedure for the Juvenile Court.

E. If there appears to be a conflict of interest between a child and his parent or guardian including a conflict of interest arising from payment of the fee for appointed counsel under subsection G, the juvenile court may appoint an attorney for the child in addition to that appointed for the parent or guardian or employed by the parent or guardian.

F. The judge of the juvenile court may fix a reasonable sum to be paid by the county for the services of an appointed attorney.

G. If the court finds that the parent or guardian of a child has sufficient financial resources to reimburse, at least in part, the costs of the services of an attorney appointed pursuant to this section, the court shall order the parent or guardian to pay to the appointed attorney or the county, through

the clerk of the court, an amount that the parent or guardian is able to pay without incurring substantial hardship to the family. Failure to obey an order under this subsection is not grounds for contempt or grounds for withdrawal by the appointed attorney. An order under this section may be enforced in the manner of a civil judgment.

B. In a county where there is a public defender, the public defender may act as attorney in a delinquency or incorrigibility proceeding when requested by the juvenile court.

Added by Laws 1970, Ch. 223, § 2, eff. Aug. 11, 1970. Amended by Laws 1974, Ch. 96, § 3; Laws 1980, Ch. 139, § 1.

Historical Note

The 1974 amendment, in former subsec. B, provided that the public defender could also act as an attorney in incorrigibility proceedings.

The 1980 amendment rewrote the section, which formerly read:

"A. In all proceedings under this chapter the juvenile court shall upon request of a child, parent or guardian found to be indigent, appoint an attorney to represent such person or persons. If there appears to be a conflict of interest between a child and his parent or guardian, the juvenile court may appoint an attorney for the child in addition to that appointed or employed by the parent or guardian. The presiding judge of the juvenile court may fix a reasonable sum, not exceeding two hundred fifty dollars, to be paid by the county for the services of an appointed attorney.

"B. In a county where there is a public defender, the public defender may act as attorney in a delinquency or incorrigibility proceeding when requested by the juvenile court."

Former § 8-225, enacted in 1955, relating to custody of child pending hearing, was amended by Laws 1958, Ch. 19, § 1, and was repealed by Laws 1970, Ch. 223, § 1.

See, now, § 8-223.

1980 Revisor's Note:

Pursuant to authority of § 41-1304.02, in the heading of this section the words ", parent or guardian" were added following the words "Counsel right of child".

Cross References

Counsel, review of temporary custody, see § 8-546.06.
Public defenders, duties, see § 11-584.

Law Review Commentaries

Child neglect proceedings, parens patriae versus due process. 17 Ariz.L.Rev. 1055 (1975).

Dependency adjudication: Problems of vagueness and overbreadth. 24 Ariz.L.Rev. 441 (1982).

Juvenile justice in Arizona, adjudication. 16 Ariz.L.Rev. 325 (1974).

Library References

Infants ⇐ 205.
WESTLAW Topic No. 211.
C.J.S. Infants §§ 51, 52, 62, 64 to 67.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

1. Independent counsel

Neither probation officer, who was also superintendent of detention home, and whose role in adjudicatory delinquency hearing, by statute and in fact, was arresting officer and witness against child, nor judge presiding over delinquency hearing could represent or act as counsel for child. Application of Gault (1967) 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527.

This section granting child the right to be represented by counsel in juvenile court does not require independent counsel in all proceedings. Matter of Appeal in Yavapai County Juvenile Action No. J-8545 (1984) 140 Ariz. 10, 680 P.2d 146.

Trial court in juvenile proceedings must appoint independent counsel for the child involved upon request of interested party or sua sponte where such counsel would contribute to promoting child's best interest by serving identifiable purpose such as advocating child's position in the dispute or insuring that the record be as complete and accurate as possible, or it must state why such appointment is unnecessary. Matter of Appeal in Yavapai County Juvenile Action No. J-8545 (1984) 140 Ariz. 10, 680 P.2d 146.

2. Effective assistance of counsel

Facts concerning remand from juvenile to adult court did not demonstrate such a clear violation of applicable Arizona law that an attorney's decision not to challenge the remand would establish incompetency. Saunders v. Eyman (C.A.1977) 600 F.2d 728.

Juveniles were denied a fundamental right when detention hearing proceeded with court-appointed attorney who had no opportunity to interview her clients or otherwise prepare for hearing, after juveniles indicated that they were represented by another attorney. Pipkins v. Helm (App.1982) 132 Ariz. 237, 644 P.2d 1323.

3. Failure to disclose right to counsel

Where 15-year-old boy and his parents had no counsel at juvenile delinquency proceedings and were not told of their right to counsel, their failure to object to lack of constitutionally adequate notice of hearing did not constitute waiver of requirement of adequate notice. Application of Gault (1967) 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527.

Statement made by 16-year-old defendant while he was under jurisdiction of juvenile court was not admissible against him in trial for murder where neither defendant nor his mother was advised of defendant's right to counsel, privilege against self-incrimination or of possibility that he might be remanded to trial as an adult. State v. Councilman (1969) 105 Ariz. 145, 460 P.2d 640.

4. Failure to appoint counsel

Juvenile court erred in failing to appoint independent counsel for children involved in dependency proceeding where independent counsel could have ensured that the record before the court contained reasons why each of the prospective custodians should be granted custody of the children and could have explored alternative placements and ensured that the claims of the prospective custodians were accurate. Matter of Appeal in Yavapai County Juvenile Action No. J-8545 (1984) 140 Ariz. 10, 680 P.2d 146.

Juvenile court's error in failing to appoint independent counsel for children involved in dependency proceeding did not warrant reinstatement of the proceedings where children's grandmother, who had been awarded custody of the children, had been authorized to commence guardianship proceedings in California where she and the children resided and had filed petition in California to adopt the children, no facts had been shown to indicate that children's best interests would be served by reinstatement of the dependency proceeding, and children's aunt and uncle, who opposed award of custody to grandmother, would not be denied opportunity to gain custody in that they were actively opposing the California adoption proceeding and had themselves sought adoption of the children in Arizona. Matter of Appeal in Yavapai County Juvenile Action No. J-8545 (1984) 140 Ariz. 10, 680 P.2d 146.

Where indigent mother requested appointment of counsel at dependency proceeding and evidence was taken without the appointment of counsel who was subsequently appointed and participated in further proceedings, mother was denied due process and adjudication of dependency must be set aside. Matter of Juvenile Action No. J-64016 (App.1980) 127 Ariz. 296, 619 P.2d 1073.

5. Parent or guardian's right to counsel

Incarcerated natural father, if indigent, had the right to be advised of right to appointment of counsel to represent him in proceeding to terminate parent-child relationship between himself and his minor child. Matter of Appeal in Pima County Juvenile Action No. S-949

ARKANSAS

9-27-317. Fingerprinting or photographing.

(a) A juvenile shall not be photographed or fingerprinted by any law enforcement agency unless he has been taken into custody for a violation of the law.

(b) Copies of a juvenile's fingerprints or photograph shall be made available only to other law enforcement agencies and to the juvenile court.

(c) Each law enforcement unit in the state shall keep a separate file of photographs and fingerprints, it being the intention that such photographs and fingerprints of juveniles not be kept in the same file with those of adults.

(d) However, in any case where the juvenile is found not to have committed the alleged violation of law, the juvenile court may order any law enforcement agency to return all pictures and fingerprints to the juvenile court and shall order the law enforcement unit that took the juvenile into custody to mark the arrest record with the notation "found not to have committed the alleged offense."

History. Acts 1975, No. 451, § 19; 1979, No. 815, § 3; A.S.A. 1947, § 45-419.

9-27-318. Right to counsel — Appointment.

(a) In delinquency and juvenile-in-need-of-supervision cases, a juvenile and his parent, guardian, or custodian shall be advised by the intake officer at the initial intake interview and by the court at the juvenile's first appearance before the court that the juvenile has the right to be represented at all stages of the proceedings by counsel retained by or on behalf of the juvenile.

(b)(1) The inquiry concerning the ability of the juvenile to retain counsel shall include a consideration of the juvenile's financial resources and the financial resources of his or her family. However, the failure of the juvenile's family to retain counsel for the juvenile shall not deprive the juvenile of the right to appointed counsel if required under this section.

(2) The court may order financially able juveniles, parents, guardians, or custodians to pay all or part of a reasonable attorney's fee and expenses for representation of a juvenile.

(c)(1) If counsel is not retained for the juvenile or it does not appear that counsel will be retained, counsel must be appointed to represent the juvenile at all appearances before the court, unless the right to counsel is waived in writing by the juvenile and his or her parent, guardian, or custodian.

(2) Appointment of counsel shall be made at a time sufficiently in advance of the court appearance to allow adequate preparation by appointed counsel and adequate consultation between the appointed counsel and the juvenile.

(d) If counsel is not retained for the juvenile in a proceeding in which the judge determines at the plea and arraignment stage of the proceedings that there is a reasonable likelihood that the proceeding may result in the juvenile's commitment to an institution in which the freedom of the juvenile would be curtailed, the court shall appoint counsel for the juvenile. No waivers shall be accepted of the right to counsel appointed under this paragraph.

(e)(1) In all proceedings involving the custody of juveniles, the court shall appoint counsel or a guardian ad litem to represent the interests of the juvenile.

(2) The counsel or guardian ad litem shall be given access to all reports relevant to the case and to any reports of examination of the juvenile's parents or other persons responsible for the care of the juvenile.

(3) The counsel or guardian ad litem shall be charged with the representation of the juvenile's best interests and shall make such further investigation as he deems necessary to ascertain the facts.

(4) The counsel or guardian ad litem shall interview witnesses, make recommendations to the court, and participate further in the proceedings to the degree appropriate for adequately representing the juvenile.

(5) The participation may include presentation of evidence, prehearing and post-hearing motions, examination and cross-examination of witnesses in any hearing involving the represented juvenile, and appeals.

History. Acts 1975, No. 451, § 13; 1981, No. 394, § 1; 1985, No. 425, § 2; 1985, No. 672, § 2; A.S.A. 1947, § 45-413.

RESEARCH REFERENCES

Ark. L. Rev. Right to counsel in the Arkansas Juvenile Court — Arkansas Juvenile Code of 1975 and Proposed Rules of Procedure for Juvenile Court, 30 Ark. L. Rev. 95.

UALR L.J. Sallings, Child Custody — Counsel for Children Permitted, 3 UALR L.J. 133.

Legislative Survey, Juvenile Law, 8 UALR L.J. 591.

CASE NOTES

Cited: Ricketts v. Ricketts, 265 Ark. 28, 576 S.W.2d 932 (1979).

9-27-319. Right to counsel — Waiver.

(a)(1) Waiver of the right to counsel shall be accepted only upon a finding by the court from clear and convincing evidence, after questioning the juvenile, that the juvenile understands the full implications of the right to counsel; that the juvenile freely, voluntarily, and intelligently wishes to waive the right to counsel; and that the parent, guardian, custodian, or counsel for the juvenile agree with the juvenile's decision to waive the right to counsel.

(2) The agreement of the parent, guardian, custodian, or attorney shall be accepted by the court only if the court finds that such person has freely, voluntarily, and intelligently made the decision to agree with the juvenile's waiver of the right to counsel, that such person has no interest adverse to the juvenile, and that such person has consulted with the juvenile in regard to the juvenile's waiver of the right to counsel.

(b) In determining whether a juvenile's waiver of the right to counsel was made freely, voluntarily, and intelligently, the court shall consider all the circumstances of the waiver, including:

(1) The juvenile's physical, mental, and emotional maturity;

(2) Whether the juvenile or his parent, guardian, custodian, or guardian ad litem understood the consequences of the waiver;

(3) Whether the juvenile and his parent, guardian, or custodian were informed of the delinquent act alleged to make the juvenile one in need of supervision;

(4) Whether the waiver of the right to counsel was the result of any coercion, force, or inducement;

(5) Whether the juvenile and his parent, guardian, custodian, or guardian ad litem had been advised of the juvenile's right to remain silent and to the appointment of counsel.

(c) No waiver of the right to counsel shall be accepted in any case in which the parent, guardian, or custodian has filed a petition against the juvenile, initiated the filing of a petition against the juvenile, or requested the removal of the juvenile from the home.

(d) All waivers of the right to counsel shall be in writing and signed by the juvenile and his parent, guardian, or custodian.

History. Acts 1975, No. 451, § 13; 1981, No. 394, § 1; A.S.A. 1947, § 45-413.

RESEARCH REFERENCES

Ark. L. Rev. Right to Counsel in the Arkansas Juvenile Court — Arkansas Juvenile Code of 1975 and Proposed Rules of Procedure for Juvenile Court, 30 Ark. L. Rev. 95.

UALR L.J. Sallings, Child Custody — Counsel for Children Permitted, 3 UALR L.J. 133.

Legislative Survey, Juvenile Law, 8 UALR L.J. 591.

CALIFORNIA

Cross References

Time of hearing, see California Rules of Court, Rule 1331.
Wards of court, similar provisions, see § 632.

Library References

Infants ⇐192.
C.J.S. Infants §§ 42, 53, 54, 55.

Family Law Practice, Goddard, §§ 1632, 1641, 1650.

§ 316. Informing minor as to reasons for custody; nature of proceedings; right to counsel

Upon his appearance before the court at the detention hearing, such minor and his parent or guardian, if present, shall first be informed of the reasons why the minor was taken into custody, the nature of the juvenile court proceedings, and the right of such minor and his parent or guardian to be represented at every stage of the proceedings by counsel.

(Added by Stats.1976, c. 1068, p. 4760, § 7.)

Historical Note

This section was derived from § 633 insofar as that section related to dependent children.

Cross References

Commencement of hearing, explanation of petition and proceedings, see California Rules of Court, Rule 1334.
Infractions, right to counsel, see Penal Code § 19c.
Right to counsel, see Penal Code § 686.
Wards of court, similar provisions, see § 633.

Library References

Infants ⇐192.
C.J.S. Infants §§ 42, 53, 54, 55.

Family Law Practice, Goddard, §§ 1650, 1651.

§ 317. Appointment of counsel

When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court shall appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or guardian. In a county where there is no public defender the court may fix the compensation to be paid by the county for service of such appointed counsel.

(Added by Stats.1976, c. 1068, p. 4760, § 7.)

Historical Note

This section was derived from § 634 insofar as that section related to dependent children.

Cross References

Detention hearing commenced, right to counsel, see California Rules of Court, Rule 1334.
Infractions, right to counsel, see Penal Code § 19c.
Jurisdiction hearing commenced, appointment of counsel, see California Rules of Court, Rule 1363.
Public defender's office established, see Government Code § 27700.
Right to counsel, see Penal Code § 686.
Wards of court, similar provisions, see § 634.

Library References

Infants ⇐192.
C.J.S. Infants §§ 42, 53, 54, 55.

Family Law Practice, Goddard, §§ 1651, 1674, 1678.

Notes of Decisions

1. In general

Wende review procedure devised in criminal setting to effect that when appellate counsel files brief raising no specific issues, court must not only review record to determine correctness of counsel's assessment of case, but must itself expressly determine whether appeal is frivolous, is applicable in review of dependent children proceedings. In re Brian B. (App. 4 Dist. 1983) 190 Cal.Rptr. 153, 141 C.A.3d 397.

Court, which appointed private counsel for indigent mother in proceeding to determine dependent status of children after she refused services of public defender, had no authority, under statutes providing that court shall appoint counsel in any case in which it appears that conflict of interest prevents attorney from properly representing parent or child, that in county where there is no public defender court may fix compensation to be paid by county for service of appointed counsel and that in any case in which court appoints counsel, he shall receive reasonable sum for compensation, to appoint private counsel and thus no jurisdiction to pay him. In re JGL (1974) 117 Cal.Rptr. 799, 43 C.A.3d 447.

Mother had statutory right to appointed counsel to represent her on appeal from an order after an adjudicatory disposition held in juvenile court which found and declared her minor daughter a dependent child. In re Simeth (1974) 115 Cal.Rptr. 617, 40 C.A.3d 982.

Indigent parents were not statutorily entitled to appointment of counsel on appeal from juvenile court order, entered in dependency proceeding, depriving them of custody of their child. In re T. (1972) 101 Cal.Rptr. 606, 25 C.A.3d 120.

§ 318. Appointment of counsel; continuation of representation; duties of counsel; access to records

(a) Notwithstanding the provisions of Section 317, when a minor who is alleged to be a person described in subdivision (d) of Section 300 appears before the juvenile court at a detention hearing, the court shall appoint counsel. The court may appoint the district attorney to represent the minor pursuant to Section 351.

(b) The counsel appointed by the court shall represent the minor at the detention hearing and at all subsequent proceedings before the juvenile court.

(c) Any counsel upon entering an appearance on behalf of a minor shall continue to represent that minor unless relieved by the court upon the substitution of other counsel or for cause.

(d) The counsel shall be charged in general with the representation of the child's interests. To that end, he shall make such further investigations as he deems necessary to ascertain the facts, including the interviewing of witnesses, and he shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings; he may also introduce and examine his own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In addition, the counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may be protected by other administrative or judicial proceedings, including but not limited to, a civil action pursuant to subdivision (b) of Section 11172 of the Penal Code. The court shall take whatever appropriate action is necessary to fully protect the interests of the child.

(e) Notwithstanding any other provision of law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. Counsel shall be given access to records maintained by hospitals or by other medical or nonmedical practitioners or by child care custodians, in the manner prescribed by Section 1158 of the Evidence Code.

(Added by Stats.1976, c. 1068, p. 4760, § 7. Amended by Stats.1980, c. 1254, p. 4242, § 1.)

Historical Note

This section was derived from §§ 634.5 and 634.6 insofar as those sections related to dependent children.

The 1980 amendment added subds. (d) and (e).

Cross References

Detention hearings commenced, counsel appointed, see California Rules of Court, Rule 1334.
Infractions, right to counsel, see Penal Code § 19c.
Jurisdiction hearings commenced, appointment of counsel, see California Rules of Court, Rule 1363.
Right to counsel, see Penal Code § 686.
Wards of court, similar provision, see § 634.6.

Library References

Infants ⇐192, 205.
C.J.S. Infants §§ 42, 51 et seq.

Family Law Practice, Goddard, §§ 1651, 1674.

can be said that he has been denied due process of law. People v. Dotson (1956) 299 P.2d 875, 46 C.2d 891.

4. Right to counsel—In general

Minor has absolute right to court-appointed attorney at adjudication hearing, while minor's parent does not possess such right. In re Robert W. (1977) 137 Cal.Rptr. 558, 68 C.A.3d 705.

Language of this section, which language is mandatory in nature, gives parent of minor an absolute right to be represented by counsel at every stage of juvenile court proceedings; under this section, parent's right to counsel is not affected by fact that minor is represented by counsel; each is entitled to be so represented. Id.

Where the ward has not been accused of crime and the change in custody involves purely a matter of discretion on part of the court, neither necessity nor occasion exists for advice of an attorney in relation thereof, and no rights of the ward in this connection are violated by refusal to permit counsel to intervene. In re O'Day (1948) 189 P.2d 525, 83 C.A.2d 339.

In proceeding to remove minor children from custody of their parents and make them wards of juvenile court, where best interests of children were protected and record failed to show that any attorney sought to be present or was prevented from showing any evidence on behalf of the minors, no rights of the wards were violated by failure of the court to provide counsel. Id.

5. —— Notice, right to counsel

Advice in notice of hearing on merits and remarks of judge at detention hearing, both of which referred to right to have attorney at hearing on merits, did not satisfy requirement that infant be advised of right to counsel at detention hearing. In re Macidon (1966) 49 Cal.Rptr. 861, 240 C.A.2d 600.

A minor and his parent were adequately apprised of right to counsel where minor was advised at detention hearing of right to counsel, and mother of the minor was personally served with notice which contained a statement that minor or his parent or guardian was entitled to have his attorney present at hearing on the petition, and that they should notify the court if they were indigent and desired an attorney. In re Patterson (1962) 27 Cal.Rptr. 10, 317 P.2d 74, 58 C.2d 848, certiorari denied 83 S.Ct. 1889, 374 U.S. 838, 10 L.Ed.2d 1059.

Absence of statement in minutes that juvenile court advised juvenile of right to counsel did not establish that he was denied that right, where Juvenile Court Act did not at that time require judge to advise minor or his parents that they had right to have attorney represent them and there was no guarantee to juvenile of right to counsel in such proceeding. In re Garcia (1962) 20 Cal.Rptr. 313, 201 C.A.2d 662.

6. —— Waiver, right to counsel

Where minor, who was charged with burglary, appeared before referee, sitting as a juvenile court, with his mother and grandmother, and at detention hearing minor, his mother, and grandmother were told of right to counsel and to remain silent, but they were not asked if counsel was desired, and mother stated that she left matter in hands of God, and there was nothing to show that contents of probation officer's report, social study, and recommendations were ever shown, there was no intelligent waiver of right to counsel. In re D.A.S. (1971) 93 Cal.Rptr. 112, 15 C.A.3d 283.

7. Compensation of counsel

No authorization exists for compensation of attorney appointed to represent an indigent minor or his parents or guardian in juvenile court proceedings, and such attorney is not entitled to compensation from county funds. 38 Ops.Atty.Gen. 154.

§ 634. Appointment of counsel

When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel. In a case in which the minor is alleged to be a person described in Section 601 or 602, the court shall appoint counsel for the minor if he appears at the hearing without counsel, whether he is unable to afford counsel or not, unless there is an intelligent waiver of the right of counsel by the minor; and, in the

absence of such waiver, if the parent or guardian does not furnish counsel and the court determines that the parent or guardian has the ability to pay for counsel, the court shall appoint counsel at the expense of the parent or guardian. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court shall appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or guardian. In a county where there is no public defender the court may fix the compensation to be paid by the county for service of such appointed counsel.

(Added by Stats.1961, c. 1616, p. 3475, § 2. Amended by Stats.1963, c. 2136, p. 4445, § 1; Stats.1967, c. 1355, p. 3193, § 4; Stats.1968, c. 1223, p. 2332, § 1; Stats. 1970, c. 625, p. 1241, § 1; Stats.1971, c. 667, p. 1322, § 2.)

Historical Note

As originally added in 1961, this section provided:

"When it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court may appoint counsel. In such a case the court must appoint counsel for the minor if he is charged with misconduct which would constitute a felony if committed by an adult. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or a parent or guardian."

The 1963 amendment added the final sentence.

The 1967 amendment rewrote the first two sentences into a single sentence which read:

"When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel and in a case in which the minor is alleged to be a person described in Section 601 or 602 the court must appoint counsel for the minor if he appears at the hearing without counsel, whether he is unable to afford counsel or not, unless there is an intelligent waiver of the right of counsel."

The 1968 amendment rewrote the section so as to read:

"When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel. In any case in which the minor is alleged to be a person described in Section 601 or 602, he shall be represented by counsel and the court shall appoint counsel for the minor if the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, unless there is an intelligent waiver of the right of counsel by the minor. If the parent or guardian does not furnish counsel and the court determines that such parent or guardian has the ability to pay, the court shall appoint counsel at the expense of the parent or guardian. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or guardian. In a county where there is no public defender the court may fix the compensation to be paid by the county for service of such appointed counsel."

The 1970 amendment rewrote the second and third sentences as the present second sentence.

The 1971 amendment required the court to appoint counsel by substituting in the third sentence, "shall" for "may".

The subject matter of this section insofar as it related to dependent children is now contained in § 317.

Juvenile defendants best served by informal judicial setting. The juvenile system is premised on the concept that a more informal, simple, and speedy judicial setting will best serve the needs and welfare of juvenile defendants. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

Applied in S.A.S. v. District Court, 623 P.2d 58 (Colo. 1981).

Rule 3. Advisement Hearing — Delinquency or CHINOS

(a) At their first appearance before the court, the child and his parents, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:

(1) The nature of the allegations contained in the petition;

(2) Their right to counsel and if they are indigent they will be assigned counsel, as provided by law;

(3) That the child need make no statement, and any statement made may be used against him;

(4) Their right to a jury trial as provided by law;

(5) That any admission the child makes must be voluntary on his part and not the result of undue influence or coercion on the part of anyone;

(6) The dispositional alternatives available to the court if the petition is proven or admitted;

(7) The child's right to bail and the amount of bail that has been set by the court;

(8) That the child may be subject to transfer to the criminal division of the district court to be tried as an adult, as provided by law.

(b) The child shall, after being so advised, admit or deny the allegations of the petition.

(c) If the child admits the allegations of the petition, the court shall not accept the admission without first determining that the child is advised of all the matters set forth in section (a) of this Rule and also determines that:

(1) The child understands the nature of the delinquent act alleged and the elements of the offense to which he is admitting and the effect of his admission;

(2) The admission is voluntary on the child's part and is not the result of undue influence or coercion on the part of anyone;

(3) The child understands and waives his right to trial by jury on all issues; (Amended May 22, 1980, effective July 1, 1980.)

(4) The child understands the possible dispositional alternatives available to the court;

(5) The child understands that the court will not be bound by representations made to the child by anyone concerning the dispositional alternatives selected;

(6) There is a factual basis for the admission. If the admission is entered as a result of plea agreement, the court shall explain to the child, and satisfy itself that the child understands the basis for the plea agreement, and the child may then waive the establishment of a factual basis for the particular charge to which he is admitting.

(d) If the child denies the allegations of the petition, the court shall forthwith set the matter for an adjudicatory hearing.

Law reviews. For article, "Representing the Mentally Retarded or Disabled Parent in a Child Abuse, Dependent or Neglected Child Action", see 11 Colo. Lawyer 1 (1982).

This rule is the substantial equivalent of Rule 11, Crim. P., so that the court may analogize to it and the cases dealing with a guilty plea

withdrawal. People in Interest of J.F.C., 660 P.2d 7 (Colo. Ct. App. 1982).

And codifies juvenile's constitutional rights. This rule is the codification of the standards guaranteeing a juvenile's constitutional rights. People in Interest of J.F.C., 660 P.2d 7 (Colo. Ct. App. 1982).

Presence of parent. The parent is there to assure that the juvenile is provided with parental guidance and moral support, as well as some assurance that any waiver of the juvenile's rights is made knowingly and intelligently. People in Interest of J.F.C., 660 P.2d 7 (Colo. Ct. App. 1982).

Of critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile is the presence of the parent. People in Interest of J.F.C., 660 P.2d 7 (Colo. Ct. App. 1982).

Failure to comply with rule voids disposition. Where the referee in two prior delinquency hearings failed to comply with the mand of this rule, those prior dispositions are co tutionally void, and cannot be used as to t for enhanced punishment proceedings u section 19-3-113.1. People v. M.A.W., P.2d 433 (Colo. Ct. App. 1982).

Court not required to warn of possible fu consequences of guilty plea. In the absenc a specific requirement by statute or rul juvenile court is not required to advise juvenile of consequences of a guilty which would result from the future com sion of felonies. People v. District Court, Colo. 298, 552 P.2d 297 (1976).

Applied in People in Interest of M.M. Colo. App. 44, 582 P.2d 692 (1978); Peopl Alward, 654 P.2d 327 (Colo. Ct. App. 19 People in Interest of C.R.B., 662 P.2d (Colo. Ct. App. 1983).

Rule 4. Attorney of Record

(a) An attorney shall be deemed of record when he appears persona before the court, files a written entry of appearance, or has been appoint by the court.

(b) The clerk shall notify an attorney appointed by the court. A writt notation of appointment shall appear in the file.

Rule 5. Notice

(Repealed May 22, 1980, effective July 1, 1980.)

Rule 6. Summons — Service

(a) When the person to be served has no residence within Colorado a his place of residence is not known, or when he cannot be found within t state after due diligence, service may be by a single publication pursuant Rule 4(h), Colorado Rules of Civil Procedure.

(b) When the court has acquired jurisdiction over the parties as provid in section 19-3-103, C.R.S., subsequent pleadings and notice may be serv on such parties by regular mail.

Rule 7. Petition Initiation, Form and Content, Time Limit for Filing Petition

(a) A petition concerning a delinquent child, a child needing oversigl (CHINOS) or a child who is neglected or dependent shall be initiated accordance with section 19-3-101, C.R.S. (Amended May 22, 1980, effectiv July 1, 1980.)

Historical Note

This section, formerly set out as § 17–66, was transferred to § 51–315 in the 1977 Court Reorganization Supp., and was further transferred to § 46b–134 in Gen.St., Rev. to 1979.

Derivation:

1945, Supp. § 425h.
1930 Rev., § 1861.
1921, P.A. ch. 336, § 10.

1969, P.A. 794, § 9, substituted, in the first sentence, "disposition" for "hearing", inserted "found to be delinquent", inserted "by the probation officer, and until such investigation has been completed and the results thereof placed before the judge, no disposition of the child's case shall be made"; substituted the former third and last sentence for sentences which read: "In cases of alleged delinquent children, such investigation shall be made by the probation officer. In such cases the court shall also, if practicable, cause the child to be examined as to his mentality by a competent and experienced mental examiner, who shall make a report of his findings. Prior to the hearing in the case of any child, if such child attends school, there shall be obtained from the school which he attends a report concerning him. The school officials shall furnish such report upon the request of the court or its probation officer. The court shall, when it is considered necessary, cause a complete physical examination to be made of the child by a competent physician. Until such investigations have been completed and the results thereof placed before the judge, no disposition of the child's case shall be made".

1978, P.A. 78–188, § 7, added the former last sentence relating to restitution investigation.

Section 8 of 1978, P.A. 78–188, provided that the act takes effect July 1, 1978.

1979, P.A. 79–581, § 5, inserted the provisions requiring a complete diagnostic examination of a child found delinquent for a serious juvenile offense, information included, and sharing information.

1982, P.A. 82–298, § 7, deleted the former last sentence which read: "The court may also order a restitution investigation in accordance with section 54–110a."

Law Review Commentaries

Juvenile Law: Highlights of 1980. Hon. Frederica D. Brenneman, 55 Conn.Bar J. 82 (1981).

Practice and procedure of the Juvenile Court. 41 Conn.Bar J. 201 (1967).

Runaway children. John L. Bonee III, 48 Conn.Bar J. 360 (1974).

Library References

Infants ⇐221 et seq.
C.J.S. Infants §§ 57, 69 to 85.

Conn.Prac. Book Ann., 2d, Vol. 1, Moller and Horton, §§ 1025, 1037, 1048.

United States Supreme Court

Preventive detention of juveniles, risk of crime prior to trial, procedural safeguards prior to detention, post-detention procedures, see Schall v. Martin, 1984, 104 S.Ct. 2403, 467 U.S. 253, 81 L.Ed.2d 207.

§ 46b–135. Right to counsel and cross-examination

(a) At the commencement of any proceeding on behalf of a delinquent child, the parent or parents, guardian and the child shall have the right to counsel and be so informed by the judge, and that if they are unable to afford counsel that counsel will be provided for them, and such counsel and such parent or parents, guardian, or child shall have the rights of confrontation and cross-examination.

(b) At the commencement of any proceeding on behalf of a neglected, uncared-for, or dependent child or youth, the parent or parents or

guardian of the child or youth shall have the right to counsel, and sha be so informed by the judge, and that if they are unable to affo counsel, counsel will be provided for them, and such counsel and suc parent or guardian of the child or youth shall have the rights confrontation and cross-examination.

(1967, P.A. 630, § 8, eff. June 22, 1967; 1969, P.A. 794, §§ 11, 12; 1975, P. 75–602, § 5, eff. Jan. 1, 1976; 1976, P.A. 76–436, § 23, eff. July 1, 197

Historical Note

This section, originally set out as § 17–66b, was transferred to § 51–316 in the 1977 Court Reorganization Supp., and was further transferred to 46b–135 in Gen. St., Rev. to 1979.

1969, P.A. 794, § 11, in subsec. (a), substituted "At the commencement of" for "In", inserted "on behalf of a delinquent child", deleted "or other persons having control of the child" following "guardian", inserted "and be so informed by the judge, and that if they are unable to afford counsel that counsel will be provided for them" and deleted "other person" following "guardian".

1969, P.A. 794, § 12, added subsec. (b).

1975, P.A. 75–602, § 5, in subsec. (b) serted "or youth" following "child" tw and deleted "parents" following "and su parent,".

Section 13 of 1975, P.A. 75–602, provid that the act takes effect Jan. 1, 1976.

1976, P.A. 76–436, § 23, deleted, fr subsecs. (a) and (b), "in the juvenile cou following "commencement of any proce ing".

Section 681 of 1976, P.A. 76–436, provi that § 23 of the act takes effect July 1978.

Cross References

Indigent defendant, determination, see § 51–297.

Library References

Infants ⇐205, 207.
C.J.S. Infants §§ 51, 52, 62, 64 to 67.

United States Supreme Court

Right to counsel. California v. Prysock, 1981, 101 S.Ct. 1773, 451 U.S. 1301, 68 L.Ed.2d 185.

Notes of Decisions

Parent or guardian 1
Waiver 2

---

1. Parent or guardian

Where plaintiff intended to, and did, assume the rights, duties, and privileges of a parent to child born of another and placed with plaintiff, plaintiff was a person "in control" of child within meaning of Connecticut law and, therefore, was entitled to written notice of juvenile court hearing inv ing child's custody and had right to app and be heard, personally, and through c sel. James v. McLinden (D.C.1969) F.Supp. 1233.

2. Waiver

Juvenile did not waive his right to cou at dispositive stage of delinquency hea by his silence after the withdrawal of attorney. In re Juvenile Appeal (198 (1983) 465 A.2d 1107, 39 Conn.Sup.

§ 46b–136. Appointment of attorney to represent child or youth and parent or guardian

In any proceeding on a juvenile matter the judge before whom such proceeding is pending shall, even in the absence of a request to do so, provide an attorney to represent the child or youth, his parent or parents, guardian or other person having control of the child or youth, if such judge determines that the interests of justice so require, and in any proceeding in which the custody of a child is at issue, such judge shall provide an attorney to represent the child and may authorize such attorney or appoint another attorney to represent such child or youth, parent, guardian or other person on an appeal from a decision in such proceeding. Where, under the provisions of this section, the court so appoints counsel for any such party who is found able to pay, in whole or in part the cost thereof, it shall assess as costs against such parents, guardian, or custodian, including any agency vested with the legal custody of the child or youth, the expense so incurred and paid for by the court in providing such counsel, to the extent of their financial ability to do so.

(1967, P.A. 630, § 9, eff. June 22, 1967; 1969, P.A. 794, § 10; 1973, P.A. 73–188; 1975, P.A. 75–277; 1975, P.A. 75–602, § 6, eff. Jan. 1, 1976; 1976, P.A. 76–235, § 1, eff. May 25, 1976; 1976, P.A. 76–436, § 24, eff. July 1, 1978.)

Historical Note

This section, originally set out as § 17–66c, was transferred to § 51–317 in the 1977 Court Reorganization Supp., and was further transferred to 46b–136 in Gen. St., Rev. to 1979.

Section 13 of 1967, P.A. 631, provided that the act takes effect from passage, June 22, 1967.

1969, P.A. 794, § 10, substituted, in the first sentence, "even in the absence of a request to do so" for "if he determines that the interests of justice so require" inserted "if such judge determines that the interests of justice so require"; and added the second sentence relating to assessment of costs for appointed counsel.

1973, P.A. 73–188 added provisions of the first sentence authorizing the attorney or appointment of another attorney on appeal.

1975, P.A. 75–277 inserted, in the first sentence, requirement for provision of attorney for child in custody proceedings.

1975, P.A. 75–602, § 6, inserted, in four places, "or youth" following "child"; and deleted, from the first sentence, "parents," preceding "guardian or other person".

Section 13 of 1975, P.A. 75–602, provided that the act takes effect Jan. 1, 1976.

1976, P.A. 76–235, § 1, substituted, in first sentence, "is at issue" for "may be affected" following "the custody of a child."

Section 2 of 1976, P.A. 76–235, provided that the act takes effect from passage, May 25, 1976.

1976, P.A. 76–436, § 24, in the first sentence substituted "on a juvenile matter" for "in the juvenile court" following "In any proceeding", and deleted "to the superior court" at the end.

Section 681 of 1976, P.A. 76–436, provided that § 24 of the act takes effect July 1, 1978.

Law Review Commentaries

Parental autonomy, family rights and the illegitimate. Aviam Soifer, 7 Conn.L.Rev. 1 (1974).

Library References

Infants ⇐205.
C.J.S. Infants §§ 51, 52, 62, 64 to 67.

Conn.Prac.Book Ann., 2d, Vol. 1, Moller and Horton, § 1053.

Notes of Decisions

1. In general

Where a statute or practice book rule mandates the assistance of counsel, it is implicit that this means competent counsel. State v. Anonymous (1979) 425 A.2d 939, 179 Conn. 155.

§ 46b–137. Admissibility of confession or other statement in juvenile proceedings

(a) Any admission, confession or statement, written or oral, by a child shall be inadmissible in any proceeding for delinquency against the child making such admission, confession or statement unless made by such child in the presence of his parent or parents or guardian and after the parent or parents or guardian and child have been advised (1) of the child's right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child's behalf, (2) of the child's right to refuse to make any statements and (3) that any statements he makes may be introduced into evidence against him.

(b) Any confession, admission or statement, written or oral, made by the parent or parents or guardian of the child or youth after the filing of a petition alleging such child or youth to be neglected, uncared-for or dependent, shall be inadmissible in any proceeding held upon such petition against the person making such admission or statement unless such person shall have been advised of his right to retain counsel, and that if he is unable to afford counsel, counsel will be appointed to represent him, that he has a right to refuse to make any statement and that any statements he makes may be introduced in evidence against him.

(1967, P.A. 630, § 10, eff. June 22, 1967; 1969, P.A. 794, §§ 13, 14; 1975, P.A. 75–183; 1975, P.A. 75–602, § 7, eff. Jan. 1, 1976; 1976, P.A. 76–436, § 591, eff. July 1, 1978.)

Historical Note

This section, originally set out as § 17–66d was transferred to § 51–318 in the 1977 Court Reorganization Supp., and was further transferred to 46b–137 in Gen.St., Rev. to 1979.

Section 13 of 1967, P.A. 630, provided that the act takes effect from passage, June 22, 1967.

1969, P.A. 794, § 13, in subsec. (a) inserted "for delinquency" following "in any proceeding", deleted "or other persons having control" following "guardian", and substituted "to retain counsel and * * * evidence against them" for "as provided by section 17–66a".

Section 14 of 1969, P.A. 794, added subsec. (b).

1975, P.A. 75–183 rewrote subsec. (a) which formerly read:

"(a) Any admission, confession or statement, written or oral, shall be inadmissible in any proceeding for delinquency in the juvenile court against the person making such admission, confession or statement unless such person, and the parent or parents or guardian of such person if he is a child as defined in section 17–53 shall have been advised of their rights to retain counsel and that if they are unable to afford counsel, to have counsel appointed to represent them,

DELAWARE

person charged or on application of the Attorney General or of an attorney appointed by the Court for that purpose by an order to show cause or an order of apprehension. The person charged is entitled to admission to bail as provided in these Rules.

(3) If the contempt charged involves disrespect to or criticism of a judge or master, that judge or master is disqualified from presiding at the trial or hearing except with the consent of the person charged.

(4) Upon a verdict or finding of guilt, the Court shall enter an order fixing the punishment.

X. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE PERSON CHARGED

The person charged shall be present at the arraignment, at every stage of the trial and at the imposition of sentence, except as otherwise provided by these Rules. The voluntary absence of the person charged after the trial has been commenced in the person's presence shall not prevent continuing the trial to its conclusion. The presence of the person charged is not required at a reduction of sentence under Rule 35.

RULE 44. APPOINTMENT OF COUNSEL

(a) **Appointment of Counsel.** If the person charged appears in Court without counsel, the Court shall advise of the right to counsel and, in every case in which the law requires and in any other case in which the Court deems it appropriate, the Court shall appoint counsel to represent the person charged at every stage of the proceeding unless the person charged elects to proceed without counsel or is able to obtain counsel. A waiver of the right to counsel by a child shall be in writing unless made in Court on the record or made in the presence of the child's custodian. The Court may appoint the Public Defender to represent a person charged if it finds at or after arraignment that the person charged, and if the person charged is a child the custodian as well, is indigent; if the person charged is an indigent child who wishes counsel but whose custodian is not indigent but has refused to obtain counsel for the child, the Court may appoint counsel to represent the child at the expense of the Child's custodian.

(b) **Application for Fees and Disbursements of Court-Appointed Counsel for Indigent Persons.** A separate claim for compensation and reimbursement shall be made to this Court for compensation and reimbursement for representation of the client in this Court. Each claim before this Court shall be supported by a written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before this Court, and all compensation and reimbursement applied for, expected or received in the same case from any other source. The Court shall thereupon set the compensation and reimbursement to be paid to the attorney.

(c) **Standards for Setting Counsel Fees.** Any attorney appointed under this Rule for an indigent person shall be compensated at a rate not to exceed

D.C.

§ 16-2303. Retention of jurisdiction.

For purposes of this subchapter, jurisdiction obtained by the Division in the case of a child shall be retained by it until the child becomes twenty-one years of age, unless jurisdiction is terminated before that time. This section does not affect the jurisdiction of other divisions of the Superior Court or of other courts over offenses committed by a person after he ceases to be a child. If a minor already under the jurisdiction of the Division is convicted in the Criminal Division or another court of a crime committed after he ceases to be a child, the Family Division may, in appropriate cases, terminate its jurisdiction. (Dec. 23, 1963, 77 Stat. 587, Pub. L. 88-241, § 1; July 29, 1970, 84 Stat. 525, Pub. L. 91-358, title I, § 121(a); 1973 Ed., § 16-2303.)

Court possesses no authority which is inconsistent with or broader than statutory mandate, although it clearly retains continuing jurisdiction over a juvenile until he reaches the age of majority. In re J.M.W., App. D.C., 411 A.2d 345 (1980).

Section does not provide for a judicial modification of a commitment order, as this would extend the powers of the court far beyond that which is expressly delegated by statute. In re J.M.W., App. D.C., 411 A.2d 345 (1980).

Cited in In re C.I.T., App. D.C., 369 A.2d 171 (1977); In re T.L.J., App. D.C., 413 A.2d 154 (1980); In re J.A.G., App. D.C., 443 A.2d 13 (1982).

§ 16-2304. Right to counsel; party status.

(a) A child alleged to be delinquent or in need of supervision is entitled to be represented by counsel at all critical stages of Division proceedings, including the time of admission or denial of allegations in the petition and all subsequent stages. If the child and his parent, guardian, or custodian are financially unable to obtain adequate representation, the child shall be entitled to have counsel appointed for him in accordance with rules established by the Superior Court. In its discretion, the Division may appoint counsel for the child over the objection of the child, his parent, guardian, or other custodian.

(b) (1) When a child is alleged to be neglected or when the termination of the parent and child relationship is under consideration, the parent, guardian or custodian of the child named in the petition or in a motion to terminate is entitled to be represented by counsel at all critical stages of the proceedings, and, if financially unable to obtain adequate representation, to have counsel appointed in accordance with rules established by the Superior Court of the District of Columbia.

(2) The Division shall maintain a register of those attorneys who have expressed an interest in being appointed to represent parties or to serve as guardians ad litem in neglect proceedings, and shall attempt insofar as possible to make appointments from the register.

(3) If the child has been living with a person other than the parent, the person shall receive notice of the neglect or the termination proceedings and, if the child has been with them for twelve (12) months or more, the person may, upon his or her request, be designated a party to the proceedings. If the child has been living with the person less than twelve (12) months, upon the person's request the judge may, at his or her discretion,

designate the person a party to the procedings [proceedings] which pertain to the determination of neglect as defined in D.C. Code, section 16-2301. If the parent or other person party to the proceedings is financially unable to obtain adequate representation, counsel shall be appointed according to rules established by the Superior Court of the District of Columbia. The Superior Court shall in every case involving a neglected child which results in a judicial proceeding, including the termination of the parent and child relationship pursuant to subchapter III of this chapter, appoint a guardian ad litem who is an attorney to represent the child in the proceedings. The guardian ad litem shall in general be charged with the representation of the child's best interest.

(c) Prior to appointment of counsel under this section, the eligibility of a child or other party to be represented by counsel shall be determined by the Division pursuant to rules established by the Superior Court of the District of Columbia.

(d) There are authorized to be appropriated such funds as may be necessary for the administration of this section. (Dec. 23, 1963, 77 Stat. 587, Pub. L. 88-241, § 1; July 29, 1970, 84 Stat. 526, Pub. L. 91-358, title I, § 121(a); 1973 Ed., § 16-2304; Sept. 23, 1977, D.C. Law 2-22, title IV, § 402, 24 DCR 3341; June 4, 1982, D.C. Law 4-114, § 2, 29 DCR 1699; Mar. 13, 1985, D.C. Law 5-129, § 2(b), 31 DCR 5192.)

Cross references. — As to authority and functions of Public Defender Service, see § 1-2702. As to definition of terms in Chapter 21 of Title 6, Child Abuse and Neglect, see § 6-2101. As to plan for furnishing representation of indigents in criminal cases, see § 11-2601. As to representation of indigents in criminal cases, see § 11-2601 et seq. As to definition of terms used in this chapter, see § 16-2301.

Section references. — This section is referred to in §§ 16-2306, 16-2308 and 16-2311 to 16-2313.

Legislative history of Law 2-22. — See note to § 2-1351.

Legislative history of Law 4-114. — Law 4-114 was introduced in Council and assigned Bill No. 4-411, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 23, 1982, and April 6, 1982, respectively. Signed by the Mayor on April 12, 1982, it was assigned Act No. 4-177 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-129. — See note to § 16-2326.1.

Definitions applicable. — See note to § 16-2301.

Absence of probable cause hearing where juvenile not detained not fundamentally unfair. — In view of the precautionary measures required before the filing of a delinquency petition, the fact that no probable cause hearing is required where a juvenile is not ordered detained does not violate fundamental fairness. M.A.P. v. Ryan, App. D.C., 285 A.2d 310 (1971).

Proceeding to surrender parental rights. — Any attempt to surrender parental rights through voluntary relinquishment while the mother remains under the court's neglect jurisdiction must be regarded as a "critical stage" under subsection (b)(1) of this section, affording her a statutory right to counsel. In re D.R., App. D.C., 541 A.2d 1260 (1988).

Counsel has obligation either to comply with court order appointing him to represent an indigent parent in a child neglect case or to seek to have the order vacated. In re Marshall, App. D.C., 445 A.2d 5, cert. denied, 459 U.S. 875, 103 S. Ct. 166, 74 L. Ed. 2d 137 (1982).

For discussion of the constitutionality of pro bono appointment of attorneys to neglect cases from a list of lawyers who have requested assignments of juvenile cases for which compensation is provided, see Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984).

Cited in In re T.W., App. D.C., 295 A.2d 69 (1972); In re Gary H., 115 WLR 1201 (Super. Ct.).

FLORIDA

Historical Note

Derivation:

Laws 1978, c. 78-414, § 10.
Laws 1973, c. 73-231, § 13.
Laws 1951, c. 26880, § 1.

Laws 1973, c. 73-231, § 13, added the second through fifth sentences.

Laws 1978, c. 78-414, in the first sentence substituted "for delinquency" for "or any other pleading" following "No answer to the petition" and deleted at the end thereof "or filed in writing as any such person may choose".

Cross References

Related court rule provision, see Juvenile Procedure Rule 8.130.

Law Review Commentaries

Delinquency and denied rights in juvenile court system. 20 U.Fla.L.R. 369 (1968).

Library References

Infants ⇐197.
C.J.S. Infants § 55.

39.071. Right to counsel

(1) A child shall be entitled to representation by legal counsel at all stages of any proceedings under this part. If the child and his parents or other legal guardian are insolvent and are unable to employ counsel for the child, the court shall appoint counsel for him pursuant to s. 27.52. Costs of representation shall be assessed as provided by s. 27.52 and s. 27.56. If a child appears without counsel, the court shall advise him of his rights with respect to representation of court-appointed counsel.

(2) If the parents of an insolvent child are solvent but refuse to employ counsel, the court shall appoint counsel pursuant to s. 27.52 for representation at the detention hearing and until counsel is provided. Costs of representation shall be assessed as provided by s. 27.52 and s. 27.56. Thereafter, the court shall not appoint counsel for an insolvent child with solvent parents or legal guardian but shall order the parents or legal guardian to obtain private counsel. The parents or legal guardian of an insolvent child who has been ordered to obtain private counsel for the child and who willfully fails to follow the court order shall be punished by the court in civil contempt proceedings.

(3) An insolvent child with solvent parents or legal guardian may have counsel appointed for him pursuant to s. 27.52 if his parents or legal guardian has willfully refused to obey the court order to obtain counsel for him and has been punished by civil contempt and then still has willfully refused to obey the court order. Costs of representation shall be assessed as provided by s. 27.52 and s. 27.56.

Historical Note

Derivation:

Laws 1981, c. 81-211, § 1.
Laws 1978, c. 78-414, § 11.

Laws 1981, c. 81-211, § 1, designated subsec. (1), substituted "guardians" for "custodians" and deleted ", or if the parents of an insolvent child are solvent but refuse to employ coun-

sel," preceding "the court shall appoint" in the second sentence thereof, and added subsecs. (2) and (3).

Cross References

Related court rule provision, see Juvenile Procedure Rule 8.290.

Law Review Commentaries

Invocation and waiver of fifth amendment rights by juveniles. 32 U.Fla.L.Rev. 356 (1980).

Library References

Infants ⇐205.
C.J.S. Infants § 51 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

1. Retroactive application of constitutional right

Standards of Gault decision of United States Supreme Court guaranteeing juveniles right to assistance of counsel at hearings in juvenile court were not applicable retroactively to hearing wherein juvenile and domestic relations court found infant to be delinquent child, imposed indefinite sentence and placed him on probation, inasmuch as probability of having made an incorrect determination of delinquency of innocent person was remote. Richardson v. State ex rel. Milton, App., 219 So.2d 77 (1969).

2. Indigency or insolvency

To sustain claim for denial of counsel, defendant had to allege that he was indigent at time he appeared before juvenile court. Sutton v. State, App., 384 So.2d 955 (1980).

Under the provisions of § 27.51, public defender was authorized to appear in juvenile proceedings only in delinquency proceedings where the child had been determined to be insolvent and either the child requested, or the court decided, on its own motion, that the child in that particular situation required appointive representation by the public defender or one of his assistants. A public defender did not have legal authority to represent, in the juvenile court, insolvent juveniles alleged to be "children in need of supervision." Op.Atty. Gen., 072-57, Feb. 29, 1972.

3. Stage of delinquency proceedings

This section governing right to counsel in juvenile proceedings requires that child be represented by counsel at all stages of proceedings under that chapter. State ex rel. Alton v. Conkling, App., 421 So.2d 1108 (1982).

There was no denial of juvenile's right to counsel, although juvenile was not represented by counsel at hearing in which court entered order of dependency and warned juvenile that if she did not go to school pursuant to court order she would be held in contempt of court and although juvenile contended that hearing was critical first step toward later delinquency determination, in view of fact that hearing could very well have been juvenile's last experience with juvenile authorities and delinquency adjudication was not inevitable result of judge's warning. M. J. M. v. Department of Health and Rehabilitative Services, App., 397 So.2d 755 (1981).

Failure to offer assistance of counsel to juvenile before commencement of adjudicatory hearing or dispositional phase despite juvenile's appearance without attorney violated due

process. R.V.P. v. State, App., 395 So.2d 291 (1981).

If first ungovernable child petition was filed in contemplation of its being first step in delinquency proceedings, court had to instruct child as to his right to counsel or provide counsel if child was indigent and, in such case, public defender could represent child as in other delinquency proceedings. In Interest of C. F., 345 So.2d 709 (1977).

Child did not have constitutional right to counsel at first hearing on ungovernability, because first such hearing was not necessarily first step in adjudication of delinquency. In Interest of Hutchins, 345 So.2d 703 (1977).

4. Waiver—In general

In delinquency proceeding, there was inadequate offer of counsel by court at arraignment hearing and at disposition hearing where right-to-counsel colloquies did not demonstrate that defendant knew what his rights were, and such inadequate offer of counsel constituted reversible error. J.G.S. v. State, App. 2 Dist., 435 So.2d 942 (1983).

Parent and child must be informed of their right to representation by counsel in any proceeding to determine delinquency which may result in commitment to institution and any waiver must be intentional relinquishment or abandonment, of fully known right. State ex rel. Alton v. Conkling, App., 421 So.2d 1108 (1982).

5. —— Knowing waiver

Rule of juvenile proceeding governing waiver of counsel requires more than just advice that juvenile is entitled to attorney; juvenile must specifically waive that right, and court must be satisfied that he has ability to understand significance of advice that he has right to counsel. State ex rel. Alton v. Conkling, App., 421 So.2d 1108 (1982).

Since it is unlikely that child could understand the importance of counsel, juvenile judge must make certain that child or his parents understand right to counsel and that any waiver is intelligently and validly made, and circumstances of waiver should appear in record. Id.

Since it is extremely doubtful that any child of limited experience can possibly comprehend importance of counsel in delinquency proceedings, juvenile judge must make certain that child or parents understand not only child's right to counsel, but also that any waiver is intelligently and validly made; circumstances of any waiver should be made part of record. R. V. P. v. State, App., 395 So.2d 291 (1981).

6. —— Request for counsel, waiver

Fact that juvenile does not specifically request an attorney is not, in itself, a waiver of that right. State ex rel. Alton v. Conkling, App., 421 So.2d 1108 (1982).

7. —— Presence of counsel, waiver

Where a defendant has employed counsel or one has been appointed for him, presence of his counsel is not essential to the validity or effectiveness of a waiver by the defendant of the right to have counsel present at some critical stage of the proceeding. Johnson v. State, App., 268 So.2d 544 (1972) remanded 294 So.2d 69.

8. —— Confessions, waiver

Fact that a juvenile's confession was given before he had opportunity to talk with his parents or an attorney is factor militating against its admissibility, but existence of this fact does not preclude finding of voluntariness depending upon all other circumstances surrounding confession. Doerr v. State, App., 348 So.2d 938 (1977) approved 383 So.2d 905.

State failed to bear its heavy burden of establishing that waiver of *Miranda* rights during custodial interrogation of 14-year-old juvenile, who was of below average intelligence, who had reading ability equivalent to that of a child entering first grade, who had difficulty understanding normal speech, and whose parents were not notified, was intelligently made. Tennell v. State, App., 348 So.2d 937 (1977).

Record in delinquency proceeding supported determination of voluntariness of juvenile's confession, in that prior to confession juvenile was fully advised of constitutional rights and intelligently and voluntarily waived those rights and there was no indication that juvenile was under any pressure at the time and absent showing that delay in transporting juvenile from public safety department homicide office to youth hall in any way vitiated voluntariness. B. M. v. State, App., 341 So.2d 801 (1977).

Confession obtained from 17-year-old juvenile, following his arrest after the giving of Miranda warnings while he was being detained without being allowed to speak to his parents who were waiting in police station to knowledge of at least one of the officers, should not have been admitted in robbery prosecution. Weatherspoon v. State, App., 328 So.2d 875 (1976).

Evidence supported determination that 15-year-old boy, who had been picked up at his home by police and taken to police headquarters for questioning in connection with arson case, who was in tenth grade, whose mother related that he was fairly mature and

GEORGIA

proceedings are still pending. Chastin v. Smith, 243 Ga. 262, 253 S.E.2d 560 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 43-48.

C.J.S. — 43 C.J.S., Infants, §§ 56, 57.

U.L.A. — Uniform Juvenile Court Act (U.L.A.) § 25.

15-11-30. Right to counsel.

(a) *"Indigent person" defined.* An indigent person is one who at the time of requesting counsel is unable without undue financial hardship to provide for full payment of legal counsel and all other necessary expenses for representation. .

(b) *Right to legal representation.* Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency, unruliness, or deprivation and if, as an indigent person, he is unable to employ counsel, he is entitled to have the court provide counsel for him. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and to be provided with counsel by the court if he is an indigent person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented indigent person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them. (Ga. L. 1968, p. 1013, § 11; Code 1933, § 24A-2001, enacted by Ga. L. 1971, p. 709, § 1.)

Law reviews. — For article discussing due process in juvenile court procedures in California and Georgia, in light of In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), see 8 Ga. St. B.J. 9 (1971). For article, "Termination of Parental Rights: Recent Judicial and Legislative Trends," see 30 Emory L.J. 1065 (1981). For comment on **Freeman v. Wilcox**, 119 Ga. App. 325, 167 S.E.2d 163 (1969) and a juvenile's right to counsel at pre-adjudicatory stages of juvenile proceedings, see 22 Mercer L. Rev. 597 (1971). For comment on Parham v. J.R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979), regarding juvenile commitment to state mental hospitals upon application of parents or guardians, see 29 Emory L.J. 517 (1980).

JUDICIAL DECISIONS

Due process requires notice to parties of right to counsel. — The due process clause of U.S. Const., Amend. 14, requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E.2d 163 (1969), disapproved sub nom. Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976). For comment, see 22 Mercer L. Rev. 597 (1971).

General Assembly intended that in juvenile court child is of right entitled to counsel at hearing which covers a determination by the court concerning the existence of delinquency by reason of violation of probation conditions. K.E.S. v. State, 134 Ga. App. 843, 216 S.E.2d 670 (1975).

Right applies to informal detention hearing and other stages of proceedings alleging delinquency, etc. — An accused juvenile is entitled to counsel at an "informal detention hearing" required by § 15-11-21, or at any of the other stages of any proceedings alleging delinquency, unruliness, and deprivation. A.C.G. v. State, 131 Ga. App. 156, 205 S.E.2d 435 (1974).

Juvenile entitled to application of jurisprudential principles necessary to essence of fair trial. — A juvenile charged with "delinquency" is entitled by right to have the court apply those common-law jurisprudential principles which experience and reason have shown are necessary to give the accused the essence of a fair trial. T.L.T. v. State, 133 Ga. App. 895, 212 S.E.2d 650 (1975).

Ingredients of fair trial. — To give one accused in a juvenile proceeding a fair trial, the trial must include such ingredients as the presumption of innocence, the requirement that if the conviction is based entirely upon circumstantial evidence then the proved facts shall exclude every other reasonable hypothesis save that of guilt, and the necessity of producing independent corroborative evidence to that of an accomplice for a finding of guilt when based upon the latter's testimony. T.L.T. v. State, 133 Ga. App. 895, 212 S.E.2d 650 (1975).

No authority for reversing delinquency adjudication unless deprivation of counsel at detention hearing resulted in harm. — Although an accused is entitled to counsel at the stage known as "a detention hearing" under this chapter, there is no authority for reversing an adjudication of delinquency after a fair trial with legal representation because of lack of counsel at the detention hearing, unless it appears that deprivation of counsel at that stage resulted in harm to the juvenile. T.K. v. State, 126 Ga. App. 269, 190 S.E.2d 588 (1972).

This chapter recognizes that parent is "party" to proceedings involving his child. Sanchez v. Walker County Dep't of Family & Children Servs., 237 Ga. 406, 229 S.E.2d 66 (1976).

Physical presence of parent cannot be equated with meaningful representation. K.E.S. v. State, 134 Ga. App. 843, 216 S.E.2d 670 (1975).

This section does not imply that foster parents may have certain rights. Drummond v. Fulton County Dep't of Family & Children Servs., 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977).

Determination of voluntary and knowing waiver of right depends on totality of circumstances. — The question of a voluntary and knowing waiver of a juvenile's right to counsel depends on the totality of the circumstances and the state has a heavy burden in showing that the juvenile did understand and waive his right to counsel. Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977).

Factors considered in determining whether waiver made knowingly and voluntarily. — Several of the factors to be considered among the totality of the circumstances in determining whether the juvenile's waiver of counsel is made knowingly and voluntarily are: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused was held incommunicado or allowed to consult with relatives, friends, or an attorney; (5) whether the accused was interrogated before or after formal charges were filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions, and (9) whether the accused repudiated an extrajudicial statement at a later date. Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977).

Right to counsel may be waived unless child is not represented by his parents, guardian, or custodian. A.C.G. v. State, 131 Ga. App. 156, 205 S.E.2d 435 (1974).

Juvenile court proceeding null where no waiver of right, etc. — Where, in a juvenile court proceeding, there was neither waiver of right of a mother, nor proper service upon the parties and where the hearing is not taken under oath, or waived by any of the parties, the proceeding is an absolute nullity. McBurrough v. Dep't of Human Resources, 150 Ga. App. 130, 257 S.E.2d 35 (1979).

Mother who waives child's rights must be unbiased mother, free of interests conflicting with the needs of her daughter whom she undertakes to represent; an ally, not an adversary. K.E.S. v. State, 134 Ga. App. 843, 216 S.E.2d 670 (1975).

Indigent parent entitled to paupered transcript for use in appeal. — An indigent parent, whose parental rights have been terminated by an order of the juvenile court on a petition filed by an agency of the state, is entitled to a paupered transcript of the proceeding in the juvenile court for use in appealing the decision of that court. Nix v. Department of Human Resources, 236 Ga. 794, 225 S.E.2d 306, answer conformed to, 138 Ga. App. 831, 227 S.E.2d 521 (1976).

Cited in M.E.B. v. State, 230 Ga. 154, 195 S.E.2d 891 (1973); D.M.N. v. State, 129 Ga. App. 165, 199 S.E.2d 114 (1973); Long v. Powell, 388 F. Supp. 422 (N.D. Ga. 1975); J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976); C.H. v. State, 148 Ga. App. 609, 252 S.E.2d 22 (1979); Williams v. Department of Human Resources, 150 Ga. App. 610, 258 S.E.2d 288 (1979); Chancey v. Department of Human Resources, 156 Ga. App. 338, 274 S.E.2d 728 (1980); R.S. v. State, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, § 38.

C.J.S. — 43 C.J.S., Infants, § 52.

U.L.A. — Uniform Juvenile Court Act (U.L.A.) § 26.

ALR. — Right to an appointment of counsel in juvenile court proceedings, 60 ALR2d 691, 25 ALR4th 1072.

Right of juvenile court defendant to be represented during court proceedings by parent, 11 ALR4th 719.

Validity and efficacy of minor's waiver of right to counsel — modern cases, 25 ALR4th 1072.

15-11-31. Additional basic rights of child and parties.

(a) A party is entitled to the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine adverse witnesses.

(b) A child charged with a delinquent act need not be a witness against or otherwise incriminate himself. An extrajudicial statement obtained in

attorney of the minor shall be notified when the minor's name and address have been released.

***

[am L 1987, c 47, §1]

Revision Note

Only the subsection amended is compiled in this Supplement.

[§571-87] Appointment of counsel and guardian ad litem; compensation. (a) When it appears to a judge that a person requesting the appointment of counsel satisfies the requirements of chapter 802 for determination of indigency, or the court in its discretion appoints counsel under chapter 587, or that a person requires appointment of a guardian ad litem, the judge shall appoint counsel or a guardian ad litem to represent the person at all stages of the proceedings, including appeal, if any. Appointed counsel and the guardian ad litem shall receive reasonable compensation for necessary expenses, including travel, the amount of which shall be determined by the court, and fees pursuant to subsection (b). All of these expenses shall be certified by the court and paid upon vouchers approved by the judiciary and warrants drawn by the comptroller.

(b) The court shall determine the amount of reasonable compensation to appointed counsel and guardians ad litem, based on the rate of $40 an hour for out-of-court services, and $60 an hour for in-court services with a maximum fee in accordance with the following schedule:

(1) Cases arising under chapter 587:
  (A) Predisposition $1,500;
  (B) Postdisposition review hearing $ 500;
(2) Cases arising under chapters 560, 571, 580, and 584 $1,500.

Payments in excess of any maximum provided for under paragraphs (1) and (2) may be made whenever the court in which the representation was rendered certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the administrative judge of such court. [L 1987, c 376, §1]

Note

This section shall apply to any action or proceeding which is commenced on or after July 7, 1987, and, to the extent permitted by law, to any action or proceeding which is pending on July 7, 1987. L 1987, c 376, §2.

[CHAPTER 571D]
JUVENILE JUSTICE INTERAGENCY BOARD

SECTION

571D-1 JUVENILE JUSTICE INTERAGENCY BOARD

§571D-1 Juvenile justice interagency board. There is established within the department of the attorney general for administrative purposes the juvenile justice interagency board, consisting of nine members which shall include a police chief of one of the counties, the prosecuting attorney of a county, a representative from a private social service agency, and two additional members, all appointed by the governor as provided in section 26-34, and the superintendent of education, the public defender, the director of corrections, and the senior judge of the first circuit

(e) To consider the needs and best interests of the child as well as a need for protection of the community and to achieve the foregoing purposes in the least restrictive setting necessary, with a preference at all times for the family home and the integration of parental responsibility for the child into the treatment and counseling program.

(f) To provide a procedure utilizing due process through which the law relating to the protection and rehabilitation of children is executed and enforced and in which the parties are assured of a fair hearing and their constitutional and other legal rights recognized and enforced. [Amended March 20, 1985, effective July 1, 1985.]

Compiler's notes. The Idaho Juvenile Rules were adopted by order of the Supreme Court, May 20, 1977, effective July 1, 1977. The order adopting the rules read:

"NOW, THEREFORE, IT IS HEREBY ORDERED, that the Rules of the District Court and the Magistrates Division Thereof for the State of Idaho Relating to Juvenile Rules be, and the same are hereby, rescinded effective July 1, 1977.

"IT IS FURTHER ORDERED, that the new proposed Idaho Juvenile Rules, a copy of which is attached hereto and incorporated herein by this reference be, and the same are hereby, approved by the Court effective July 1, 1977.

"IT IS FURTHER ORDERED, that these new Idaho Juvenile Rules shall be effective on and after the 1st day of July, 1977.

"IT IS FURTHER ORDERED, that the Clerk of the Court cause this to be published in two consecutive issues of The Advocate."

The bracketed word "procedure" in the first paragraph was inserted by the compiler.

Rule 2. Definitions. [Rescinded effective July 1, 1985.]

Compiler's notes. This rule (adopted May 20, 1977, effective July 1, 1977) was rescinded by order of the Supreme Court on March 20, 1985, effective July 1, 1985.

Rule 3. Right to counsel. — (a) The child, his parents, guardian or custodian must be advised of their right to have court appointed counsel at the earliest possible time, and before a C.P.A. or Y.R.A. hearing, and this notification must be contained upon the notice or summons of an adjudicatory hearing or trial upon a C.P.A. or Y.R.A. petition, unless the parties have already been advised of their right to counsel and counsel has been appointed or retained for the child. The child, his parents, guardian or custodian shall be advised of their right to counsel at the very first time they appear before the court, but in the event such notice is given upon the notice or summons of an adjudicatory hearing, such notice shall state that if they are financially unable to employ counsel, or if counsel has not been appointed for the child, in the event they wish to have counsel appointed at county expense they should appear before the court on or before a time certain, before the date of the adjudicatory hearing, at which time the court shall appoint counsel for the child and inquire as to whether the other persons are needy persons requiring the appointment of counsel. At the time of such hearing, the court should inquire as to whether there is a conflict between the interest of the child and the interest of the parents, guardian or custodian, and if the court so finds such conflict of interest, it shall appoint independent counsel for the child and the parents, guardian or custodian. In the event the court finds the parents, guardian or custodian are needy persons entitled to have counsel appointed at county expense, the

IDAHO

court shall immediately appoint such counsel, which may be the same counsel as the counsel for the child in the event there is no conflict, and counsel shall be notified immediately so as to be prepared in advance for the C.P.A. or Y.R.A. hearing;

(b) In a C.P.A. proceeding, pursuant to Section 16-1618, Idaho Code, the court shall appoint separate counsel for the child to serve at each stage in the proceedings under the C.P.A. and to act as guardian ad litem when it appears to the court that the interests of the child are not being fully represented by another party to the action and that party has retained or had counsel appointed;

(c) In a Y.R.A. proceeding, pursuant to Section 16-1809A, Idaho Code, the court shall appoint separate counsel for the child, whether or not he or his parents or guardian are able to afford counsel, unless there is an intelligent waiver of the right of counsel by the child and the court further determines that the best interest of the child does not require the appointment of counsel.

Rule to rule ref. This rule is referred to in Rule 9.

Denial of Right to Counsel.

Where the attorney has been deprived of a realistic opportunity to assist his client, the issue is not one of ineffective counsel, it is one of counsel denied. The right to counsel is so basic to our notions of fair trial and due process that denial of the right is never treated as harmless error; such denial requires setting aside an adjudication under the Youth Rehabilitation Act, §§ 16-1801 — 16-1845, and a remand for further proceedings in which counsel is timely provided. Kinley v. State, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

Where the county public defender appointed to represent the accused had only 15 minutes to speak with the accused and go over the case, and accordingly moved for a continuance in order to prepare a defense, to which the prosecutor did not object, the magistrate's denial of the continuance amounted to a denial of the right to counsel in violation of this rule and § 16-1809A, and constituted an abuse of discretion. Kinley v. State, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

Collateral References. Duty to advise accused as to right to assistance of counsel. 3 A.L.R.2d 1003.

Evidence, applicability of rules of. 43 A.L.R.2d 1128.

Right to and appointment of counsel. 60 A.L.R.2d 691.

Rule 4. Payment of cost of court appointed counsel. — (a) Counsel appointed for a child in a C.P.A. proceeding shall be paid for by the county unless it is shown conclusively that the child has an independent estate sufficient to pay such costs, pursuant to Section 16-1618(b), Idaho Code;

(b) Counsel appointed for a child in a Y.R.A. proceeding shall initially receive reasonable compensation from the county and the county shall have the right to be reimbursed for the cost thereof by the parents or guardian as provided in Section 16-1809A(2), Idaho Code. Such payment may be enforced by order and contempt proceedings for failure to pay such costs, or the claim may be referred to the prosecuting attorney for suit against such persons liable for the cost of such legal services. In the event the court is satisfied that such persons are needy persons who are financially unable to afford to pay for such legal services, the court shall make such a finding and enter an order that such legal services shall be paid for at county expense.

4Chapter 40, ¶ 2201 et seq.
5Paragraph 802-29, 803-30, 804-27 or 805-31 of this chapter.
6Paragraph 802-22, 803-23, 804-20 or 805-22 of this chapter.

ILLINOIS

For text of paragraph effective until July 1, 1989, see ¶ 801-3, ante.

Historical Note

P.A. 85-1209, the First 1988 Revisory Act, provides in Art. II, for the nonsubstantive revision or renumbering or repeal of certain sections of Acts of the 85th General Assembly through P.A. 85-1014, and corrects errors, revises cross-references and deletes obsolete text in such sections. For provisions of Art. I, § 1-1, relating to intent and supersedure and Art. IV, § 4-1, relating to effective dates and acceleration of Acts with later effective dates or extension or revival of repealed Acts, see Historical Notes following ch. 5, ¶ 804.

P.A. 85-1443 defined "chronic truant" to have the definition ascribed to it in ch. 122, ¶ 26-2a and deleted definitions of "detention" and "juvenile detention home". For definitions of "detention", "juvenile detention home", "public or community service" and "site", effective July 1, 1989, see ¶ 805-3 of this chapter.

Library References

Words and Phrases (Perm. Ed.)

801-4. Limitations of scope of Act

§ 1-4. Limitations of scope of Act. Nothing in this Act shall be construed to give: (a) any guardian appointed hereunder the guardianship of the estate of the minor or to change the age of minority for any purpose other than those expressly stated in this Act; or (b) any court jurisdiction, except as provided in Sections 2-7, 3-6, 3-9, 4-6 and 5-7,[1] over any minor solely on the basis of the minor's (i) misbehavior which does not violate any federal or state law or municipal ordinance, (ii) refusal to obey the orders or directions of a parent, guardian or custodian, (iii) absence from home without the consent of his or her parent, guardian or custodian, or (iv) truancy, until efforts and procedures to address and resolve such actions by a law enforcement officer during a period of limited custody, by crisis intervention services under Section 3-5,[2] and by alternative voluntary residential placement or other disposition as provided by Section 3-6[3] have been exhausted without correcting such actions. P.A. 85-601, Art. I, § 1-4, eff. Jan. 1, 1988.

1 Paragraphs 802-7, 803-6, 803-9, 804-6 and 805-7 of this chapter.
2 Paragraph 803-5 of this chapter.
3 Paragraph 803-6 of this chapter.

801-5. Rights of parties to proceedings

§ 1-5. Rights of parties to proceedings. (1) Except as provided in this Section and paragraph (2) of Sections 2-22, 3-23, 4-20 or 5-22,[1] the minor who is the subject of the proceeding and his parents, guardian, legal custodian or responsible relative who are parties respondent have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel. At the request of any party financially unable to employ counsel, the court shall appoint the Public Defender or such other counsel as the case may require.

No hearing on any petition filed under this Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel.

(2) Though not appointed guardian or legal custodian or otherwise made a party to the proceeding, any current or previously appointed foster parent or representative of an agency or association interested in the minor has the right to be heard by the court, but does not thereby become a party to the proceeding.

In addition to the foregoing right to be heard by the court, any current foster parent of a minor and the agency designated by the court or the Department of Children and Family Services as custodian of the minor who has been adjudicated an abused or neglected minor under Section 2-3[2] or a dependent minor under Section 2-4[3] of this Act has the right to and shall be given adequate notice at all stages of any hearing or proceeding under this Act wherein the custody or status of the minor may be changed. Such notice shall contain a statement regarding the nature and denomination of the hearing or proceeding to be held, the change in custody or status of the minor sought to be obtained at such hearing or proceeding, and the

date, time and place of such hearing or proceeding. The clerk shall mail the notice by certified mail marked for delivery to addressee only. The regular return receipt for certified mail is sufficient proof of service.

(3) Parties respondent are entitled to notice in compliance with Sections 2-15 and 2-16, 3-17 and 3-18, 4-14 and 4-15 or 5-15 and 5-16,[4] as appropriate. At the first appearance before the court by the minor, his parents, guardian, custodian or responsible relative, the court shall explain the nature of the proceedings and inform the parties of their rights under the first 2 paragraphs of this Section. Upon an adjudication of wardship of the court under Sections 2-22, 3-23, 4-20 or 5-22, the court shall inform the parties of their right to appeal therefrom as well as from any other final judgment of the court.

(4) No sanction may be applied against the minor who is the subject of the proceedings by reason of his refusal or failure to testify in the course of any hearing held prior to final adjudication under Section 2-22, 3-23, 4-20 or 5-22.

(5) In the discretion of the court, the minor may be excluded from any part or parts of a dispositional hearing and, with the consent of the parent or parents, guardian, counsel or a guardian ad litem, from any part or parts of an adjudicatory hearing.

(6) The general public except for the news media and the victim shall be excluded from any hearing and, except for the persons specified in this Section, only persons, including representatives of agencies and associations, who in the opinion of the court have a direct interest in the case or in the work of the court shall be admitted to the hearing. However, the court may, for the minor's protection and for good cause shown, prohibit any person or agency present in court from further disclosing the minor's identity.

P.A. 85–601, Art. I, § 1–5, eff. Jan. 1, 1988.

[1] Paragraph 802–22, 803–23, 804–20 or 805–22 of this chapter.

[2] Paragraph 802–3 of this chapter.

[3] Paragraph 802–4 of this chapter.

[4] Paragraphs 802–15 and 802–16, 803–17 and 803–18, 804–14 and 804–15 or 805–15 and 805–16 of this chapter.

801–6. State's attorney

§ 1-6. State's Attorney. The State's Attorneys of the several counties shall represent the people of the State of Illinois in proceedings under this Act in their respective counties.

P.A. 85–601, Art. I, § 1–6, eff. Jan. 1, 1988.

801–7. Confidentiality of law enforcement records

Text of paragraph effective until July 1, 1989.

§ 1–7. Confidentiality of law enforcement records. (A) Inspection and copying of law enforcement records maintained by law enforcement agencies which relate to a minor who has been arrested or taken into custody before his 17th birthday shall be restricted to the following:

(1) Any local, State or federal law enforcement officers of any jurisdiction or agency when necessary for the discharge of their official duties during the investigation or prosecution of a crime.

(2) Prosecutors, probation officers, social workers, or other individuals assigned by the court to conduct a pre-adjudication or predisposition investigation, and individuals responsible for supervising or providing temporary or permanent care and custody for minors pursuant to the order of the juvenile court, when essential to performing their responsibilities.

(3) Prosecutors and probation officers:

(a) in the course of a trial when institution of criminal proceedings has been permitted under Section 5–4 [1] or required under Section 5–4; or

(b) when institution of
or required under Sectio
determine the amount of

(c) when criminal proce
under Section 5–4 and
pre-sentence investigatic
probation.

(4) Adult and Juvenile

(5) Authorized militar

(6) Persons engaged
Judge of the Juvenile C
ment agency; provided
minor's identity and pr

(B) (1) Except as pro
person or agency may
Division or the Departr
any fingerprint or pho
into custody before his
authorizes the transm
requiring the institutic

(2) Law enforcemen
Department of State F
are alleged to have cc
24–1 of the Criminal C
the Criminal Code of
identification and inv

(C) The records of
of age must be maint
to public inspection c
court or when the i
Section 5–4 or requir
crime and is the sub
tion for probation.

(D) Nothing conta
or disclosure to vict
law enforcement ag
presence of a law
apprehension of an
investigation or pros

(E) Law enforcer
releasing informati
tion of any case in

P.A. 85–601, Art.
§ 2–22, eff. Aug.

[1] Paragraph 805–4

[2] Chapter 38, ¶ 24–

[3] Chapter 38, ¶ 2–

[4] Chapter 38, ¶ 20

For text of

801–7. Confider

§ 1–7. Confic
of law enforcem
a minor who has
be restricted to

INDIANA

cial statutory proceedings the provisions of which must be followed. Shupe v. Bell, 1957, 141 N.E.2d 351, 127 Ind.App. 292.

The ordinary rules of criminal procedure are applicable to a 14 year old boy unless the legislature has declared otherwise. State ex rel. Imel v. Municipal Court of Marion County, 1947, 72 N.E.2d 357, 225 Ind. 23.

When a child is charged with delinquency, some specific act or conduct must be charged as constituting the delinquency, the truth of which charge must be determined in an adversary proceeding, and the child is entitled to a trial under the rules prescribed for the trial of prosecutions for the commission of misdemeanors. State ex rel. Jones v. Geckler, 1938, 16 N.E.2d 875, 214 Ind. 574.

31-6-7-2 Right to counsel; parent and child

Sec. 2. (a) If a child alleged to be a delinquent child does not have an attorney who may represent him without a conflict of interest, and if he has not lawfully waived his right to counsel under section 3 of this chapter [1], the juvenile court shall appoint counsel for him at the detention hearing, or at the initial hearing, whichever occurs first, or at any earlier time. The court may appoint counsel to represent any child in any other proceeding.

(b) If a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent him without a conflict of interest, and if he has not lawfully waived his right to counsel under section 3 of this chapter [1], the juvenile court shall appoint counsel for him at the initial hearing or at any earlier time. The court may appoint counsel to represent any parent in any other proceeding.

(c) Payment for counsel shall be made under IC 31-6-4-18. *As added by Acts 1978, P.L.136, SEC.1. Amended by Acts 1979, P.L. 276, SEC.36.*

1. Section 31-6-7-3.

Commentary

By J. Richard Kiefer

The United States Supreme Court held in Kent v. United States (1966), 86 S.Ct. 1045, 383 U.S. 541, 16 L.Ed.2d 84, that as a condition of a valid waiver of jurisdiction to criminal court, a child is entitled to the effective assistance of counsel. A year later, the high court ruled that a child is entitled to counsel at the adjudicatory hearing in delinquency proceedings that "may result in commitment to an institution in which the juvenile's freedom is curtailed . . .". In re Gault (1967), 87 S.Ct. 1428, 1451, 387 U.S. 1, 41, 18 L.Ed.2d 527. Relying on these decisions, the Supreme Court of Indiana has extended the right to counsel to waiver hearings, Summers v. State (1967), 248 Ind. 551, 230 N.E.2d 320,

and fact-finding hearings. Bridges v. State (1973), 260 Ind. 651, 299 N.E.2d 616. Citing *Gault*, the Indiana Supreme Court stated in *Bridges, supra*, that a juvenile ". . . is entitled to the assistance of counsel at every stage of the juvenile proceeding". *Id., at 617*. The Court added that ". . . a juvenile who is alleged to be delinquent is entitled to the assistance of counsel at any interrogation that may take place, and at the hearing before the juvenile judge at which disposition of this status is made". *Id.* More recently, the Court of Appeals, First District, has held that a child has a right to counsel at a probation revocation hearing. In re Jennings (App.1978), 375 N.E.2d 258.

This section codifies the case law which recognizes the constitutional right to counsel of children in delinquency cases. Subsection (a) extends the right to counsel to all children alleged to be delinquent, regardless of whether they face a deprivation of liberty, the touchstone of *Gault*. Under the new juvenile code, counsel must be appointed at either the detention or initial hearing, whichever occurs first. Unless a child has been taken into custody pursuant to an order of the court, the detention hearing will usually precede the initial hearing. The court may appoint counsel at an earlier time.

The new Juvenile Code does not require proof that the child is indigent before the court has a duty to appoint counsel. Instead, the test is whether the child has an attorney who can represent him without a conflict of interest or whether he lawfully waived his right to counsel pursuant to IC 31-6-7-3. If counsel is appointed for a child whose parent or guardian of his estate is able to pay for such services, the court may require payment by him of the legal fees pursuant to IC 31-6-4-18 if the child is subsequently adjudicated to be a delinquent child.

This section does not require appointment of counsel for any child alleged to be a child in need of services, although the court may do so under subsection (a). Nor must the court appoint an attorney for parents in proceedings involving children in need of services, but the court has discretion to do so. However, appointment of counsel is mandatory under subsection (b) in proceedings to terminate parental rights, unless counsel has been obtained or waived. As with alleged delinquents, there is no requirement that the parent be indigent; however, payment of the expenses of his legal fees may be assessed to him pursuant to IC 31-6-4-18.

The Supreme Court has held that the child's right to counsel includes ". . . access by his counsel to the social records and probation and similar reports which presumably are considered by the court . . .". *Kent v. United States, supra*, 86 S.Ct. at 1053, 383 U.S. at 557, 16 L.Ed.2d 84. See, State ex rel. Hurd v.

Davis (1948), 226 Ind. 526, 82 N.E.2d 82; Clemons v. State (1974), 162 Ind.App. 50, 317 N.E.2d 859. Access to these records is assured counsel under several sections of the new Juvenile Code. See IC 31-6-4-15(f); IC 31-6-4-19(e); IC 31-6-8-1(b)(2); IC 31-6-8-1.2(b)(3).

Historical Note

Acts 1978, P.L. 136, Sec. 1, eff. Oct. 1, 1979, added this section.

For applicability of prior law and for provisions concerning modification of judgments, see Historical Note under section 31-6-1-1.

Acts 1979, P.L. 276, Sec. 36, eff. Oct. 1, 1979, substituted, in Subsecs. (a) and (b), "may represent him without a conflict of interest, and if he has not lawfully" for "represents his exclusive interests in the case, and if he has not properly"; and deleted the words "or shelter care" following "detention" in the first sentence of Subsec. (a).

Cross References

Rights of children in juvenile court, see section 31-6-3-1.
Termination of parental rights, advisement of parents' right to counsel, see section 31-6-5-3.

Law Review Commentaries

In defense of youth: Public defenders in juvenile court. Anthony Platt, Howard Schechter, Phyllis Tiffany. 43 Ind.L.J. 619 (1968).

Right to counsel and the role of counsel in juvenile court proceedings, Daniel L. Skoler. 43 Ind.L.J. 558 (1968).

Library References

Infants ⇐16.9.
C.J.S. Infants §§ 51, 52, 62, 64 to 67.

I.L.E. Minors §§ 11 et seq., 74, 87.

United States Supreme Court

Counsel, constitutional requirements, see In re Gault, 1967, 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527.

Notes of Decisions

---

1. In general

Due process and fair treatment to a juvenile includes notification to juvenile and his parents that juvenile has right to be represented by counsel retained by them or, if they are unable to afford counsel, by counsel appointed by court to represent juvenile. In re Jennings, App.1978, 375 N.E.2d 258.

Juvenile was deprived of his right of due process where juvenile court failed in probation revocation hearing to inform juvenile of his right to have an attorney appointed to represent him in event he was unable to afford one. Id.

Juvenile who is alleged to be delinquent is entitled to assistance of counsel at any interrogation that may taken place and at hearing before juvenile judge at which disposition of status is

made. Bridges v. State, 1973, 299 N.E. 2d 616, 260 Ind. 651.

Infant who was 15 years of age at time of allegedly committing aggravated assault was entitled to full hearing with counsel, confrontation of witnesses, and right to present evidence entitling him to benefits that might be afforded by the former Juvenile Act, before waiver of juvenile court jurisdiction and transfer to criminal court. Summers v. State, 1967, 230 N.E.2d 320, 248 Ind. 551.

Evidence established that a minor pleading guilty to a charge of burglary was denied the full measure of his constitutional rights where though he expressed his desire for counsel, such was not accorded to him. Monroe v. State, 1961, 178 N.E.2d 692, 242 Ind. 14.

2. Failure of notice to parents

Where parents of juvenile were not advised of his right to have assistance of counsel before and during questioning, and juvenile was not given time to consult with his mother, confession elicited during interrogation was inadmissible in delinquency proceeding, even though juvenile executed waiver of rights. Bridges v. State, 1973, 299 N.E.2d 616, 260 Ind. 651.

Decisions in Other States

31. Indigent parents

An indigent parent, faced with loss of a child's society, as well as the possibility of criminal charges is entitled to assistance of counsel in child neglect proceedings and is required to be advised of such right. In re B., 1972, 334 N.Y. S.2d 133, 30 N.Y.2d 352, 285 N.E.2d 288.

31-6-7-3 Waiver of rights; parent and child

Sec. 3. (a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:

(1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.

(b) The child may waive his right to meaningful consultation under subdivision (a)(2)(C) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

(c) When a statement made knowingly and voluntarily cannot be admitted as evidence against a child because of failure to meet the requirements of subsection (a), it may be admitted to impeach the child as a witness, if he testifies in his own defense, in the same manner as evidence of any other prior inconsistent statement can be admitted for impeachment.

(d) In determining whether any waiver of rights during custodial interrogation was made knowingly and voluntarily, the juvenile court shall consider all the circumstances of the waiver, including:

(1) the child's physical, mental, and emotional maturity;

(2) whether the child or his parent, guardian, custodian, or attorney understood the consequences of his statements;

(3) whether the child and his parent, guardian, or custodian had been informed of the delinquent act with which the child was charged or of which he was suspected;

(4) the length of time he was held in custody before consulting with his parent, guardian, or custodian;

(5) whether there was any coercion, force, or inducement; and

(6) whether the child and his parent, guardian, or custodian had been advised of the child's right to remain silent and to the appointment of counsel.

(e) A parent who is entitled to representation by counsel may waive that right if he does so knowingly and voluntarily.

(f) Any person other than the child may waive service of summons if he does so in writing.

(g) The right of a parent, guardian, or custodian to be present at any hearing concerning his child is waived by that person's failure to appear after lawful notice. *As added by Acts 1978, P.L.136, SEC.1. Amended by Acts 1979, P.L.276, SEC.37.*

Commentary

By J. Richard Kiefer

This section of the new Juvenile Code prescribes the procedural requirements which must be met for a child to waive *any rights* guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law, including, of course, rights conferred on the child by the new Juvenile Code. Although the section is an outgrowth of the Indiana case law that has developed over the last decade concerning juvenile confessions, it is not limited to those situations. An examination of that case law and earlier decisions by the U.S. Supreme Court, will place this section in its proper context.

The United States Supreme Court in Haley v. Ohio (1948), 68 S.Ct. 302, 332 U.S. 596, 92 L.Ed.2d 224, over thirty years ago, stated that the waiver by juveniles of fundamental constitutional rights "cannot be judged by the exacting standards of maturity". *68 S.Ct. 304, 332 U.S. at 599.* The Supreme Court has more recently emphasized that "admissions and confessions of juveniles require special caution". In re Gault (1967), 87 S.Ct. 1428, 1453, 387 U.S. 1, 45, 18 L.Ed.2d 527.

However the Supreme Court has not set forth separate standards for waiver of rights by juveniles. Courts were thus left with the requirement that the decision to waive rights be made voluntarily, knowingly and intelligently, Miranda v. Arizona (1966), 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed.2d 694, 10 A.L.R.3d 974, rehearing denied 87 S.Ct. 11, 385 U.S. 890, 17 L.Ed.2d 121, and the admonishment that in determining whether the waiver of rights was a knowing and intelligent one, several factors were to be considered: the accused's educational level, the seriousness and complexity of the charge lodged against him, his mental condition and his age. VonMoltke v. Gillies (1948), 68 S.Ct. 316, 332 U.S. 708, 92 L.Ed. 309.

In 1972, the Indiana Supreme Court filled the void by articulating procedures to be followed for the waiver of certain rights by juveniles. A confession by a juvenile, the court said:

> . . . cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided of course that there are no elements of coercion, force or inducement present. Lewis v. State (1972), 259 Ind. 431, 288 N.E.2d 138, 142.

This test has been consistently applied to determine the admissibility of juvenile confessions in Indiana. Fortson v. State (1979), 385 N.E.2d 429; Bluitt v. State (1978), 381 N.E.2d 458; Stone v. State (1978), 377 N.E.2d 1372; Burnett v. State (1978), 377 N.E.2d 1340; Buchanan v. State (1978), 376 N.E.2d 1131; Yates v. State (1978), 372 N.E.2d 461; Tippett v. State (1977), 266 Ind. 517, 364 N.E.2d 763; Garrett v. State, (1976), 351 N.E.2d 30; Hall v. State (1976), 264 Ind. 448, 346 N.E.2d 584; Lockridge v. State (1975), 263 Ind. 678, 338 N.E.2d 274; Bridges v. State (1973), 260 Ind. 651, 299 N.E.2d 616. Although the Supreme Court of Indiana stated in *Bluitt v. State, supra*, that its decision was based on *Lewis*

v. State, supra, a careful examination of the facts in *Bluitt* has led many attorneys in the state to view that decision as an erosion of the "meaningful consultation" requirement of *Lewis*.

The United States Supreme Court has not required meaningful consultation between a child and his parent, guardian or custodian as a constitutional prerequisite to the child's waiver of his Fifth Amendment right to remain silent. In fact, the Court has not even decided whether *Miranda, supra*, applies in full force to delinquency adjudications. In a footnote to a recent decision, Justice Blackmun, speaking for a five-member majority, noted:

> Indeed, this Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its prescriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions. See McKeiver v. Pennsylvania, 403 U.S. 528; 540–541, 91 S.Ct. 1976, 1983–1984, 29 N.E.2d 647 (1971) (plurality opinion). We do not decide that issue today. In view of our disposition of this case, we assume without deciding that the *Miranda* principles were fully applicable to the present proceedings. Fare v. Michael C. (1979), 99 S.Ct. 2560, 2567, n. 4.

In *Fare* the Court reversed a decision by the California Supreme Court in which a child's request to speak with his probation officer was held to be a *per se* invocation by the child of his Fifth Amendment right to remain silent. The Supreme Court disagreed, stating that while such a request by the child is a factor to consider in determining the voluntariness of the child's statement, a *per se* rule was not mandated by *Miranda*. The Court expressly held that the "totality of the circumstances" test applied to determine the admissibility of confessions in adult criminal cases is "adequate to determine whether there has been a waiver even where interrogation of juveniles is involved". *Id., 99 S.Ct. 2572.*

This section is a codification of the requirements of *Lewis v. State, supra*, as they existed before *Bluitt, supra*, and *Fare, supra*, which were decided after the section had been enacted; the section also makes some changes both in the application of the *Lewis* test and the standards employed. Subsection (a) states that this section applies to *any* rights guaranteed to the child by the United States or Indiana Constitutions or by any other law. The scope of the section is thus much broader than *Lewis*, which dealt only with the waiver of the child's rights in the context of an incriminating statement or confession. Accordingly, for example, a child's right to cross-examination, to confrontation, to speedy trial, to counsel, to the privilege against compulsory self-incrimination,

to be secure against unreasonable searches and seizures, and to notice, can be waived only in strict compliance with this section.

The new code also expands the reach of *Lewis* by applying this section to persons eighteen, nineteen or twenty who were charged with an act of delinquency committed prior to their eighteenth birthday. See, IC 31-6-1-2 for the definition of "child". Prior to enactment of the new code, the Supreme Court of Indiana had held that the waiver of rights test mandated by *Lewis* was inapplicable to persons over eighteen years of age. Banks v. State (1976), 351 N.E.2d 4, certiorari denied 97 S.Ct. 821, 429 U.S. 1077, 50 L.Ed.2d 797. See, Moreno v. State (App.1975), 336 N.E.2d 675. The Court more recently ruled that the *Lewis* test is not proper for a person who was under the age of eighteen at the time of the delinquent act but over the age of eighteen at the time of the confession, where the child has been waived to criminal court before the confession was made. Massey v. State (1975), 371 N.E. 2d 703. By defining "child" to include a person eighteen, nineteen and twenty who was charged with an act of delinquency committed prior to his eighteenth birthday, the code seems to require application of this section to a waiver of rights by a person who is alleged to have committed an act of delinquency before his eighteenth birthday but who makes an incriminating statement after he turns eighteen; however, if the child is waived to criminal court, he is no longer a "child" since he is not charged with a "delinquent act", and *Massey* would be controlling.

A related question is unanswered by the new code. What is the effect of deception by the child? In *Stone v. State, supra*, the Supreme Court of Indiana held that where the child told police he was nineteen years old and police records erroneously confirmed his age, the child could not later seek refuge in *Lewis* for the failure of police to permit the child to have an opportunity to consult with his parents. The above section states that the child's right may be waived "only in accord with this section", thus implying that a child's deception does not exempt him from the waiver of rights test.

Under the *Lewis* test, a child, by himself, could waive his rights to counsel and to remain silent if both he and his parent or guardian were advised of these rights and they had been given an opportunity to consult. The new code eliminates unilateral waiver by the child; instead, subsection (a) requires that the child be joined in the waiver by either his attorney or a custodial parent, guardian, guardian ad litem or custodian. In addition, subsection (a)(2)(B) requires that the non-attorney adult who joins the child in the waiver have "no interest adverse to the child". A parent who had referred the child to court as an incorrigible, and who therefore is the chief witness against the child, would not qualify as a person who could lawfully join the child in the waiver of his rights. The Supreme Court of Indiana has considered the adverse interest issue in the context of advice from a parent that the child waive his right to remain silent, and tell the truth. In *Buchanan v. State, supra*, the Court held that because the child's father was not an agent of the police, his advice did not render the child's confession involuntary.

Both *Lewis* and this section require the child to be given an opportunity for meaningful consultation. In two cases decided since *Lewis*, the state's highest court held that the child's sister qualified as a "defacto guardian" or a "guardian acting in loco parentis" for the purpose of consultation with the child. *Burnett v. State, supra; Hall v. State, supra.* Subsection (a)(2) requires that the meaningful consultation be with the child's custodial parent, guardian, guardian ad litem or custodian. The term "custodial parent" is not defined in the code, but the other three terms are defined by IC 31-6-1-2. A relative or friend of the child who had not been appointed by the court could not qualify as either a "guardian" or "guardian ad litem", as those terms are defined by IC 31-6-1-2. "Custodian" is defined by that section as "a person with whom a child resides". It would seem that the child's sister would not be his "custodian" unless he lived with her, instead of his parents.

The Supreme Court of Indiana has recently held that the absence of an opportunity for the child and his parent to counsel *alone* does not *per se* render a confession inadmissible. *Bluitt v. State, supra.* The Court noted, however, that ". . . it provides a clearer record on appeal when the juvenile and his parent have been afforded the opportunity to counsel alone . . .". *Bluitt v. State, supra, 381 N.E.2d at 646.*

Lewis made no provision for the child to waive his right to meaningful consultation with his parent, guardian or attorney. Subsection (b), however, provides that the child may waive his right to meaningful consultation if (1) he is informed of that right, (2) his waiver is made *in the presence* of his custodial parent, guardian, custodian, guardian ad litem or attorney, and (3) the waiver is made knowingly and voluntarily.

Subsection (c) states that a confession of a child that is inadmissible due to the failure to meet the requirements of subsection (a) may be admitted to impeach the child as a witness if he testifies in his own defense. This provision is consistent with the cases that have dealt with impeachment by an otherwise inadmissible confession. See, Harris v. New York (1971), 91 S.Ct. 643, 401 U.S. 222, 28 L.Ed.2d 1; Johnson v. State (1972), 258 Ind.

683, 284 N.E.2d 517, cause remanded on rehearing 258 Ind. 683, 288 N.E.2d 553; Seay v. State (App.1977), 363 N.E.2d 1063.

The new code does not resolve the question of whether a confession that is inadmissible as substantive evidence at trial may nevertheless be admitted into evidence at a waiver hearing. The Indiana Court of Appeals ruled in Clemons v. State (1974), 162 Ind.App. 50, 317 N.E.2d 859, certiorari denied 96 S.Ct. 113, 423 U.S. 859, 49 L.Ed.2d 86, that an otherwise inadmissible confession is admissible at a waiver hearing.

Subsection (a) requires that in addition to meaningful consultation with an adult, any waiver of rights by the child be "knowingly and voluntarily" made. Subsection (d) lists six factors for the court to consider when the waiver of rights occurs during "custodial interrogation". It should be emphasized that subsection (a) is not limited to custodial interrogations; *Lewis* and *Miranda*, however, were so limited. *Lockridge v. State, supra*. Subsection (d) requires the court, in determining whether the waiver of rights during custodial interrogation was knowingly and voluntarily made, to consider "all the circumstances of the waiver", thereby incorporating in the code, in addition to the mandatory consultation requirement, the "totality of the circumstances" test dictated by both the United States and Indiana Supreme Courts. See, *Fare v. Michael C., supra*; Gallegos v. Colorado (1962), 82 S.Ct. 1209, 370 U.S. 49, 8 L.Ed.2d 325, 87 A.L.R.2d 614, rehearing denied 82 S.Ct. 1579, 370 U.S. 965, 8 L.Ed.2d 835; *Bluitt v. State, supra*. Several cases have discussed some of the factors the court is required to consider by this subsection. See, *Garrett v. State, supra* (mental retardation of child); *Fortson v. State, supra* (delay in taking child before a judge of nearly 30 hours did not make waiver of rights involuntary); *Bluitt v. State, supra* (coercion). In discussing the test, the U.S. Supreme Court said in *Fare, supra, 99 S.Ct. at 2578*:

> This totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

The Supreme Court of Indiana has held that the state must show beyond a reasonable doubt that a child's waiver of rights was knowing and voluntary and in compliance with the additional requirements of *Lewis*. *Fortson v. State, supra; Garrett v. States, supra*. An argument can be made that the new code reduces the state's burden to a "preponderance of the evidence". See, IC 31-6-7-13(a).

IC 31-6-3-2(c) provides that a parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. Subsection (e) of the above section states that the parent's right may be waived if done so knowingly and voluntarily. The additional requirements of subsection (a) do not apply to a parent.

Under the 1945 Act, both the child and his parent, guardian or custodian could waive service of summons by voluntarily appearing in court. Acts 1945, ch. 356, § 9. See, Watson v. Department of Public Welfare of Harrison County (1960), 130 Ind.App. 659, 165 N.E.2d 770; Akers v. State (1943), 114 Ind.App. 195, 51 N.E. 2d 91. Subsection (f) makes two significant changes in the law relating to waiver of service of summons. First, the child may not waive service of summons in any manner; the child must therefore be served in all cases. Second, the child's parent, guardian or custodian may no longer waive service of summons simply by appearing voluntarily in court. The new code requires waiver by such adult to be *in writing* to be valid.

Finally, subsection (g) states that failure of a parent, guardian or custodian to appear at any hearing concerning the child is a waiver of that person's right to be present, if lawful notice was given to him.

Historical Note

Acts 1978, P.L. 136, Sec. 1, eff. Oct. 1, 1979, added this section.

For applicability of prior law and for provisions concerning modification of judgments, see Historical Note under section 31-6-1-1.

Acts 1979, P.L. 276, Sec. 37, eff. Oct. 1, 1979, deleted, within Cl. (a)(1), "solely" following "appointed," "interests of the" preceding "child," "in the matter" following "child," and "on the record" following "waiver"; deleted "on the record" following "waiver" in Subd. (a)(2)(D); inserted "or attorney" in Cl. (d)(2); inserted "the appointment of" in Cl. (d)(6); and also inserted "lawful" in Subsec. (g).

Cross References

Rights of children in juvenile court proceedings, see section 31-6-3-1.

Library References

Infants ⇐16.4.
C.J.S. Infants §§ 42, 53, 54.

I.L.E. Minors §§ 11 et seq., 74.

232.11. Right to assistance of counsel

1. A child shall have the right to be represented by counsel at the following stages of the proceedings within the jurisdiction of the juvenile court under division II:

a. From the time the child is taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code, and during any questioning thereafter by a peace officer or probation officer.

b. A detention or shelter care hearing as required by section 232.44.

c. A waiver hearing as required by section 232.45.

d. An adjudicatory hearing required by section 232.47.

e. A dispositional hearing as required by section 232.50.

f. Hearings to review and modify a dispositional order as required by section 232.54.

2. The child's right to be represented by counsel under subsection 1, paragraphs "b" to "f" of this section shall not be waived by a child of any age. The child's right to be represented by counsel under subsection 1, paragraph "a" shall not be waived by a child less than sixteen years of age without the written consent of the child's parent, guardian, or custodian. The waiver by a child who is at least sixteen years of age is valid only if a good faith effort has been made to notify the child's parent, guardian, or custodian that the child has been taken into custody and of the alleged delinquent act for which the child has been taken into custody, the location of the child, and the right of the parent, guardian, or custodian to visit and confer with the child.

3. If the child is not represented by counsel as required under subsection 1, counsel shall be provided as follows:

a. If the court determines, after giving the child's parent, guardian or custodian an opportunity to be heard, that such person has the ability in whole or in part to pay for the employment of counsel, it shall either order that person to retain an attorney to represent the child or shall appoint counsel for the child and order the parent, guardian or custodian to pay for that counsel as provided in subsection 5.

b. If the court determines that the parent, guardian or custodian cannot pay any part of the expenses of counsel to represent the child, it shall appoint such counsel, who shall be reimbursed according to the provisions of section 232.141, subsection 1, paragraph "d".

c. The court may appoint counsel to represent the child and reserve the determination of payment until the parent, guardian or custodian has an opportunity to be heard.

4. If the child is represented by counsel and the court determines that there is a conflict of interest between the child and the child's parent, guardian or custodian and that the retained counsel could not properly represent the child as a result of the conflict, the court shall appoint

JUVENILE

other coun
custodian t

5. If the
reasonable
an has the
for the chil
court finds
the person
reason, the

6. Noth
the child's
represent t
which the a
the Iowa C

Acts 1978 (6
G.A.) ch. 56,

Derivation:
Codes 1977
Acts 1967
Code 1966.
Acts 1965
Codes 196
§ 232.15.
Codes 193
§ 3631.
Acts 1923–
§ 364.
Code Supp.
Acts 1915
Code Supp.

Financial stat

Effect of t
juvenile justic
Drake L.Rev.

Infants ⇐2
C.J.S. Infan

In general
Admissibility
Chemical te
Compensatio
Confessions
Waiver 7
Witnesses

other counsel to represent the child and order the parent, guardian or custodian to pay for such counsel as provided in subsection 5.

5. If the court determines, after an inquiry which includes notice and reasonable opportunity to be heard that the parent, guardian or custodian has the ability to pay in whole or in part for the attorney appointed for the child, the court may order that person to pay such sums as the court finds appropriate in the manner and to whom the court directs. If the person so ordered fails to comply with the order without good reason, the court shall enter judgment against the person.

6. Nothing in this section shall be construed to prevent the child or the child's parent, guardian or custodian from retaining counsel to represent the child in proceedings under this division II of this chapter in which the alleged delinquent act constitutes a simple misdemeanor under the Iowa Code.

Acts 1978 (67 G.A.) ch. 1088, § 6, eff. July 1, 1979. Amended by Acts 1979 (68 G.A.) ch. 56, § 3; Acts 1982 (69 G.A.) ch. 1209, § 2.

Historical Note

Derivation:

Codes 1977, 1975, 1973, 1971, § 232.28.
Acts 1967 (62 G.A.) ch. 203, § 4.
Code 1966, § 232.28.
Acts 1965 (61 G.A.) ch. 215, § 29.
Codes 1962, 1958, 1954, 1950, 1946, § 232.15.
Codes 1939, 1935, 1931, 1927, 1924, § 3631.
Acts 1923-24 Ex.Sess. (40 G.A.) H.F. 84, § 364.
Code Supp.1915, § 254a-16.
Acts 1915 (36 G.A.) ch. 262, § 2.
Code Supp.1913, § 254-a16.
Acts 1904 (30 G.A.) ch. 1154.

The 1979 amendment added par. c to subsec. 3.

The 1982 amendment revised subsec. 2 which previously read:

"The child's right to be represented by counsel under subsection 1, paragraphs 'b' to 'f' of this section shall not be waived by a child of any age. The child's right to be represented by counsel under subsection 1, paragraph 'a' shall not be waived by the child without the written consent of the child's parent, guardian or custodian."

Cross References

Financial statement required of client of court-appointed counsel, see § 331.778.

Law Review Commentaries

Effect of the Gault decision on the Iowa juvenile justice system. Martin A. Frey, 17 Drake L.Rev. 53, 60 (1967).

Funding the juvenile justice system in Iowa. 60 Iowa L.Rev. 1149 (1975).

Library References

Infants ⇐203 to 211.
C.J.S. Infants §§ 51, 52.

Notes of Decisions

1. In general

This section must be read as requiring both a good-faith effort to contact a parent and a good-faith effort to furnish parent with each of the four parts of the substantive message specified in the statute. State v. Walker, 1984, 352 N.W.2d 239.

KANSAS

alleged juvenile offender shall be in any county where any act of the alleged offense was committed.

(b) Except as provided in subsection (c), venue for dispositional proceedings in any case involving a juvenile alleged to be a juvenile offender shall be in the county of the juvenile's residence or, if the juvenile is not a resident of this state, in the county where the alleged offense was committed. When the dispositional hearing is to be held in a county other than the county where the alleged offense was committed, the adjudicating judge shall transmit the record of the adjudicatory hearing, and recommendations as to disposition, to the court where the dispositional hearing is to be held.

(c) If the adjudicatory hearing is held in a county other than the county of the juvenile's residence, the dispositional hearing may be held in the county in which the adjudicatory hearing is held if the adjudicating judge, upon motion by the complainant or any person authorized to appeal, finds that it is in the best interests of the juvenile offender and the community that the dispositional hearing be held in the county where the act was committed.

History: L. 1982, ch. 182, § 63; Jan. 1, 1983.

CASE ANNOTATIONS

1. Statute contemplates adjudicating court engaging in separate deliberation on venue; venue outside resident county only when best interests of juvenile are met. *In re* A.T.K., 11 K.A.2d 174, 176, 717 P.2d 528 (1986).

38-1606. Right to an attorney. (a) *Appointment of attorney to represent juvenile.* A juvenile charged under this code is entitled to have the assistance of an attorney at every stage of the proceedings. If a juvenile appears before any court without an attorney, the court shall inform the juvenile and the juvenile's parents of the right to employ an attorney. Upon failure to retain an attorney, the court shall appoint an attorney to represent the juvenile. The expense of the appointed attorney may be assessed to the juvenile or parent, or both, as part of the expenses of the case.

(b) *Continuation of representation.* An attorney appointed for a juvenile shall continue to represent the juvenile at all subsequent court hearings in the proceeding under this code, including appellate proceedings, unless relieved by the court upon a showing of good cause or upon transfer of venue.

(c) *Attorneys' fees.* Attorneys appointed hereunder shall be allowed a reasonable fee for services, which may be assessed as an expense in the proceedings as provided in K.S.A. 38-1613.

History: L. 1982, ch. 182, § 64; Jan. 1, 1983.

CASE ANNOTATIONS

1. Court may conduct hearing without voluntary waiver of appearance by juvenile if counsel is present. State v. Muhammad, 237 K. 850, 856, 703 P.2d 835 (1985).

38-1607. Court records. (a) *Official file.* The official file of proceedings pursuant to this code shall consist of the complaint, process, service of process, orders, writs and journal entries reflecting hearings held and judgments and decrees entered by the court. The official file shall be kept separate from other records of the court. The official file shall be open for public inspection as to any juvenile 16 or more years of age at the time any act is alleged to have been committed. The official file shall be privileged as to any juvenile less than 16 years of age at the time any act is alleged to have been committed and shall not be disclosed directly or indirectly to anyone except:

(1) A judge of the district court and members of the staff of the court designated by the judge;

(2) parties to the proceedings and their attorneys;

(3) a public or private agency or institution having custody of the juvenile under court order;

(4) law enforcement officers or county or district attorneys or their staff when necessary for the discharge of their official duties; and

(5) any other person when authorized by a court order, subject to any conditions imposed by the order.

(b) *Social file.* Reports and information received by the court other than the official file shall be privileged and open to inspection only by attorneys for the parties or upon order of a judge of the district court or an appellate court. The reports shall not be further disclosed by the attorney without approval of the court or by being presented as admissible evidence.

offense, the child's prior record, if any, and whether there are other charges pending against the child.

(3) If, after completion of the detention hearing, the court is of the opinion that detention is necessary, the order shall state on the record the specific reasons for detention. (Enact. Acts 1986, ch. 423, § 47, effective July 1, 1987; 1988, ch. 350, § 33, effective April 10, 1988.)

610.290. Rights of juvenile. — (1) Unless a hearing is held and the necessity for detention properly established, the child shall be released to the custody of his parents, person exercising custodial control or supervision or other responsible adult pending further disposition of the case. A child shall have a right to counsel at his detention hearing determining his right to freedom pending the disposition of his case, and his parents, person exercising custodial control or supervision or other responsible adult shall have a right to attend the hearing if such attendance will not unnecessarily delay the hearing. Any person aggrieved by a proceeding under this subsection may proceed by habeas corpus to the circuit court.

(2) Whether the child is released before or after a hearing, or is detained as a result of such hearing, the child and his parents, person exercising custodial control or supervision or other responsible adult shall be given written notice of the time and place of the adjudicatory hearing concerning the child and an account of the specific charges against the child, including the specific statute alleged to have been violated. Such notice shall be given at least seventy-two (72) hours prior to the initial hearing on the case. (Enact. Acts 1986, ch. 423, § 48, effective July 1, 1987; 1988, ch. 350, § 34, effective April 10, 1988.)

610.300. Evidence in public offense investigations. — (1) Physical evidence shall be obtained and utilized in the investigation of public offenses involving children in the same manner as it is obtained and utilized in the investigation of public offenses involving adults.

(2) All records and physical evidence so obtained shall be surrendered to the court upon motion for good cause shown or upon elimination of the child as a suspect in the case.

(3) The court shall, upon receipt of physical evidence, return any evidence, which is not contraband and is not needed for further prosecution, to its lawful owner. (Enact. Acts 1986, ch. 423, § 49, effective July 1, 1987; 1988, ch. 350, § 35, effective April 10, 1988.)

610.310. Medical treatment for child. — (1) When the health or physical condition of any child before the juvenile court requires it, the court may order the child to be placed in a public or private hospital or institution for treatment or care. In order to ascertain the physical condition of a child, the court may cause the child to be examined by a health officer or children's clinic or any reputable physician who will conduct the examination.

(2) The court may order or consent to necessary medical treatment, including surgical procedures, except for the purpose of abortion, electroshock therapy or psychosurgery as provided in KRS Chapter 645, or sterilization, after a hearing conducted to determine the necessity of such treatment or procedure. In making the order, the court may take into consideration the religious beliefs and practices of the child and his parents or guardian. Reasonable notice, taking into account any emergency circumstances, shall be provided to the parents, guardian or person exercising custodial control or supervision of the child to enable them to attend the hearing. (Enact. Acts 1986, ch. 423, § 50, effective July 1, 1987; 1988, ch. 350, § 36, effective April 10, 1988.)

KENTUCKY

610.320. Juvenile record and juv formation in court and police recor ited — Exceptions. — (1) A special re for all cases, to be known as the "juven dar of such cases shall be called the

(2) No probation officer, nor employe the consent of the district judge sitting municate to any persons other than th ested in the case, a member of the ad sentative of the cabinet, any inform charge of his duties, nor shall any r officer be made public except by leav nothing in this subsection shall prohi ing or communicating such informat superiors in his own department, or direct interest in the record or soci

(3) All law enforcement records reg their eighteenth birthday shall not However, such law enforcement re child, family, guardian or legal repr records shall also be made availab representatives of the cabinet.

(4) This section shall not relieve from divulging such facts as a witn cases failing under KRS Chapters records for use in such trial or proce effective July 1, 1987; 1988, ch. 3

610.330. Expungement of juv who has been adjudicated as comir 630, 635, or 645, but not KRS Cha for the expungement of his juveni such right at the time of adjudica the motion of a probation officer of or any other interested person, ma cerning the record of any child wl court. Such petition shall be file than two (2) years after the date over the person, or two (2) years a mitment to the cabinet for human except that the two (2) year perio such extraordinary circumstances make the waiver advisable.

(2) Upon the filing of a petitio shall set a date for a hearing anyone else whom the court or th custodian has reason to believe the expungement of the record

(3) The court shall order seal custody of the court and any suc or official, including law enforc finds that:

(a) Since the termination of release from commitment to th person whose record is in ques has not been adjudicated und

stenographic notes, electronic, mechanical, or other appropriate means. When a transfer is ordered, neither the record of the hearing or the reasons for the transfer shall be admissible in evidence in any subsequent criminal proceedings; provided, however, that the said records may be used for the purpose of impeachment of a witness.

D. The general public shall be excluded from such hearings. Only the child, his counsel, witnesses in support of the transfer and in opposition to it, the child's parents, tutor, or other custodian, the personnel of the court, and any other persons as the court finds have a legitimate or proper interest in the proceedings or in the work of the court may be admitted by the court. The court may exclude the child or any other person from the hearing if such person's conduct is disruptive of orderly proceedings and the court's admonition to conduct himself properly is not heeded promptly.

Added by Acts 1974, No. 568, § 1.

Library References

Infants ⇐68.7(3).
C.J.S. Infants § 45.

Notes of Decisions

1. Validity

Adoption of 1979 amendment to LSA-Const. Art. 5, § 19 governing prosecution of juveniles which removed State's authority to initiate prosecution of juveniles in the district court until enabling legislation was adopted by legislature did not have the effect of abrogating provisions of R.S. 13:1570 and 13:1571.1 et seq. governing initiation of prosecution of juveniles in district court and transfer proceedings from juvenile court to district court, nor did adoption of the amendment require reenactment of such statutes, in that the amendment had effect of invalidating only such laws as were in conflict therewith and neither of the statutes conflicted with the amendment. State v. Bowden, Sup.1981, 406 So.2d 1316.

2. Construction and application

Provisions of juvenile transfer statute, R.S. 13:1569 et seq., provide juvenile defendant with all constitutional rights afforded adults similarly situated. State v. Hall, Sup.1977, 350 So.2d 141.

3. Due process

Juvenile transfer statute, R.S. 13:1571.1 et seq., was intended to be subject to constitutional standards of procedural due process which are implicitly embodied in such statute. State v. Everfield, Sup.1977, 342 So.2d 648.

§ 1571.3. Right to counsel

A child shall be represented by an attorney at the transfer hearing. A child unable to afford counsel is one who is unable, or whose parents or tutor is unable, to provide for the payment of legal counsel. The court shall appoint counsel to represent a child unable to afford counsel at such transfer proceeding.

Added by Acts 1974, No. 568, § 1.

Cross References

Right to counsel under Code of Juvenile Procedure, see LSA–C.J.P. art. 95.

Library References

Infants ⇐68.4.
C.J.S. Infants §§ 201, 202.

Notes of Decisions

---

1. Validity

Adoption of 1979 amendment to LSA–Const. Art. 5, § 19 governing prosecution of juveniles which removed State's authority to initiate prosecution of juveniles in the district court until enabling legislation was adopted by legislature did not have the effect of abrogating provisions of R.S. 13:1570 and 13:1571.1 et seq. governing initiation of prosecution of juveniles in district court and transfer proceedings from juvenile court to district court, nor did adoption of the amendment require reenactment of such statutes, in that the amendment had effect of invalidating only such laws as were in conflict therewith and neither of the statutes conflicted with the amendment. State v. Bowden, Sup.1981, 406 So.2d 1316.

R.S. 13:1571.1 et seq. authorizing transfer of certain juveniles to district court is not unconstitutional for permitting the appointment of a different attorney to represent a defendant at transfer hearing and subsequent trial in district court. State v. Hall, Sup.1977, 350 So.2d 141.

2. Construction and application

Provisions of juvenile transfer statute, R.S. 13:1569 et seq., provide juvenile defendant with all constitutional rights afforded adults similarly situated. State v. Hall, Sup.1977, 350 So.2d 141.

3. Due process

Juvenile transfer statute, R.S. 13:1571.1 et seq., was intended to be subject to constitutional standards of procedural due process which are implicitly embodied in such statute. State v. Everfield, Sup.1977, 342 So.2d 648.

§ 1571.4. Confrontation of witnesses, cross examination, privileges and immunities, appeals

A. Only such evidence may be introduced at a transfer hearing which pertains to the transfer criteria stated in R.S. 13:1571.1 and to determine whether probable cause exists that the child committed the acts alleged in the original petition. A child is entitled to introduce evidence in his own behalf and to cross examine witnesses. A child who is the subject of a transfer hearing shall not be required to be a witness against himself or to otherwise give evidence against himself.

B. The decision of the juvenile court to transfer or not to transfer the case to the court exercising criminal jurisdiction is only an interlocutory judgment which either the child or the state, or both, have the right to have reviewed summarily by the Louisiana Supreme Court, and such review shall be by preference.

Added by Acts 1974, No. 568, § 1.

Library References

Infants ⇐68.7(8), 68.8.

Maine

COMMENTARY—1979

This section is analogous to Rule 11 ("Pleas") of the Maine District Court Criminal Rules, but is termed an answer because juvenile proceedings are formally considered civil in nature. Unlike civil proceedings, however, this section does not permit adjudication by default; it only expedites proceedings subject to constitutional standards of an intelligent and knowing waiver. It is a substantial departure from the pre-Code practice of Title 15, section 2610, which did not appear to permit a juvenile or his representative to waive a hearing.

Maine Rules of Criminal Procedure

Pleas, see Glassman, Maine Practice, Rules of Criminal Procedure, Rule 11.

Library References

Infants ⇐16.6. C.J.S. Infants § 55.

§ 3306. Right to counsel

1. Notice and appointment.

A. At his first appearance before the court, the juvenile and his parents, guardian or legal custodian shall be fully advised by the court of their constitutional and legal rights, including the juvenile's right to be represented by counsel at every stage of the proceedings. At every subsequent appearance before the court, the juvenile shall be advised of his right to be represented by counsel.

B. If the juvenile requests an attorney and if he and his parents, guardian or legal custodian are found to be without sufficient financial means, counsel shall be appointed by the court.

C. The court may appoint counsel without such request if it deems representation by counsel necessary to protect the interests of the juvenile.

2. State's attorney. The district attorney or the attorney general shall represent the State in all proceedings under this chapter.

1977, c. 520, § 1, eff. July 1, 1978; 1977, c. 664, § 25, eff. March 21, 1978.

b. *Use of Report.*

The report of examination is admissible in evidence as set forth in Section 3-818 of the Courts Article.

c. *Admissibility of Testimony.*

1. In Delinquency and Contributing Cases.

In delinquency cases and in cases in which an adult is charged with a violation of Section 3-831 of the Courts Article, testimony concerning a study or examination ordered under Section 3-818 of the Courts Article by persons who conducted the study or examination is admissible

(i) at waiver and disposition hearings, and

(ii) at an adjudicatory hearing on the issues of a respondent's competence to participate in the proceedings and his legal responsibility for his acts.

2. In All Other Cases.

In all other cases, testimony concerning a study or examination ordered under Section 3-818 of the Courts Article by persons who conducted the study or examination is admissible at any hearing.
(Amended Nov. 5, 1976, effective Jan. 1, 1977.)

Effect of amendments. — The 1976 amendment rewrote the Rule, which formerly consisted of one sentence.

The 1980 amendment added the second sentence in subsection 1 of section a.

University of Baltimore Law Forum. — For discussion of police investigative procedures and juveniles, see 16, No. 1 U. Balt. Law Forum 6 (1986).

Disposition hearing. — Section 3-818 (c) of the Courts and Judicial Proceedings Article and section c of this Rule create a hearsay exception for admission of evaluative reports at disposition hearings in Children in Need of Assistance cases. In re Wanda B., 69 Md. App. 105, 516 A.2d 615 (1986).

Consideration of agency study which accused's counsel has never received. — It is apparent that CJ § 3-818 and this Rule have been violated where, prior to any formal adjudication of delinquency, the court acknowledged that it had considered, and was still considering, the contents of an agency study, and where it was clear from the record that the accused's counsel had never received a copy of the report although the judge was considering disposition of the case. In re Jeffrey L., 50 Md. App. 268, 437 A.2d 255 (1981).

Rule 906. Right to Counsel.

a. *In All Proceedings — Appearance of Out-of-State Attorney.*

The respondent is entitled to be represented in all proceedings under this Chapter by counsel retained by him, his parent, or appointed pursuant to the provisions of subsection b 2 and 3 of this Rule. An out-of-state attorney may enter his appearance and participate in a cause only after having been admitted in accordance with Rule 20 of the Rules Governing Admission to the Bar of Maryland (Special Admission for Out-of-State Attorneys). Once so admitted, his appearance and participation is limited by the restrictions of that Rule.

Cross reference. — See Rule 20 of the Rules Governing Admission to the Bar of Maryland.

b. *Waiver of Representation — Indigent Cases — Non-Indigent Cases.*

1. Waiver Procedure.

If, after the filing of a juvenile petition, a respondent or his parent indicates a desire or inclination to waive representation for himself, before permitting the waiver the court shall determine, after appropriate questioning in open court and on the record, that the party fully comprehends:

(i) the nature of the allegations and the proceedings, and the range of allowable dispositions;

(ii) that counsel may be of assistance in determining and presenting any defenses to the allegations of the juvenile petition, or other mitigating circumstances;

(iii) that the right to counsel includes the right to the prompt assignment of an attorney, without charge to the party if he is financially unable to obtain private counsel;

(iv) that even if the party intends not to contest the charge or proceeding, counsel may be of substantial assistance in developing and presenting material which could affect the disposition; and

(v) that among the party's rights at any hearing are the right to call witnesses in his behalf, the right to confront and cross-examine witnesses, the right to obtain witnesses by compulsory process, and the right to require proof of any charges.

2. Representation of Indigents.

(a) Unless knowingly and intelligently waived, and unless counsel is otherwise provided, an indigent party, or an indigent child whose parents are either indigent or unwilling to employ counsel, shall be entitled to be represented by the Office of the Public Defender at any stage in a waiver, adjudicatory or disposition hearing, or hearing under Rule 916 (Modification or Vacation of Order).

(b) Upon request or upon the court's own motion, the Office of the Public Defender shall appoint separate counsel to represent any indigent party other than the child if the interests of the child and those of the party appear to conflict, and if such counsel is necessary to meet the requirements of a fair hearing.

3. Non-Indigent Cases.

Upon motion of any party or upon the court's motion, the court may appoint an attorney to represent a child. Compensation for the services of the attorney may be assessed against any party.
(Amended Nov. 5, 1976, effective Jan. 1, 1977; Nov. 4, 1977, effective Jan. 1, 1978.)

Effect of amendments. — The 1976 amendment eliminated references to guardian or custodian in section a and in subsection 1 of section b, divided former paragraph (i) in that subsection into present paragraphs (i) and (ii), redesignated the succeeding paragraphs in the subsection, substituted "affect" for "effect" in present paragraph (iv), eliminated "by the Public Defender" at the end of the heading for subsection 2, added "and unless counsel is otherwise provided" near the beginning of paragraph (a) in that subsection and made several style changes.

The 1977 amendment added "Appearance of Out-of-State Attorney" in the heading for section a, substituted "him, his parent," for "him or his parent," in the first sentence in that section, added "and 3" near the end of that sentence, added the second and third sentences in section a, added "Non-Indigent Cases" in the heading for section b and added subsection 3 in that section.

University of Baltimore Law Forum. — For discussion of police investigative procedures and juveniles, see 16, No. 1 U. Balt. Law Forum 6 (1986).

Section b must be satisfied for effective waiver. — Before the court may accept a juvenile's waiver of counsel, it must satisfy each mandate in section b of this Rule. Anything less will render the waiver void as unknowingly and unintelligently given. In re Appeal No. 101, 34 Md. App. 1, 366 A.2d 392 (1976).

[illegible] must comprehend rights and [illegible] — The court must determine [illegible] comprehends each of the [illegible] in this [illegible]

[illegible]

child [illegible]
name [illegible]
The [illegible]. The
in the [illegible] order
obtain [illegible] psychologist or
If the [illegible] copies of the ex-
served, notice [illegible]
directed by the [illegible]
in the proceedings.

Delay in effecting [illegible], effective July 1,
prevent the court from [illegible]
shall require. [illegible]

d. *Subpoena.*

The clerk shall issue a subpoena [illegible] as made to the court under
pursuant to Rule 2-510. [illegible]counsel for the parties before any hearing at which
[illegible]ered in evidence.

cital. In re Appeal No. 101, 34 Md. App. 1, 366 A.2d 392 (1976).

A juvenile facing possible waiver of juvenile jurisdiction is entitled to advice of counsel. Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970).

Review of commitment considered "proceedings" for counsel purposes. — Hearings before the juvenile court judge for "Review of Commitment for Placement" of a juvenile were "proceedings," and, therefore, there was a requirement that the juvenile be offered counsel. In re Glenn H., 43 Md. App. 510, 406 A.2d 444 (1979).

Order for psychiatric examination. — Since there is no requirement for a hearing prior to ordering a psychiatric examination of a child under CJ § 3-818, the parent's entitlement to appointed counsel under subsection 2 of section b of this Rule is not implicated. In re Wanda B., 69 Md. App. 105, 516 A.2d 615 (1986).

Parents' responsibility for child's legal services deemed "necessaries". — Legal services provided to a minor may, in some circumstances, be deemed "necessaries" for which a parent may be required to pay, e.g., where they are reasonable and necessary for the protection or enforcement of the property rights of the minor or for his personal protection, liberty or relief. Serabian v. Alpern, 284 Md. 680, 399 A.2d 267 (1979).

Recoverable at law. — Recovery against the parent for "necessary" legal services provided to a minor must ordinarily be sought in an action at law. Serabian v. Alpern, 284 Md. 680, 399 A.2d 267 (1979).

Quoted in Johnson v. Solomon, 484 F. Supp. [illegible] (D. Md. 1979).

[illegible] Michael W., 53 Md. App. 271,

[illegible]) Md. App. 48,

[illegible]ll or any facts
[illegible]ing preliminary
respondent fails
allegations in the

[illegible]e allegations of the
[illegible]n not to deny those
catory hearing, shall

advise the child of the nature and possible consequence of his action or intended action. The court shall neither encourage or discourage the child with respect to his action or intended action, but shall ascertain to its satisfaction that the child understands the nature and possible consequences of failing to deny the allegations of the juvenile petition, and that he takes that action knowingly and voluntarily. These proceedings shall take place in open court and shall be on the record. If the respondent is an adult, the provisions of Title 4 shall apply.

(Amended Nov. 5, 1976, effective Jan. 1, 1977; Apr. 6, 1984, effective July 1, 1984.)

Effect of amendments. — The 1976 amendment added the second sentence in section a, eliminated "or files a pleading neither admitting nor denying all or part of the facts alleged" preceding "his failure" in the last sentence in the section, eliminated "respondent" preceding "child" in the first sentence in section b and twice in the second sentence, eliminated "in open court and on the record" preceding "advise" in the first sentence and following "satisfaction" in the second sentence and added the third sentence in that section.

The 1984 amendment substituted "Title 4" for "Chapter 700 (Criminal Causes)" in the last sentence in section b.

This Rule makes no distinction between delinquency cases and other juvenile cases. In re Appeal No. 544, 25 Md. App. 26, 332 A.2d 680 (1975).

Failure to file pleading deemed denial. — Although by this Rule a party may file a pleading denying or admitting all or a part of the facts alleged, if no pleading is filed, the parties are deemed to have denied the allegations. In re Appeal No. 769, 25 Md. App. 565, 335 A.2d 204 (1975).

Applied in In re Appeal No. 1038, 32 Md. App. 239, 360 A.2d 18 (1976).

Quoted in In re James B., 54 Md. App. 270, 458 A.2d 847 (1983).

Rule 908. Amendment — Continuance.

a. *Juvenile Petition.*

A juvenile petition may be amended by or with the approval of the court at any time prior to the conclusion of the adjudicatory hearing.

b. *Other Pleading.*

A pleading other than a juvenile petition may be amended with the approval of the court at any time prior to the final disposition of that pleading.

c. *Continuance.*

If a juvenile petition or other pleading is amended, the court shall grant the parties such continuance as justice may require in light of the amendment.

(Amended Nov. 5, 1976, effective Jan. 1, 1977.)

Effect of amendment. — The 1976 amendment eliminated "Juvenile Petition — Other Pleading —" preceding "Continuance" in the Rule heading, substituted "the conclusion of the adjudicatory hearing" for "a final adjudication" in section a and added "juvenile" near the beginning of section c.

Maryland Law Review. — For note, "Does a Juvenile Court Rehearing on the Record After a Master Has Made Proposed Findings Violate Double Jeopardy or Due Process?" see 39 Md. L. Rev. 395 (1979).

Massachusetts

but its breach is also crime against society. Com. v. Brasher (1971) 270 N.E.2d 389, 359 Mass. 550.

§ 29. Counsel for child; appointment

Whenever a child is before any court under subsection C of section twenty-three or sections twenty-four to twenty-seven, inclusive, or section twenty-nine B, said child shall have and shall be informed of the right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child. The parent, guardian or custodian of such child shall have and shall be informed of the right to counsel at all hearings under said sections and in any other proceeding regarding child custody where the department of social services or a licensed child placement agency is a party, including such proceedings under sections five and fourteen of chapter two hundred and one; and if said parent, guardian or custodian of such child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian. The probate and family court department of the trial court shall establish procedures for notifying said parent, guardian or custodian of such right, and for appointing counsel for an indigent parent, guardian or custodian within fourteen days of a licensed child placement agency filing or appearing as a party in any such action. In any such proceeding regarding child custody, where the department of social services or a licensed child placement agency is a party, the parent, guardian or custodian of such child shall have and shall be informed of the right to a service or case plan for the child and his family which complies with applicable state and federal laws and regulations regarding such plans. The department or agency shall provide a copy of such plan to the parent, guardian or custodian of the child and to the attorneys for all parties appearing in the proceeding within forty-five days of the department or agency filing an appearance in such proceeding. Thereafter, any party may have the original or changed plan introduced as evidence, and with the consent of all parties such plan shall be filed with the court. Notwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society.

The department, upon its request, shall be represented by the district attorney for the district in which the case is being heard.

Amended by St.1973, c. 1076, § 4; St.1978, c. 501; St.1983, c. 517; St.1984, c. 197, § 3.

Historical Note

1973 Amendment. St.1973, c. 1076, § 4, approved Nov. 21, 1973, rewrote the section.

1978 Amendment. St.1978, c. 501, approved July 19, 1978, rewrote the first paragraph which prior thereto read:

"Whenever a child is before any court under sections twenty-four to twenty-seven, inclusive, the parents, guardian or custodian of such child shall have, and shall be informed of, the right to be represented by counsel. The court shall appoint counsel for the child if it determines that the interest of justice so require. Counsel shall be appointed and paid by the court whenever the court, upon request of the parents, custodian or guardian, determines that such person, or child, is unable for financial reasons to retain counsel or whenever the court, in its discretion, determines that the appointment of counsel is required in the interest of justice."

1983 Amendment. St.1983, c. 517, in the first paragraph, inserted "under said sections and in any other proceeding regarding child custody where the department of social services or a licensed child placement agency is a party, including such proceedings under sections five and fourteen of chapter two hundred and one;" in the second sentence and inserted the third to sixth sentences.

1984 Amendment. St.1984, c. 197, § 3, approved July 12, 1984, inserted "or section twenty-nine B" in the first sentence.

Sections 6 and 7 of St.1984, c. 197, provided:

"Section 6. The department of social services shall conduct a full review of state laws, policies and procedures governing the placement of children in foster care through voluntary agreements between the department and the parents of a child. Such review shall include an examination of circumstances under which voluntary agreements are signed, extended and terminated and shall determine if said laws, policies and procedures effectively meet the needs of children and families.

"In conducting such review, the department shall compile the following information:—

"(1) the total number of children placed in foster care through signed voluntary agreements in fiscal year nineteen hundred and eighty-four;

Michigan

712A.16a Repealed. P.A.1963, No. 214, § 10, Imd. Eff. May 17

Historical Note

The repealed section was derived from P.A.1939, No. 288, c. XIIA, § 16a; P.A. 1956, No. 117, § 1, and provided for joint regional facilities for diagnosis and custody of minors detained for investigation and pending criminal proceedings.

See, now, sections 712A.16, 720.651 et seq.

712A.17 Hearings; jury; bond; counsel to represent child

Sec. 17. The court may conduct hearings in an informal manner and may adjourn the hearing from time to time. Stenographic notes or other transcript of the hearing shall be taken only when requested by an attorney of record or when so ordered by the court. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case.

In all hearings under this chapter, any person interested therein may demand a jury of 6, or the judge of probate of his own motion, may order a jury of the same number to try the case. Such jury shall be summoned and impanelled in accordance with the law relating to juries in courts held by justices of the peace.

Any parent, guardian, or other custodian of any child held under this chapter shall have the right to give bond or other security for the appearance of the child at the hearing of such case; and in the event such child or his or her parents desire counsel and are unable to procure same, the court in its discretion may appoint counsel to represent the child. The attorney so appointed shall be entitled to receive from the county treasurer from the general fund of the county, on the certificate of the probate judge that such services have been duly rendered, such an amount as the probate judge shall, in his discretion, deem reasonable compensation for the services performed: Provided, That the prosecuting attorney shall appear for the people when requested by the court.

Historical Note

Source:

P.A.1939, No. 288, c. XIIA, § 17, added by P.A.1944, 1st Ex.Sess., No. 54, Imd. Eff. March 6, 1944.

Prior Laws:

P.A.1907, Ex.Sess., No. 6, §§ 2, 3.
P.A.1911, No. 262.
P.A.1915, No. 308.
C.L.1915, §§ 2012, 2013.
P.A.1925, No. 117.
P.A.1927, No. 127.
C.L.1929, §§ 12835, 12836.
P.A.1939, No. 288, c. XII, § 12.
P.A.1944, 1st Ex.Sess., No. 54.

Cross References

Vehicle code violations, hearing procedure, see § 712A.2b.

hereby appropriated annually to the commissioner of corrections as reimbursement of the costs of providing these services to the juvenile courts.

Subd. 2. The court may proceed as described in subdivision 1 only after a petition has been filed and, in delinquency cases, after the child has appeared before the court or a court appointed referee and has been informed of the allegations contained in the petition. However, when the child denies being delinquent before the court or court appointed referee, the investigation or examination shall not be conducted before a hearing has been held as provided in section 260.155.

Amended by Laws 1986, c. 444, Laws 1987, c. 384, art. 2, § 66.

1986 Amendment. Laws 1986, c. 444, § 1, removed gender specific references applicable to human beings throughout Minn.Stats. by adopting by reference proposed amendments for such revision prepared by the revisor of statutes pursuant to Laws 1984, c. 480, § 21, and certified and filed with the secretary of state on Jan. 21, 1986. Section 3 of Laws 1986, c. 444, provides that the amendments "do not change the substance of the statutes amended."

1987 Legislation

Laws 1987, c. 384 was a Revisor's bill correcting erroneous, ambiguous, omitted and obsolete references and text.

Cross References

Mental illness, capacity to understand proceedings and participate, see Juvenile Court Rule 33.

Law Review Commentaries

Juvenile court legislative reform and the serious young offender: Dismantling the "rehabilitative ideal". Barry C. Feld. 1981, 65 Minn.Law Review 167.

260.155. Hearing

Subdivision 1. General. Except for hearings arising under section 260.261, hearings on any matter shall be without a jury and may be conducted in an informal manner. The rules of evidence promulgated pursuant to section 480.0591 and the law of evidence shall apply in adjudicatory proceedings involving a child alleged to be delinquent, in need of protection or services under section 260.015, subdivision 2a, clause (11) or (12), or a juvenile petty offender, and hearings conducted pursuant to section 260.125 except to the extent that the rules themselves provide that they do not apply. Hearings may be continued or adjourned from time to time and, in the interim, the court may make any orders as it deems in the best interests of the minor in accordance with the provisions of sections 260.011 to 260.301. The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court; except that, the court shall open the hearings to the public in delinquency proceedings where the child is alleged to have committed an offense or has been proven to have committed an offense that would be a felony if committed by an adult and the child was at least 16 years of age at the time of the offense. In all delinquency cases a person named in the charging clause of the petition as a person directly damaged in person or property shall be entitled, upon request, to be notified by the court administrator in writing, at the named person's last known address, of (1) the date of the reference or adjudicatory hearings, and (2) the disposition of the case. Adoption hearings shall be conducted in accordance with the provisions of laws relating to adoptions.

Subd. 1a. Right to participate in proceedings. A child who is the subject of a petition, and the parents, guardian, or lawful custodian of the child have the right to participate in all proceedings on a petition. Any grandparent of the child has a right to participate in the proceedings to the same extent as a parent, if the child has lived with the grandparent within the two years preceding the filing of the petition. At the first hearing following the filing of a petition, the court shall ask whether the child has lived with a grandparent within the last two years, except that the court need not make the inquiry if the petition states that the child has not been with a grandparent during this time period. Failure to notify a grandparent of the proceedings is not a jurisdictional defect

if the court shall appoint counsel to represent the minor or the parents or guardian in any other case in which it feels that such an appointment is desirable.

[See main volume for text of subd. 3]

Subd. 4. Guardian ad litem. (a) The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that the minor's parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor's interests, and in every proceeding alleging a child's need for protection or services under section 260.015, subdivision 2a, clauses (1) to (10). In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such an appointment is desirable. The court shall appoint the guardian ad litem on its own motion or in the manner provided for the appointment of a guardian ad litem in the district court.

(b) The court may waive the appointment of a guardian ad litem pursuant to clause (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interests of the minor are protected.

(c) In appointing a guardian ad litem pursuant to clause (a), the court shall not appoint the party, or any agent or employee thereof, filing a petition pursuant to section 260.131.

Subd. 4a. Examination of child. In any child in need of protection or services proceeding, neglected and in foster care, or termination of parental rights proceeding the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child's best interests to do so. Informal procedures that may be used by the court include taking the testimony of a child witness outside the courtroom. The court may also require counsel for any party to the proceeding to submit questions to the court before the child's testimony is taken, and to submit additional questions to the court for the witness after questioning has been completed. The court may excuse the presence of the child's parent, guardian, or custodian from the room where the child is questioned in accordance with subdivision 5.

[See main volume for text of subd. 5]

Subd. 6. Rights of the parties at the hearing. The minor and the minor's parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross examine witnesses appearing at the hearing.

Subd. 7. Factors in determining neglect. In determining whether a child is neglected and in foster care, the court shall consider, among other factors, the following:

(1) the length of time the child has been in foster care;

(2) the effort the parent has made to adjust circumstances, conduct, or condition to make it in the child's best interest to be returned to the parent's home in the foreseeable future, including the use of rehabilitative services offered to the parent;

(3) whether the parent has visited the child within the three months preceding the filing of the petition, unless extreme financial or physical hardship or treatment for mental disability or chemical dependency or other good cause prevented the parent from visiting the child or it was not in the best interests of the child to be visited by the parent;

(4) the maintenance of regular contact or communication with the agency or person temporarily responsible for the child;

(5) the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;

(6) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; and

(7) the nature of the effort made by the responsible social service agency to rehabilitate and reunite the family.

Subd. 8. Waiver [illegible] of any rights which a child has under this chapter may be [illegible] the child after the child [illegible]

fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

(b) Waiver of a child's right to be represented by counsel provided under the juvenile court rules must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. In determining whether a child has voluntarily and intelligently waived the right to counsel, the court shall look to the totality of the circumstances which includes but is not limited to the child's age, maturity, intelligence, education, experience, and ability to comprehend, and the presence and competence of the child's parents, guardian, or guardian ad litem. If the court accepts the child's waiver, it shall state on the record the findings and conclusions that form the basis for its decision to accept the waiver.

Amended by Laws 1985, c. 286, § 1; Laws 1986, c. 361, § 1; Laws 1986, c. 444; Laws 1986, c. 446, §§ 1, 2; Laws 1986, 1st Sp., c. 3, art. 1, § 82; Laws 1987, c. 331, §§ 1, 2; Laws 1988, c. 514, §§ 6, 7, eff. Aug. 1, 1988; Laws 1988, c. 673, §§ 18 to 20.

1985 Amendment. Added subd. 4a.

1986 Amendments. Laws 1986, c. 361, § 1, added, to the sentence in subd. 1 requiring the court to exclude the general public and admit only those with a direct interest, the exception for delinquency proceedings involving an alleged offense that would be a felony if committed by an adult.

Laws 1986, c. 444, § 1, removed gender specific references applicable to human beings throughout Minn.Stats. by adopting by reference proposed amendments for such revision prepared by the revisor of statutes pursuant to Laws 1984, c. 480, § 21, and certified and filed with the secretary of state on Jan. 21, 1986. Section 3 of Laws 1986, c. 444, provides that the amendments "do not change the substance of the statutes amended."

Laws 1986, c. 446, §§ 1, 2, inserted the provisions pertaining to the right to participate in proceedings; in subd. 8, designated the first paragraph as par. (a) and, in par. (a), inserted "voluntarily and" in the first sentence, and added par. (b).

1987 Legislation

Laws 1987, c. 331, § 1, in the fourth sentence of subd. 1, inserted "or has been proven to have committed an offense" following "committed an offense".

Laws 1987, c. 331, § 2, rewrote subd. 1a which previously read:

"A child who is the subject of a petition, and the parents, guardian, or custodian of the child, and any grandparent of the child with whom the child has resided within the past two years, have the right to participate in all proceedings on a petition."

1988 Legislation

Laws 1988, c. 514, §§ 6 and 7, included "termination of parental rights" among the proceedings specified in subd. 1a, and revised subd. 5(?) which formerly read:

[illegible]

ly impossible for the parent to visit or not in the best interests of the child to be visited by the parent;"

Laws 1988, c. 514, § 10, provides that chapter 514 is effective August 1, 1988, and applies to petitions for termination of parental rights filed and placement begun on or after that date.

Laws 1988, c. 673 in subd. 1 substituted "child alleged to be delinquent, in need of protection or services under section 260.015, subdivision 2a, clause (11) or (12), or a juvenile petty offender, and hearings" for "child alleged to be delinquent, a habitual truant, a runaway, a juvenile petty offender, or a juvenile alcohol or controlled substance offender, and hearings" and "offense" for "hearing" following "at least 16 years of age at the time of the"; in subd. 4 substituted "proceeding alleging a child's need for protection or services under section 260.015, subdivision 2a, clauses (1) to (10)" for "proceeding alleging neglect or dependency"; and in subd. 4a substituted "In any child in need of protection or services proceeding" for "In any dependency, neglect,".

Cross References

Appointment of counsel, see generally Juvenile Court Rules 4, 40.

Attendance, see Juvenile Court Rules 7.01, 8.01, 42.01, 43.01.

Continuances and advancements, reasonable time for good cause, see Juvenile Court Rules 12.01, 47.01.

Counsel, right to,

Advice of right, see Juvenile Court Rules 4.01, 40.01.

Child, see Juvenile Court Rules 4.01, 40.01.

Guardian, see Juvenile Court Rules 4.02, 40.01.

Guardian ad litem, see Juvenile Court Rules 4.04, 40.02.

Parent, see Juvenile Court Rules [illegible]

Exclusion and absence, child and other persons at hearings, see Juvenile Court Rules 7.02 to 7.04, 42.02 to 42.04.

Guardian ad litem, see Juvenile Court Rules 5, 41.

Participation, right of,

Child, see Juvenile Court Rules 3.01, 39.01.

County attorney, see Juvenile Court Rules 3.02, 39.03.

County welfare board, see Juvenile Court Rules 39.03.

Guardian, see Juvenile Court Rules 3.03, 39.02.

Guardian ad litem, see Juvenile Court Rules 39.04.

Parent, see Juvenile Court Rules 3.03, 39.02.

Petitioner, see Juvenile Court Rules 39.05.

Waiver of rights,

Counsel, right to, see Juvenile Court Rules 15.02, 50.01.

Recording, see Juvenile Court Rules 15.04, 50.01.

Right to remain silent, see Juvenile Court Rules 6.01.

Rights generally, see Juvenile Court Rules 15.03, 50.01.

Law Review Commentaries

Juvenile court legislative reform and the serious young offender: Dismantling the "rehabilitative ideal". Barry C. Feld. 1981, 65 Minn.Law Review 167.

Waivers of counsel in juvenile courts. 1986, 12 Wm.Mitchell L.Rev. 53.

Notes of Decisions

1. Purpose of hearing

Dependency and neglect statutes create temporary remedy, intended to ensure the welfare of the minor child, with the ultimate goal being to return the child to the parents. Matter of Welfare of M.M.B., App.1984, 350 N.W.2d 432.

7. Termination of parental rights

Where record showed the inability of mother, who was presently incarcerated after being convicted of murdering another of her infants, to care for her previous children, and where there was evidence that child's normal development was hindered by visits with mother and that the mother was psychologically disturbed, the child was a "neglected child and in foster care," such that terminating mother's parental rights would be in child's best interests. Matter of Welfare of B.C., App.1984, 356 N.W.2d 798.

8. Best interest of minor

Preference of child as to future custody is [illegible]

ciently mature to make such a choice. Matter of Welfare of M.M.B., App.1984, 350 N.W.2d 432.

9. Parental fitness

Presumption is that a parent is a fit and suitable person to be entrusted with the care of his child; that presumption extends to situations in which the special care and treatment required must be entrusted to professionals if the parents are able to provide special care and treatment and are willing to cooperate with the treatment program. Matter of Welfare of M.M.B., App.1984, 350 N.W.2d 432.

Evidence of past failure to provide special care to the child in the home is not a primary factor in determining whether parents can provide special care through a residential treatment program and thus should have child returned to them following dependency determination. Matter of Welfare of M.M.B., App.1984, 350 N.W.2d 432.

10. Guardian ad litem

Guardian ad litem for minor child who was receiving AFDC benefits was entitled to absolute immunity in mother's action in which she alleged that guardian ad litem failed to act in best interest of child when he accepted child support settlement which resolved biological father's past, present and future obligations. Tindell v. Rogosheske, App.1988, 421 N.W.2d 340.

11. Counsel

Counsel appointed to represent child in dependency proceeding adequately represented child's interest, thus permitting court to waive appointment of guardian ad litem, even though counsel did not attend every hearing, in light of consistent and careful consideration of court to needs of child. Matter of Welfare of C.B., App.1986, 383 N.W.2d 732.

14. Conduct of proceedings

Father's right to due process was violated when trial court did not provide him with opportunity to respond to recommendation from county attorney's office, upon which trial court relied exclusively in making its disposition calling for suspension of all father's visitation rights with daughter unless father completed treatment program for sexual abusers and rejecting father's requested treatment program. Matter of Welfare of N.W., App.1987, 405 N.W.2d 512.

Trial court did not err in terminating parental rights of father who had been convicted and imprisoned for abuse of his child when his conviction was on appeal and he refused to take stand to testify in his own behalf, especially in light of evidence that child, who was severely mentally and physically handicapped as a result of father's maltreatment, had need of stable [illegible]

Cross References

Dispositions, delinquent child, see § 260.185.

Law Review Commentaries

Admissibility of evidence, juvenile hearings. 1969, 54 Minn. Law Review 469.

Delinquency proceedings—fairness for accused. Thomas A. Welch, March 1969, 53 Minn. Law Review 653.

Juvenile court rules, disposition provisions. 1969, 54 Minn. Law Review 327.

Parental commitment of minors. 1969 Hamline L.Rev. 37.

Library References

Infants ⇐=208.

Notes of Decisions

1. In general

Police reports evidencing alleged offenses and their underlying circumstances are relevant to and admissible in a reference hearing for purpose of determining whether juvenile is amenable to treatment or is a threat to public safety. Welfare of M. H. J. v. State, 1969, 283 N.W.2d 32.

Where probable cause determination has been made, trial court, in its discretion, has power to order psychiatric or psychological examination of juvenile by court-appointed expert in context of a reference hearing and such reports should be examined and considered by juvenile judge along with other evidence in reaching determination as to whether or not juvenile is a threat to public safety or amenable to treatment. Id.

260.155 Hearing

Subdivision 1. General. Except for hearings arising under section 260.261, hearings on any matter shall be without a jury and may be conducted in an informal manner. The rules of evidence promulgated pursuant to section 480.0591 and the law of evidence shall apply in adjudicatory proceedings involving a child alleged to be delinquent, a habitual truant, a runaway, a juvenile petty offender, or a juvenile alcohol or controlled substance offender, and hearings conducted pursuant to section 260.125 except to the extent that the rules themselves provide that they do not apply. Hearings may be continued or adjourned from time to time and, in the interim, the court may make any orders as it deems in the best interests of the minor in accordance with the provisions of sections 260.011 to 260.301. The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court. In all delinquency cases a person named in the charging

clause of the petition as a person directly damaged in person or property shall be entitled, upon request, to be notified by the clerk of court in writing, at his last known address, of (1) the date of the reference or adjudicatory hearings, and (2) the disposition of the case. Adoption hearings shall be conducted in accordance with the provisions of laws relating to adoptions.

Subd. 2. Appointment of counsel. The minor, parent, guardian or custodian have the right to effective assistance of counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor or his parents or guardian in any other case in which it feels that such an appointment is desirable.

Subd. 3. County attorney. Except in adoption proceedings, the county attorney shall present the evidence upon request of the court.

Subd. 4. Guardian ad litem. (a) The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that his parent is a minor or incompetent, or that his parent or guardian is indifferent or hostile to the minor's interests, and in every proceeding alleging neglect or dependency. In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such an appointment is desirable. The court shall appoint the guardian ad litem on its own motion or in the manner provided for the appointment of a guardian ad litem in the district court.

(b) The court may waive the appointment of a guardian ad litem pursuant to clause (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interests of the minor are protected.

(c) In appointing a guardian ad litem pursuant to clause (a), the court shall not appoint the party, or any agent or employee thereof, filing a petition pursuant to section 260.131.

Subd. 5. Waiving the presence of child, parent. Except in delinquency proceedings, the court may waive the presence of the minor in court at any stage of the proceedings when it is in the best interests of the minor to do so. In a delinquency proceeding, after the child is found to be delinquent, the court may excuse the presence of the child from the hearing when it is in the best interests of the child to do so. In any proceeding the

court may temporarily excuse the presence of the parent or guardian of a minor from the hearing when it is in the best interests of the minor to do so. The attorney or guardian ad litem, if any, has the right to continue to participate in proceedings during the absence of the minor, parent, or guardian.

Subd. 6. Rights of the parties at the hearing. The minor and his parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross examine witnesses appearing at the hearing.

Subd. 7. Factors in determining neglect. In determining whether a child is neglected and in foster care, the court shall consider, among other factors, the following:

(1) The length of time the child has been in foster care;

(2) The effort the parent has made to adjust his circumstances, conduct, or condition to make it in the child's best interest to return him to his home in the foreseeable future, including the use of rehabilitative services offered to the parent;

(3) Whether the parent has visited the child within the nine months preceding the filing of the petition, unless it was physically or financially impossible for the parent to visit or not in the best interests of the child to be visited by the parent;

(4) The maintenance of regular contact or communication with the agency or person temporarily responsible for the child;

(5) The appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;

(6) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; and

(7) The nature of the effort made by the responsible social service agency to rehabilitate and reunite the family.

Subd. 8. Waiver. Waiver of any right which a child has under this chapter must be an express waiver intelligently made by the child after the child has been fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

Laws 1959, c. 685, § 22. Amended by Laws 1975, c. 240, § 1; Laws 1978, c. 602, § 6, eff. July 1, 1978; Laws 1980, c. 580, §§ 12 to 16, eff. Aug. 1, 1980; Laws 1982, c. 511, § 12, eff. Aug. 1, 1982.

Interim Commission Comment, 1959

Comparable provisions are found in Minn.St.1957, §§ 260.02, 260.08, 260.11, 260.13, and 260.24, and are discussed in detail under each subdivision below.

Subdivision 1. The first sentence of subd. 1, prohibits a jury trial, except for prosecutions in district juvenile courts for the crime of contributing to the delinquency or neglect of a minor. Under the former law there was no provision for a jury trial in a probate-juvenile court. Except in the 4th judicial district, either the parties or the judge could demand a jury trial in proceedings in a district juvenile court under the provisions of § 260.02, sentence 2. The Judges' Code, page 7 recommends no jury, as does the old Standard Juvenile Court Act, and also the "Standards", page 56. Wisconsin, W.S.A. § 48.25, subd. 2, provides for a jury trial on demand. Professor Paulson's opinion, in his discussion of the question in 4 Minn.Law Review 547, at 559, is that a jury trial is not desirable. The view has generally been taken that statutes providing for the custody or commitment of delinquent or incorrigible children are not unconstitutional by reason of failure to provide for a jury trial, where the investigation is into the status and needs of the child, and the institution to which the child is committed is not of a penal character, (see 31 Am Jur. Juvenile Courts, see 67; and Annotation in 43 A.L.R.2 1129).

The first sentence of subd. 1, also provides that the hearing may be conducted "in an informal manner". Section 260.08, paragraph 1, the last sentence, provided that the court "shall proceed to hear the case, and may proceed in a summary manner". The new language is intended to describe the informal atmosphere of juvenile proceedings. The new Standard Juvenile Court Act, section 17, and the "Standards" page 54, favor an "informal" hearing. Wisconsin, W.S.A. § 48.25, subd. 1, specifies as "formal or informal" a procedure as the judge desires. The Judges' Code, page 7, specifies an "informal hearing" conducted "with due regard for the right of the child and his parents".

Sentence two of subd. 1, authorizes the court to continue the hearing from time to time, and to make such orders as it deems in the best interests of the minor in accordance with the provisions of the juvenile court act. The provisions of § 260.11, third sentence, and § 260.13, first sentence, provide the court with the same authority after making a determination of delinquency, neglect, or dependency. The Judges' Code, page 7, provides for the continuance of hearings, during which time the court may make such orders as it deems

in the best interests of the child. The new Standard Juvenile Court Act and Wisconsin, W.S.A. § 48.25, subd. 1, provide merely that the hearing may be adjourned from time to time.

The third sentence of subd. 1, providing for confidential hearings, is a restatement of the first sentence of § 260.24. Wisconsin, W.S.A. § 48.25, subd. 1, the Judges' Code, page 7, the new Standard Juvenile Court Act, section 17, and the "Standards", page 59, agree with the provision. (Confidentiality of records is treated in § 260.161.)

The last sentence of subd. 1 is intended to direct the juvenile court to follow the procedure of the adoption laws when conducting an adoption hearing.

Subd. 2. The comparable provision is found in § 260.08, next to the last paragraph, second sentence. The new subdivision differs in that it gives the parent, guardian, or custodian, as well as the minor, the right to counsel, and requires the court to appoint counsel if they desire counsel but are unable to employ it. This provision is derived from the new Standard Juvenile Court Act, section 16(2). The court is also empowered to appoint an attorney for the minor or his parents or guardian in any other situation in which it feels this is desirable. This provision gives the court authority to act where the parents or guardian fail to see the necessity of counsel in a situation where counsel is necessary to protect the minor's interest, (see Op.Atty.Gen., 268–H, April 1, 1958). Professor Paulson favors counsel for all juvenile offenders after the petition is filed, (see 41 Minn.Law Review 547, pages 568–573). The Judges' Code, page 7, preserves the former language. Wisconsin, W.S.A. § 48.25, subd. 6, is similar to the Judges' Code.

Subd. 3. The comparable provision is found in § 260.08, next to the last paragraph, sentence 1. The new subdivision differs from former law in that it requires the county attorney to "present the evidence" instead of "appear for the petitioner" in all counties, not just those over 150,000 population, when the court so requests. This is the procedure presently followed in Hennepin County, (see Report on Hennepin County Juvenile Court and Probation Services to Delinquent Children, 1956, page 17). Sol Rubin, counsel to the N.P.P.A. criticizes the present provision as bringing in the atmosphere of a prosecution, or at least an adversary aspect which should be avoided. However, there are situations where facts must be established and the court or its staff should not be required to be both judge and advocate. The need to have evidence presented by the county attorney was emphasized by the juvenile court judges in discussions at their annual institute. (See also Op.Atty.Gen. 121 B, June 9, 1918).

Subd. 4. This subdivision makes mandatory and elaborates upon the provision of § 260.08, first paragraph, sentence 9, which states that "In any case the judge may appoint some suitable person to act in behalf of the child." The Judges' Code, page 6, recommends the appointment of a guardian ad litem when the child's parents are minors or incompetent. The Standards, page 55, recommend appointment of a guardian ad litem where the child is without a parent or guardian, or where they are hostile to his interests. Wisconsin, W.S.A. § 48.25, subd. 5, permits the court to appoint a guardian in any case in which it feels such an appointment is desirable. (The Minnesota Supreme Court, in In Re Wretlind, 1948, 225 Minn. 554, 32 N.W.2d 161, held that a probate court, because of failure to appoint a guardian ad litem and require service of process upon him had no jurisdiction to order the commitment of a twelve year old allegedly incompetent child to the state school for the feeble minded, notwithstanding the personal appearance of the child's mother and stepfather, who, having filed the petition initiating the proceedings, were adversary parties, and notwithstanding the appearance of the county attorney.) The procedure followed in appointing a district court guardian ad litem is included to provide some uniformity throughout the state in the appointment of a guardian ad litem.

Subd. 5. Subdivision 5 is intended to state the circumstances under which a court may either excuse or waive the presence of the minor, his parents, or guardian. Section 260.08, first paragraph, second sentence and third from the last sentence, require the person having custody or control of the child to appear with the child. Various attorney general's opinions have interpreted these provisions to mean that the presence of the child is not specifically required at the hearing. (See Op's.Atty.Gen. 268 H, June 11, 1931, 268 B, Aug. 31, 1939, and No. 203, P. 360, 1952.) However, in all of these cases the children were infants. Dean Wigmore and Professor Paulson would not allow the presence of a child to be waived in a delinquency proceeding because they feel that the child cannot make a truly effective reply to evidence unless he knows what it is and who said it. (See Wigmore on Evidence, Vol. 5, 3 ed., sec. 1400 and Paulson, 41 Minn.Law Review 547, at 561.) The "Standards", page 58, are contrary to Wigmore and Paulson to the extent that they would allow waiver of the child from the hearing if his counsel is allowed to remain. The Judges' Code, page 7, permits temporary waiver of the child or his parents at any time, without mention of the presence of counsel. The new Standard Juvenile Court Act, section 17, and Wisconsin, W.S.A. § 48.25, subd 1 permit the court to waive the presence of the child, only, a

any stage of the proceedings. Subdivision 5 is an attempt to steer a middle course here, by giving the court the authority, when it is in the best interests of the minor to do so, to waive the presence of the minor in court in any proceeding except delinquency proceedings. It is intended that the provision stating that the minor may be temporarily excused from a delinquency hearing after delinquency is determined will give the minor the right to be in court and confront witnesses, yet will authorize the court to excuse him temporarily during the disposition stage to talk to his parents or others about matters which might undermine the minor's confidence in his parents. When it is in the best interests of the minor to do so, the court may also temporarily excuse the parents from the hearing. This provision is intended to give the parent the right to be at the hearing, yet authorizes the court to excuse them for the purposes of conferring with the minor out of their presence. The last sentence of subd. 5 is intended to assure the absent person of some sort of representation during his absence.

Subd. 6. This provision is new. The idea is derived from Minnesota Statutes, § 572.12, clause (b)—the Uniform Arbitration Act, and 5 U.S.C.A. § 1006(c)—the Federal Administrative Procedure Act. The new subdivision is intended to outline the basic rights of the individuals involved in the hearing without codifying the rules of evidence, many of which are inappropriate to the setting and unnecessary in a case tried before a judge rather than a jury.

Historical Note

The 1975 amendment inserted, in subd. 4, "and in every proceeding alleging neglect or dependency" in the first sentence of par. (a) and added para. (c).

The 1978 amendment added subd. 7.

The 1980 amendment revised subd. 3 which formerly read:

"Except for hearings arising under section 260.261, hearings on any matter shall be without a jury and may be conducted in an informal manner. Hearings may be continued or adjourned from time to time and, in the interim, the court may make such orders as it deems in the best interests of the minor in accordance with the provisions of sections 260.011 to 260.301. The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court. Adoption hearings shall be conducted in accordance with the provisions of laws relating to adoptions."

The 1980 amendment also added "effective assistance of" as descriptive of "counsel" in subd. 2; deleted "if the court finds that it is not in the best interests of the child" as a qualification in subd. 4(c); and added subd. 8.

Laws 1980, c. 580, § 23, provides in part that the portion of the law relating to this section is effective August 1, 1980, and applies to offenses committed on or after that date except with respect to the history of offenses provided in the amendment of section 260.125.

The 1982 amendment included "a habitual truant, a runaway, a juvenile petty offender, or a juvenile alcohol or controlled substance offender" within the terms of subd. 1.

Prior Laws:

St.1957, §§ 260.08, 260.24.
Laws 1963, c. 219, § 1.
Laws 1959, c. 158, § 1.
Laws 1961, c. 224, § 1.
Laws 1965, c. 517, § 3.
Laws 1941, c. 158, § 1.
St.Supp.1940, § 9043-1.
Laws 1937, Ex.Sess., c. 79, § 2.
St.1927, §§ 9043, 9059.
Laws 1927, c. 192, § 4.
Gen.St.1923, §§ 9043, 9059.
Laws 1917, c. 387, §§ 8, 24.

Cross References

Adjudicatory hearings, see Juvenile Court Rules 5–1 et seq.
Basic rights of parties, see Juvenile Court Rule 2–3.
Continuance, grounds, see Juvenile Court Rule 5–1.
Counsel, see Juvenile Court Rule 2–1, at the end of this Chapter.
Dispositional hearings, see Juvenile Court Rules 6–1 et seq.
Dispositions, neglected and dependent children, see § 260.191.
Due process, cross-examination, see U.S.C.A.Const. Amends. 6, 14.
Due process, right to counsel, see U.S.C.A.Const. Amend. 14.
Finding of delinquency in hearing authorized by this section, see § 260.185.
Guardian ad litem, appointment, adjudicatory hearing, see Juvenile Ct. Rule 5–1.
Guardian ad litem, occasions for appointment, see Juvenile Court Rule 6–1.
Investigation, physical and mental examination, see § 260.151.
Payment of attorneys fees, see § 260.251.
Procedures in terminating parental rights, see § 260.231.
Public defender, minor entitled to representation, see § 611.14.
Reference for prosecution, see § 260.125.

Law Review Commentaries

Appointment of counsel, juvenile hearings. 1969, 54 Minn. Law Review 398.

Background of Minnesota juvenile law. 1969, 54 Minn. Law Review 339.

Delinquency proceedings—fairness for accused. Thomas A. Welch, 1966, 50 Minn. Law Review 653.

Juvenile court rules, adjudication provisions. 1969, 54 Minn. Law Review 329.

Juvenile court supervision. 1969, 54 Minn. Law Review 425.

Juvenile procedure: "Beyond a reasonable doubt" standard of proof extended to juveniles. 1969, 53 Minn. Law Review 1053.

Juveniles, right to cross-examine witnesses at a dispositional hearing. 1969, 54 Minn. Law Review 1261.

Procedures for reference, age at commission of the crime. 1969 Ill. Law F. Rev. 189.

Recent developments in juvenile justice. Thomas F. Ilg, November/December 1969, 50 Hennepin Lawyer 21.

Right to trial by jury for juvenile in delinquency proceedings. 1971, 7 Minn. Law Review 249.

Library References

Infants ⇔203

Dependent Children, Forms 48–50 (citation to custodian of child to appear and show cause).

15 Am Jur Pl & Pr Forms (Rev ed), Juvenile Courts and Delinquent and Dependent Children, Form 51 (order for service of citation in custody hearing by publication).

14 Am Jur Trials, Juvenile Court Proceedings, §§ 20–40 (rights and privileges of juveniles and parents).

14 Am Jur Trials, Juvenile Court Proceedings §§ 47–49 (obtaining release of juvenile).

14 Am Jur Trials, Juvenile Court Proceedings §§ 50–55 (detention hearing).

14 Am Jur Trials, Juvenile Court Proceedings § 63 (notice requirements).

§ 43-23-13. Warrant for failure to obey summons.

If any person summoned as herein provided shall, without reasonable cause (the judge to determine what is reasonable cause) fail to appear, he may be proceeded against for contempt of court. In case the summons cannot be served, or the parties served with summons fail to obey the same, or in any case when it shall be made to appear to the court that the service of summons will be ineffectual, or the welfare of a child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued against the parent, parents, guardian, or custodian, or against the child himself.

SOURCES: Codes, 1942, § 7187-07; Laws, 1964, ch. 328, § 7, eff from and after passage (approved May 22, 1964).

Cross references—

As to warrant for failure to obey summons in youth court, see § 43-21-509.

Research and Practice References—

47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

43 CJS, Infants §§ 50 et seq.

§ 43-23-15. Hearing; legal counsel; guardian ad litem for abused or neglected child.

The family court shall at all times be deemed in session for the purpose of disposition of cases under this chapter. All cases of children shall be heard separately from the trial of cases against adults, at any place that the judge deems suitable, and the hearing shall be conducted in all cases of children in an informal manner under such rules as the court may prescribe, without regard to the technicalities of other statutory proceedings and rules of evidence, and the judge may continue the case or adjourn the hearing from time to time. No proceedings by the court in cases of children shall be a criminal proceeding, but shall be entirely of a civil nature concerned with the care, protection, and rehabilitation of the child in question. The general public shall be excluded from the hearing and only such persons shall be admitted as have a

interest in or who have been subpoenaed as witnesses in.

shall be the duty of the county attorney or the district ney to appear in all such proceedings and present the petition the hearing, if required by the court to do so, and if practical; if not practicable, without delaying such hearing, the court appoint some reputable, local attorney to appear and present petition in the hearing. Any parent, guardian, custodian or son having the legal custody of a child charged with any lation under the provisions of this chapter shall be entitled to a by jury if request therefor is made at any time prior to the mencement of the trial.

shall be the duty of the family court judge to award and fix orneys' fees commensurate with the services rendered and the lity of the parent or parents to pay in all cases involving a linquent child or children.

In every case involving an abused or neglected child which sults in a judicial proceeding, a guardian ad litem shall be ppointed to represent the child in such proceedings.

OURCES: Codes, 1942, § 7187-08; Laws, 1964, ch. 328, § 8; 1977, ch. 474, § 6, eff from and after July 1, 1977.

ross references—
As to hearings in youth court, see §§ 43-21-309, 43-21-601 to 43-21-603.
As to adjudication in youth court, see §§ 43-21-551 to 43-21-561.

Research and Practice References—
47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 44 et seq.
43 CJS, Infants §§ 50 et seq.
15 Am Jur Pl & Pr Forms (Rev ed), Juvenile Courts and Delinquent and Dependent Children, Forms 61, 62 (appointment of attorney for minor).
14 Am Jur Trials, Juvenile Court Proceedings §§ 26-30 (right to counsel).
14 Am Jur Trials, Juvenile Court Proceedings §§ 56-73 (adjudicatory hearing).

ALR and L Ed Annotations—
Appointment of counsel in juvenile court proceedings. 60 ALR2d 691.
Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision. 59 ALR3d 1337.
Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 80 ALR3d 1141.

§ 43-23-17. Adjudication; placement; status of child.

If the court finds that the child is neglected or delinquent within the provisions of this chapter, it shall so adjudge and decree, and may, by order duly entered, proceed as follows:

(a) Place the child under supervision in his own home or in the home of a relative, under such terms as the court shall determine and direct; or

...section 633.120, RSMo, respectively, the director of ...ment of mental health, or his designee, shall so notify ...of the division of youth services and shall return the ...he custody of the division.

...a child for any reason ceases to come under the juris... of the division of youth services, he may be retained in a ...health facility or mental retardation facility only as oth... provided by law.

...p. 514, § 1.)

Library References

...nts ⇐227.

...211.210. Repealed by L.1957, p. 642, § 1

Historical Note

The repealed section, relating to authority of juvenile court to appoint deputy probation officers, was derived from:

R.S.1939, § 9682.
R.S.1929, § 14145.
R.S.1919, § 2600.
L.1911, p. 177.

See, now, § 211.351.

211.211. Right to counsel before commitment to training schools

Before any juvenile shall be committed to the division of youth services, he shall have the opportunity to have and be represented by counsel at a hearing held for that purpose.

(L.1957, p. 642, § 1 (§ 211.215).)

Law Review Commentaries

Juvenile social records and criminal discovery. 35 Mo.L.Rev. 113 (1970).

Legal aid to indigents. Orville Richardson, Daniel P. Reardon, Jr. and Joseph J. Simeone, 19 J. of Mo. Bar 525 (1963).

Proposed legislation on juvenile courts. John M. Speca, Floyd A. White, Jr., 40 UMKC L.Rev. 129 (1972).

Role of attorney in juvenile courts. David A. McMullan, 18 J. of Mo. Bar 512 (1962); 13 St. Louis U.L.J. (1968) 69.

Library References

Infants ⇐205. C.J.S. Infants § 52.

Notes of Decisions

1. Construction and application

Juvenile court order directing execution of suspended commitment order, made without notice to juvenile, his parents or his attorney, without any hearing before any judge or other judicial officer or receipt of any evidence, without any showing of

youth is present at the hearing, his counsel may waive service of su... in his behalf.

History: En. 10-1217 by Sec. 17, Ch. 329, L. 1974; amd. Sec. 5, Ch. 100, L. 197... 1947, 10-1217.

Cross-References

Motions and other papers, Rule 7(b), M.R.Civ.P. (see Title 25, ch. 20).

Parent may relinquish services and custody of child, 40-6-235.

Court costs and expenses, 41-5-207.

When summons may be issued ... 46-6-301.

41-5-504 through 41-5-510 reserved.

41-5-511. Right to counsel. In all proceedings following the ... petition alleging a delinquent youth or youth in need of supervision, ... and the parents or guardian of the youth shall be advised by the co... the absence of the court, by its representative that the youth may ... sented by counsel at all stages of the proceedings. If counsel is not ... or if it appears that counsel will not be retained, counsel shall be ... for the youth if the parents and the youth are unable to provid... unless the right to appointed counsel is waived by the youth and ... or guardian. Neither the youth nor his parent or guardian may wa... after a petition has been filed if commitment to the department ... of more than 6 months may result from adjudication.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1... 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(3); amd. Sec. 1, Ch. 386, L. 1979; a... 484, L. 1981; amd. Sec. 60, Ch. 609, L. 1987.

Cross-References

Rights of the accused, Art. II, sec. 24, Mont. Const.

Representation of child, 40-4-...

Right to counsel, 46-8-101.

Waiver of counsel, 46-8-102.

41-5-512. Appointment of guardian ad litem. The court ... of a proceeding on a petition under this chapter may appoint ... litem for a youth if the youth has no parent or guardian ap... behalf or if their interests conflict with those of the youth. A ... proceeding or an employee or representative of a party may not ... as guardian ad litem.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, ... 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(4).

Cross-References

Appointment of guardian ad litem, 25-5-301.

Parties to paternity proce...

Guardian ad litem, 41-3-3...

41-5-513. Right to confront witnesses. In a proceedin... a party is entitled to:

(1) the opportunity to introduce evidence and otherwise ... party's own behalf;

(2) confront and cross-examine witnesses testifying again...

(3) admit or deny the allegations against the party in the...

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 1... 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(5).

Cross-References

Rights of the accused, Art. II, sec. 24, Mont. Const.

Nebr

43-272. Right to counsel; appointment; payment; guardian ad litem; appointment; when; duties. (1) When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile and his or her parent or guardian of their right to retain counsel and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel. The court shall inform such juvenile and his or her parent or guardian of such juvenile's right to counsel at county expense if none of them is able to afford counsel. If the juvenile or his or her parent or guardian desires to have counsel appointed for such juvenile, or the parent or guardian of such juvenile cannot be located, and the court ascertains that none of such persons are able to afford an attorney, the court shall forthwith appoint an attorney to represent such juvenile for all proceedings before the juvenile court, except that if an attorney is appointed to represent such juvenile and the court later determines that a parent of such juvenile is able to afford an attorney, the court shall order such parent or juvenile to pay for services of the attorney to be collected in the same manner as provided by section 43-290. If the parent willfully refuses to pay any such sum, the court may commit him or her for contempt, and execution may issue at the request of the appointed attorney or the county attorney or by the court without a request.

(2) The court, on its own motion or upon application of a party to the proceedings, shall appoint a guardian ad litem for the juvenile: (a) If the juvenile has no parent or guardian of his or her person or if the parent or guardian of the juvenile cannot be located or cannot be brought before the court; (b) if the parent or guardian of the juvenile is excused from participation in all or any part of the proceedings; (c) if the parent is a juvenile or an incompetent; (d) if the parent is indifferent to the interests of the juvenile; or (e) in any proceeding pursuant to the provisions of subdivision (3)(a) of section 43-247.

A guardian ad litem shall have the duty to protect the interests of the juvenile for whom he or she has been appointed guardian, and shall be deemed a parent of the juvenile as to those proceedings with respect to which his or her guardianship extends.

(3) Except in cases when there are special reasons why a particular layperson would be the most appropriate guardian ad litem for the juvenile, the court shall appoint an attorney as guardian ad litem. A guardian ad litem who is an attorney shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have counsel in addition to the guardian ad litem. In such cases and in cases when the guardian ad litem appointed by the court is not an attorney, the guardian ad litem shall have the right to counsel, except that the guardian ad litem shall be entitled to appointed counsel without regard to his or her finan-

cial ability to retain counsel. Whether such appointed counsel shall be provided at the cost of the county shall be determined as provided in subsection (1) of this section.

Source: Laws 1981, LB 346, § 28; Laws 1982, LB 787, § 12.

Cross Reference

Representation by public defender, see section 29-1805.07.

43-272.01. Guardian ad litem; appointment; powers and duties; consultation; payment of costs. (1) A guardian ad litem as provided for in subsections (2) and (3) of section 43-272 shall be appointed at the commencement of all cases brought under subdivision (3)(a) or (8) of section 43-247 and section 28-707.

(2) In the course of discharging duties as guardian ad litem, the person so appointed shall consider, but not be limited to, the criteria provided in this subsection. The guardian ad litem (a) is appointed to stand in lieu of a parent for a protected juvenile who is the subject of a juvenile court petition and shall be present at all hearings before the court in such matter unless expressly excused by the court and may enter into such stipulations and agreements concerning adjudication and disposition deemed by him or her to be in the juvenile's best interests, (b) is not appointed to prosecute or defend the parents or other custodian of the protected juvenile but shall defend the legal and social interests of such juvenile. Social interests shall be defined generally as the usual and reasonable expectations of society for the appropriate parental custody and protection and quality of life for juveniles without regard to the socioeconomic status of the parents or other custodians of the juvenile, (c) may at any time after the filing of the petition move the court of jurisdiction to provide medical or psychological treatment or evaluation as set out in section 43-258. The guardian ad litem shall have access to all reports resulting from any examination ordered under section 43-258, and such reports shall be used for evaluating the status of the protected juvenile, (d) shall make every reasonable effort to become familiar with the needs of the protected juvenile which may include (i) visitation with the juvenile within two weeks after the appointment and once every six months thereafter and (ii) consultation with caseworkers, physicians, psychologists, foster parents or other custodians, teachers, clergy members, and others directly involved with the juvenile or who may have information or knowledge about the circumstances which brought the juvenile court action or related cases and the development of the juvenile, (e) may present evidence and witnesses and cross-examine witnesses at all evidentiary hearings, (f) shall be responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile, (g) shall consider such other information as is warranted by the nature and circum-

Nevada

placed child in custody of welfare division did not preclude district court of another county from entertaining subsequent petition for adoption of child, because jurisdiction of juvenile court under NRS 62.040 and former NRS 62.070 (cf. NRS 62.082) was limited to juvenile proceeding and did not divest district court of original jurisdiction provided by NRS 127.010 in adoption proceedings. State v. Bill, 91 Nev. 275, 534 P.2d 1264 (1975)

No jurisdiction over person who committed no delinquent acts before 18th birthday. Where person over age of 18 years had not committed act of delinquency before 18th birthday, she was not "child" within meaning of NRS 62.020, and provisions of former NRS 62.070 (cf. NRS 62.082) for extension of juvenile court jurisdiction to age 21 did not apply. Ewing v. State, 98 Nev. 81, 640 P.2d 922 (1982)

Attorney General's Opinions.

District court retains jurisdiction until juvenile reaches 21. Under Nev. Art. 3, § 1, relating to separation of powers, Nev. Art. 6, § 1, relating to vesting of judicial power, and NRS 62.040 and former NRS 62.070 (cf. NRS 62.082), relating to district court's original jurisdiction over juvenile matters and retention of such jurisdiction, district court has and retains exclusive jurisdiction in juvenile matters until the juvenile reaches age 21. AGO 86 (8-25-1959)

Girl on parole under control of officers of Nevada girls training center; juvenile court retains jurisdiction. While girl is on parole from Nevada girls training center all rights of control over such girl are vested in officials of training center pursuant to NRS 210.670. If parent wishes to object to action of officials, he can petition juvenile court which committed girl for hearing on matter, because under former NRS 62.070 (cf. NRS 62.082) committing court retains jurisdiction over girl. AGO 373 (1-3-1967)

OFFICERS AND EMPLOYEES

62.085 Attorney: Appointment; fees and expenses.

1. If a child is alleged to be delinquent or in need of supervision, the child and his parents, guardian or custodian must be advised by the court or its representative that the child is entitled to be represented by an attorney at all stages of the proceedings. If an attorney is not retained for the child, or if it does not appear that an attorney will be retained, an attorney must be appointed for the child, unless waived.

2. If an attorney is appointed to represent a child, the parents of that child shall pay the reasonable fees and expenses of the attorney unless they are indigent.

3. The parent, guardian or custodian may be represented by an attorney at all stages of the proceedings.

4. Each attorney appointed under the provisions of this section is entitled to the same compensation and expenses from the county as provided in NRS 7.125 and 7.135 for attorneys appointed to represent persons charged with crimes.

(Added to NRS by 1961, 399; A 1973, 1577; 1985, 1389; 1987, 1298)

62.090 Master: Appointment; training; compensation; duties.

1. The judge, in his discretion, may appoint any person qualified by previous experience, training and demonstrated interest in youth welfare as master. The master, upon the order of the judge in proceedings arising under the provisions of this chapter, may swear witnesses and take evidence.

2. Each master who is first appointed after July 1, 1981, shall attend instruction at the National College of Juvenile Justice in Reno, Nevada, in a course designed for the training of new judges of the juvenile courts on the

N. Hamp.

CHAPTER 604-A

ADEQUATE REPRESENTATION FOR INDIGENT DEFENDANTS IN CRIMINAL CASES

CROSS REFERENCES

Constitutional right to counsel, see New Hampshire Constitution, Part 1, Article 15.
Domestic violence proceedings, see RSA 173-B.
Parole of delinquents, see RSA 170-H.
Proceedings relating to abused or neglected children generally, see RSA 169-C.
Proceedings relating to children in need of services generally, see RSA 169-D.
Proceedings relating to delinquent children generally, see RSA 169-B.
Public defender program, see RSA 604-B.
Right of arrested person to confer with attorney, see RSA 594:16.
Waiver of court costs and fees, see RSA 499:18-b.

ANNOTATIONS

1. Applicability

This chapter clearly and unambiguously guarantees legal representation only to indigent defendants in criminal cases and to any juveniles charged with being delinquent, and imposes such obligation to provide legal counsel on the state. In re Heather D. (1981) 121 NH 547, 431 A2d 789.

2. Cited

Cited in State v. Howard (1969) 109 NH 518, 257 A2d 17.

LIBRARY REFERENCES

New Hampshire Practice

1 N.H.P. Criminal Practice & Procedure § 385 et seq.

ALR

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

604-A:1 Representation of Defendants. The purpose of this chapter is to provide adequate representation for indigent defendants in criminal cases, as a precondition of imprisonment, and indigent juveniles charged with being delinquent in any court of this state. Representation shall include counsel and investigative, expert and other services and expenses, including process to compel the attendance of witnesses, as may be necessary for an adequate defense before the courts of this state.

HISTORY

Source. 1965, 296:1. 1967, 422:1. 1973, 370:22. 1981, 568:20. I, eff. July 1, 1981.

Amendments—1981. Substituted "as a precondition of imprisonment, and indigent juveniles" for "charged with felonies or misdemeanors, or any juvenile" in the first sentence.

—1973. Deleted "other than petty offenses" following "misdemeanors" in the first sentence and deleted the second sentence.

—1967. Inserted "or any juvenile charged with being delinquent" following "petty offenses" and substituted "provide for impris-

may be combined with that of any other body, agency or study group engaged in reviewing the administration of criminal justice. The report shall include all pertinent data on the operations of the office, the costs, projected needs, and to the extent experience may indicate, recommendations for statutory changes, including changes in the criminal law or changes in court rules, all as may be appropriate to the improvement of the system of criminal justice, the control of crime, the rehabilitation of offenders, and other related objectives.

L.1967, c. 43, § 22, eff. July 1, 1967.

Allocation: Section 2A:158A-22 shall remain in full force and effect for use, administration and enforcement as heretofore, pending enactment of acts to revise, repeal or to compile in Title 2C, see § 2C:98-3.

2A:158A-23. Oaths and affirmations

The Public Defender, the deputy public defender, the assistant deputy public defenders and investigators attached to the Office of the Public Defender shall have the power to administer oaths and affirmations in relation to any matter within the jurisdiction of the Office of the Public Defender.

L.1968, c. 371, § 2.

Historical Note

Effective date, see Historical Note under § 2A:158A-17.

Allocation: Section 2A:158A-23 shall remain in full force and effect for use, administration and enforcement as heretofore, pending enactment of acts to revise, repeal or to compile in Title 2C, see § 2C:98-3.

2A:158A-24. Juvenile delinquent or juvenile in need of supervision; legal representation

Except as hereinafter provided, the Public Defender shall in the manner prescribed by P.L.1967, c. 43 (C. 2A:158A-1 et seq.) provide for the legal representation of any person who is charged as a juvenile delinquent or as a juvenile in need of supervision and where in the opinion of the juvenile judge the prosecution of the complaint may result in the institutional commitment of such person.

L.1968, c. 371, § 3. Amended by L.1974, c. 33, § 1, eff. May 31, 1974.

Historical Note

Effective date of addition of this section, see Historical Note under § 2A:158A-17.

The 1974 amendment deleted "N.J.S." at the beginning of the parenthetical citation, and substituted "any person who is charged as a juvenile delinquent or as a juvenile in need of supervision" for "any other person under the age of 18 who is formally charged with the commission of an act of juvenile delinquency".

Allocation: Section 2A:158A-24 shall remain in full force and effect for use,

administration and enforcement as heretofore, pending enactment of acts to revise, repeal or to compile in Title 2C, § 2C:98-3.

2A:158A-25. Minors; eligibility for services

Whenever a person formally charged with an indictable offense or coming within this act, is under the age of 21 years, the question of eligibility for services shall be measured not only in terms of the financial circumstances of the individual, but also in terms of the financial circumstances of the individual's parents or legal guardians. The Office of the Public Defender shall be entitled to recover the cost of legal services from the parents or legal guardians of such persons to the same extent and in the same manner as is provided under P.L.1967, chapter 43,[1] and shall have authority to require parents or legal guardians of such to execute and deliver such written requests or authorization as may be requisite under applicable law in order to provide the office with access to records of public or private sources, otherwise confidential, as may be of aid to it in evaluating eligibility.

L.1968, c. 371, § 4.

[1] Section 2A:158A-1 et seq.

Historical Note

Effective date, see Historical Note under § 2A:158A-17.

Allocation: Section 2A:158A-25 shall remain in full force and effect for use, administration and enforcement as heretofore, pending enactment of acts to revise, repeal or to compile in Title 2C, see § 2C:98-3.

Library References

Criminal Law ⇐641.
C.J.S. Criminal Law § 979(1).

Notes of Decisions

1. Construction and application

Age provision of this section that when person formally charged with an indictable offense is under the age of 21 years the question of his eligibility for services at public expense is to be measured not only in terms of his financial circumstances but also in terms of the financial circumstances of his parents or legal guardians has been impliedly amended from 21 years to 18 years by statutes changing age of adult status from 21 to 18 for most purposes. State v. Morgenstein, 147 N.J.Super. 234, 371 A.2d 95 (A.D.1977).

Section 9:17B-3 changing age of majority from 21 years to 18 years correspondingly modified provision of this section that when a person formally charged with an indictable offense is under the age of 21 years the question of his eligibility for services at public expense is to be measured not only in terms of his financial circumstances but also in terms of financial circumstances of his parents or legal guardian; hence, indigency of defendant, who during period between murder indictment and conviction attained the age of 18 years and who sought trial transcript at public expense, was to be measured solely by reference to his personal assets. State v. Morgenstein, 141 N.J.Super. 518, 358 A.2d 847 (L.1976) reversed on other grounds 147 N.J.Super. 234, 371 A.2d 95.

32-1-25.1. Place of temporary custody.

A child alleged to be neglected or abused shall not be detained in a jail or ... intended or used for the incarceration of adults charged with criminal offen... detention of children alleged to be delinquent children, but may be det... following community-based shelter-care facilities:

A. a licensed foster home or a home otherwise authorized under the ... foster care, group care, protective residence; or

B. a facility operated by a licensed child welfare services agency; or

C. a facility provided for in Section 32-2A-5 NMSA 1978; or

D. with a relative of the child who is willing to guarantee to the court th... will not be returned to the alleged abusive or neglectful parent, guardian or ... without the prior approval of the court; or

E. any other suitable place, other than a facility for the care and rehabil... delinquent children to which children adjudicated as delinquent children may ... under Section 32-1-34 NMSA 1978, designated by the court and which meets the ... for detention facilities under the Children's Code.

History: 1978 Comp., § 32-1-25.1, enacted by Laws 1981, ch. 36, § 20.

Children's Code. — See 32-1-1 NMSA 1978 and notes thereto.

32-1-26. Detention hearing required on detained children; determination; disposition.

A. When a child who has been taken into custody is not released but is d...

(1) a petition shall be filed within forty-eight hours, excluding Saturdays, ... and legal holidays, and if not filed within the stated time the child shall be rele...

(2) a detention hearing shall be held within twenty-four hours, excluding Sa... Sundays and legal holidays, from the time of filing the petition to determine ... continued detention is required pursuant to the criteria established by the Childre...

B. The judge may appoint one or more persons to serve as referees on a full- or p... basis for the purpose of holding detention hearings. A probation officer shall ... appointed as a referee. The judge shall approve all contracts with referees and ... their hourly compensation subject to the approval of the director of the admini... office of the courts.

C. Notice of the detention hearing, either oral or written, stating the time, pl... purpose of the hearing shall be given by the person designated by the court to th... parents, guardian or custodian, if they can be found, and to the child if the petition ... that the child is a delinquent child or a child in need of supervision. Prior to any chil... placed in the custody or protective supervision of the human services departme... department shall be provided with reasonable oral or written notification ... opportunity to be heard. At any hearing held pursuant to this subsection, the dep... may appear as a party.

D. At the commencement of the detention hearing, the judge or referee shall ad... parties of their basic rights provided in the Children's Code and shall appoint ... guardians and custodians, if appropriate.

E. If the judge or referee finds that the child's detention is appropriate under the ... established by the Children's Code, he shall order detention in an appropriate fa... accordance with the Children's Code.

F. If the judge or referee finds that detention of the child is not appropriate un... criteria established by the Children's Code, he shall order the release of the child, bu... doing, may order one or more of the following conditions:

(1) place the child in the custody of a parent, guardian or custodian or un... supervision of an agency agreeing to supervise the child;

(2) place restrictions on the child's travel, association with other persons or ... abode during the period of his release; or

detention for failure to conform to the conditions originally imposed.

detention hearing, all relevant and material evidence helpful in determining detention may be admitted by the judge or referee even though it would not be in a hearing on the petition.

child is not released at the detention hearing and a parent, guardian or was not notified of the hearing and did not appear or waive appearance at the hearing, the judge or referee shall rehear the detention matter without y delay upon the filing of an affidavit stating the facts and a motion for

1953 Comp., § 13-14-24, enacted by ch. 97, § 24; 1973, ch. 360, § 6; 1986,

rative office of the courts. — As to the ive office of the courts, see 34-9-1 NMSA

's Code. — See 32-1-1 NMSA 1978 and

ews. — For comment, "The Freedom of The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

Basic rights.

ild subject to the provisions of the Children's Code is entitled to the same basic an adult, except as otherwise provided in the Children's Code.

ter due notice to the parent, guardian or custodian, and after a hearing g indigency, the parent, guardian or custodian is declared indigent by the court, defender shall represent the child. If the court finds that the parent, guardian or is financially able to pay for an attorney but is unwilling to do so, the court shall parent, guardian or custodian to reimburse the state for public defender tion.

rson subject to the provisions of the Children's Code who is alleged or suspected delinquent child or a child in need of supervision may be interrogated or without first advising the child of his constitutional rights and securing a intelligent and voluntary waiver.

e any statement or confession may be introduced at a trial or hearing when a leged to be a child in need of supervision or a delinquent child, the state must the statement or confession offered in evidence was elicited only after a ntelligent and voluntary waiver of the child's constitutional rights was obtained. rmining whether the child knowingly, intelligently and voluntarily waived his court shall consider the following factors:

age and education of the respondent;

ether or not the respondent is in custody;

manner in which he was advised of his rights;

length of questioning and circumstances under which the respondent was

condition of the quarters where the respondent was being kept at the time he d;

time of day and the treatment of the respondent at the time that he was

mental and physical condition of the respondent at the time that he was

children would be best served by their continuance in foster care, rather than by return to their parents, was insufficient cause to justify his dismissal. Matter of Apel, 1978, 96 Misc.2d 839, 409 N.Y.S.2d 928.

At outset of proceeding on Social Services Commissioner's application for an extension of placement in foster care, a law guardian should, like judge, be neutral, since, in addition to his role as counsel, advocate and guardian, he serves also in a quasi-judicial capacity in that he has some responsibility, at least during dispositional phase of proceeding, to aid judge in arriving at a proper disposition; however, at some point in hearing, he has a right to formulate an opinion and then to attempt to persuade judge to adopt that disposition which, in his judgment, will best promote his ward's interest. Id.

5. Neglect proceedings

Family Court abused its discretion in proceeding to trial on permanent neglect petition without presence of child's court-appointed law guardian. Matter of Holland, 1980, 75 A.D.2d 1005, 429 N.Y.S.2d 129.

Where court, after being advised of its failure to inform parents of their children's rights to representation by law guardian and to counsel prior to commencement of neglect proceeding, failed then to make any attempt to correct its error, and it appeared appointment of law guardian was mandatory, due process requirement mandated by this section was violated. Cardinal v. Munyan, 1968, 30 A.D.2d 444, 294 N.Y.S.2d 180.

6. Paternity proceedings

Where infant respondent was ably represented throughout entire paternity proceeding by counsel of choosing, there was no nec... appointment of law guardian... ymous v. Anonymous, 1972, ... 2d 564, 333 N.Y.S.2d 897.

Where natural mother of ... mate child instituted paterni... ceeding against putative fa... thereafter she defaulted and ... cooperate in prosecution ... family court on its own moti... protection of child, assigned ... guardian to represent child in ... ceeding. Lucey v. Torrence, 1... Misc.2d 714, 309 N.Y.S.2d 755.

7. Custody proceedings

Since possibility that pa... rights would prevail over child... rights was clearly a danger in ... vorce proceeding wherein custod... two minor children was in issue, ... Supreme Court would direct, on ... own motion, that law guardian ... appointed to appear on behalf of ... represent interest of children as to ... sue of custody and, in event la... guardian determined that there w... conflict of interest between two chil... dren, he could advise court and sep... rate guardians would be appointe... Borkowski v. Borkowski, 1977, ... Misc.2d 937, 396 N.Y.S.2d 962.

8. Family offenses

The Family Court Act does ha... specific provisions for the appoint... ment of a law guardian in cases ari... ing under article 7 or 10 and in th... situations the appointment of a la... guardian is mandatory. However, ... article 8, which governs family ... fense petitions, is not included in th... mandatory language and therefo... the appointment of a law guardian ... within the Judge's sound discretion... Rapp v. Rapp, 1979, 101 Misc.2d 57... 438 N.Y.S.2d 154.

§ 249-a. Waiver of counsel

A minor who is a subject of a juvenile delinquency or person in need of supervision proceeding shall be presumed to lack the requisite knowledge and maturity to waive the appointment of a law guardian. This presumption may be rebutted only after a law guardian has been appointed and the court determines after

hearing at which the law guardian appears and participates and upon clear and convincing evidence that (a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense, and (c) waiver is in the best interest of the minor.

Added L.1978, c. 513, § 1.

Historical Note

Effective Date. Section effective July 20, 1978, pursuant to L.1978, c. 513, § 2.

Practice Commentary

By Douglas J. Besharov

Seven years before the enactment of this section, the Court of Appeals described the great caution with which courts must approach the waiver of counsel.

> Although one accused of crime, and that includes a minor, may "intelligently and knowingly waive his * * * right to counsel either at a pretrial stage or at the trial", the courts have become increasingly reluctant to accept such waivers unless made with sufficient awareness of the relevant circumstances and probable consequences. "To be vaild", the Supreme Court declared . . . "such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." And with respect to a juvenile charged as a delinquent, the courts have imposed particularly strict requirements before permitting a waiver of his right to counsel. In such cases, 'heavy burden' rests on the state to show a genuine waiver." [In re Lawrence S., 29 N.Y.2d 206, 209, 325 N.Y.S.2d 921, 923, 275 N.E.2d 577, 578 (1971) (Citations omitted).

In the above case, the Court of Appeals criticized the Family Court Judge who, before accepting a waiver of counsel and an admission to the allegations, made "no attempt to ascertain whether the 13-year-old respondent understood, or was capable of understanding, the nature of the charges against him, the importance of having a lawyer or, indeed,

what a waiver of an attorney entailed. More, he did not endeavor to find out whether either mother or son realized the penalty that might be imposed—institutionalization for upwards of five years—nor did he alert them to possible defenses, other mitigating factor or the desirability of having counsel." [In re Lawrence S., supra, 29 N.Y.2d at 209, 325 N.Y.S.2d at 924, 275 N.E.2d at 579.]

This section goes further than *Lawrence S.* and other cases considering the validity of a minor's waiver of counsel in Article 3 or 7 proceedings. In addition to the standard considerations used by courts to determine whether a waiver was valid, this section adds three new—and difficult to satisfy criteria. First, it establishes a rebuttable presumption that the minor lacks the capacity to waive his right to a Law Guardian (whereas the caselaw would merely place the burden of proof on the state). Second, the waiver can only take place after a hearing at which a Law Guardian "appears and participates." Third, the court must determine that the "waiver is in the best interest of the minor." Under these combined criteria, the effective waiver of counsel in an Article 7 proceeding appears unlikely, if not impossible.

In light of this section's framework and the clear hesitancy of appellate courts to approve the waiver of legal representation in Family Court proceedings, better practice seems to be to provide for the automatic appointment of a Law Guardian at a time reasonably contemporaneous with the filing of the petition (unless other independent legal representation is available), thus ensuring that the minor also has the benefit of legal counsel in preliminary court proceedings (such as detention proceedings).

When this section was first enacted, it appeared that courts might apply its provisions to suppress the confessions of juveniles made during police interrogations. [*See, e.g., In the Matter of Schaefer*, 97 Misc.2d 487, 411 N.Y.S.2d 977 (Fam.Ct., Onondaga Co., 1978).] However, subsequent case decisions seem to have established that it does not reach to pre-court, custodial interrogations. [*See, e.g., In the Matter of Roger EE*, 75 A.D.2d 269, 429 N.Y.S.2d 757 (3rd Dept., 1980); *In the Matter of Dominick E.*, 74 A.D.2d 485, 428 N.Y.S.2d 113 (4th Dept., 1980); *In the Matter of Robert O.*, 109 Misc.2d 238, 439 N.Y.S.2d 994 (Fam.Ct., Kings Co., 1981).] A further discussion of the suppression of confessions under Article 7 is found in the Practice Commentary accompanying Family Court Act § 721, *infra*.

Library References

Infants ⇐205. C.J.S. Infants § 52.

CASE NOTES

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

Cited in In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

§ 7A-578. Telephonic communication authorized.

All communications, notices, orders, authorizations, and requests authorized or required by G.S. 7A-572, 7A-574, and 7A-575 may be made by telephone when other means of communication are impractical. All written orders pursuant to telephonic communication shall bear the name and the title of the person communicating by telephone, the signature and the title of the official entering the order, and the hour and the date of the authorization. (1979, c. 815, s. 1.)

§§ 7A-579 to 7A-583: Reserved for future codification purposes.

ARTICLE 47.

Basic Rights.

§ 7A-584. Juvenile's right to counsel; presumption of indigence.

(a) A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. In any proceeding in which delinquency is alleged, the judge shall appoint counsel unless counsel is retained for the juvenile.

(b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on rights and interests of parent, child, family and State, see 4 Campbell L. Rev. 85 (1981).

CASE NOTES

Cited in In re Wharton, 306 N.C. 565, 290 S.E.2d 688 (1982).

N. Dak.

27-20-26. Right to counsel.—

1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict separate counsel shall be provided for each of them.
2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if his parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter shall, unless undue financial hardship would ensue, be responsible for providing legal counsel and for paying other necessary expenses of representation for their child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents.

Source: S. L. 1969, ch. 289, § 1; 1973, ch. 249, § 1.

Initial Interview.

Parental termination procedures are a part of the Juvenile Court Act and the right to counsel extends to parties involved in such proceedings; parents should have been advised of right to counsel and afforded opportunity to consult a lawyer before proceeding with initial interview in which juvenile supervisor was not merely screening a complaint but was functioning as a law enforcement officer by gathering evidence and determining whether there would be court proceedings to terminate parental rights. In re J. Z., 190 NW 2d 27.

27-20-27. Other basic rights.—

1. A party is entitled to the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine adverse witnesses.
2. A child charged with a delinquent act need not be a witness against or otherwise incriminate himself. An extra-judicial statement, if obtained in the course of violation of this chapter or which would be constitutionally inadmissible in a criminal proceeding, shall not be used against him. Evidence illegally seized or obtained shall not be received over objection to establish the allegations made against him. A confession validly made by a child out of court is insufficient to support an adjudication of de-

he was arrested was that he was a delinquent in that he maliciously and purposely shot M with intent to kill: In re Januszewski, 196 Fed 123, 10 OLR 151.

DECISIONS CONSTRUING FORMER GC § 1650

19. A court calendar is not required to be kept in the probate court: Stark v. Stark, 17 CC(NS) 398, 24 CD 135 [affirmed, without opinion, 88 OS 586; citing Millard v. Commissioners, 13 CC 581, 7 CD 115].

[§ 2151.35.1] § 2151.351 Repealed, 136 v H 164, § 2 [132 v S 383; 133 v H 320; 136 v H 85]. Eff 1-13-76.

CASE NOTES AND OAG

DECISIONS CONSTRUING FORMER RC § 2151.35.1

1. In order to sustain commitment of a juvenile offender to a state institution in a delinquency proceeding, where such commitment will deprive the child of his liberty, the alleged delinquent must have been afforded representation by counsel, appointed at state expense in case of indigency: In re Agler, 19 OS(2d) 70, 48 OO(2d) 85, 249 NE(2d) 808.

2. When the court deems it necessary to appoint counsel for a juvenile, pursuant to RC § 2151.35.1, such counsel's services shall be paid for by the county as is stated therein: 1969 OAG No.69-110.

[§ 2151.35.2] § 2151.352 Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon written request prior to any hearing involving such child.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 164. Eff 1-13-76.

Cross-References to Related Sections

See RC § 2151.35 which refers to § 2151.35.2 et seq.

Text Discussion

2 Anderson Fam. L. §§ 4.1-4.12, 13.14.

Research Aids

Right to counsel:
O-Jur2d: Juvenile Courts §§ 45, 45.5
Am-Jur2d: Juvenile Courts §§ 38, 39

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

The juvenile and his constitutional right to a jury trial. William A. Huddleson. 1 No.Ky.St. L.F. 164 (1973).

Ohio Rules

This section is affected by Juv. Rules 3; 4(A); 7(J); 29(B).

CASE NOTES AND OAG

See also case notes construing former RC § 2151.35.1.

1. If the parents of a juvenile who is the subject of a delinquency hearing in juvenile court are to testify at that hearing, the exclusion by the judge of the parents from the courtroom under an order for separation of witnesses until they have testified is not prejudicial, where the juvenile is represented by counsel during the hearing: State v. Ostrowski, 30 OS(2d) 34, 59 OO(2d) 62, 282 NE(2d) 359.

2. Approval by the court of the permanent surrender of a child is purely an administrative matter, and not in the nature of an adversary proceeding; the court has no duty to advise the mother of her right to counsel or to appoint a lawyer for her in the event of indigency: In re Anne K., 31 OMisc 218, 60 OO(2d) 134, 282 NE(2d) 370 (JC 1972).

DECISIONS CONSTRUING FORMER RC § 2151.35

3. Section 10, Article I of the Ohio Constitution, and the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply to, or require the appointment of counsel in, a delinquent-child proceeding in the juvenile court: Cope v. Campbell, 175 OS 475, 26 OO(2d) 88, 196 NE(2d) 457.

4. A minor charged with delinquency in a juvenile court proceeding has the right to be represented by an attorney at law in such proceeding: State v. Shardell, 107 App 338, 8 OO(2d) 262, 153 NE(2d) 510.

5. In the juvenile court in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child: 1967 OAG No. 67-068.

6. Juvenile courts have inherent power to appoint counsel for indigents: 1967 OAG No. 67-068.

7. There is no provision under the statutes which permits the juvenile court to authorize compensation to attorneys appointed to represent indigents: 1967 OAG No. 67-068.

St.1931, § 1736.
Laws 1957, p. 527, § 1.
10 O.S.1981, § 108.

OKLA.

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this volume.

§ 1109. Questioning of children—Counsel—Appointment of guardian ad litem

A. No information gained by questioning a child nor any evidence subsequently obtained as a result of such information shall be admissible into evidence against the child unless the questioning about any alleged offense by any law enforcement officer or investigative agency, or employee of the court, or the Department is done in the presence of the parents, guardian, attorney, or legal custodian of the child. No such questioning shall commence until the child and his parents, or guardian, or other legal custodian have been fully advised of the constitutional and legal rights of the child, including the right to be represented by counsel at every stage of the proceedings, and the right to have counsel appointed by the court if the parties are without sufficient financial means; provided, however, that no legal aid or other public or charitable legal service shall make claim for compensation as contemplated herein. It is further provided that where private counsel is appointed in such cases, the court shall set reasonable compensation and order the payment out of the court fund.

B. If the parents, guardian, or other legal custodian of the child requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court if a petition has been filed alleging that the child is a deprived child, a child in need of supervision, or a child in need of treatment, or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the parents, guardian or other legal custodian. If the child is not otherwise represented by counsel, whenever a petition is filed pursuant to the provisions of Section 1103 of this title, the court shall appoint a separate attorney, who shall not be a district attorney, for the child regardless of any attempted waiver by the parent or other legal custodian of the child of the right of the child to be represented by counsel.

C. Whenever a petition is filed alleging that a child is a deprived child the court may appoint a guardian ad litem for the child at any time subsequent to the filing of the petition and shall appoint a guardian ad litem upon the request of the child or his attorney.

1. The guardian ad litem shall not be a district attorney, an employee of the office of the district attorney, an employee of the court, an employee of a juvenile bureau established pursuant to the provisions of Sections 1201 through 1210 of this title, or an employee of any public agency having duties or responsibilities towards the child.

2. The guardian ad litem may be a court-appointed special advocate.

D. For the purpose of this section and Section 846 of Title 21 of the Oklahoma Statutes, a "court-appointed special advocate" or "CASA" means a responsible adult, other than the attorney of the child, who has volunteered to be available for appointment by the court to serve as an officer of the court and represent a child as guardian ad litem until discharged by the court. It shall be the duty and responsibility of the court-appointed special advocate to advocate for the best interests of the child and to assist the child in obtaining a permanent, safe, homelike placement. A court-appointed special advocate shall serve without compensation and shall have such other qualifications and duties and responsibilities as may be prescribed by rule by the Supreme Court. Any person participating in a judicial proceeding as a court-appointed special advocate shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any civil liability that otherwise might be incurred or imposed.

E. The district attorney shall prepare and prosecute any case or proceeding within the purview of Chapter 51 of this title.

Laws 1968, c. 282, § 109, eff. Jan. 13, 1969. Laws 1970, c. 226, § 1; Laws 1971, c. 66, § 2, eff. Oct. 1, 1971; Laws 1977, c. 259, § 10, eff. Oct. 1, 1977; Laws 1979, c. 257, § 3; Laws 1982, c. 312, § 20, operative Oct. 1, 1982; Laws 1985, c. 313, § 1, eff. Nov. 1, 1985; Laws 1986, c. 263, § 4, operative July 1, 1986.

Historical Note

The 1970 amendment rewrote subsection (a) which prior thereto read:

"(a) No child shall be questioned about any alleged offense by any law enforcement officer, investigative agency, or employee of the court or the Department unless his parents, guardian, attorney or their legal custodian are present at the interrogation, and not until the child and his parents, or guardian, or other legal custodian shall be fully advised of their constitutional and legal rights, including the right to a jury trial as herein provided, and the right to be represented by counsel at every stage of the proceedings, and the right to have counsel appointed by the court and paid out of the court fund if the parties are without sufficient financial means; provided, however, that no legal aid or other public or charitable legal service shall make claim for compensation as contemplated herein."

The 1971 amendment, in subsection (a), deleted "the right to a jury trial as herein provided, and" following "Legal rights, including".

The 1977 amendment, in subsection (a), first sentence, inserted "nor any evidence subsequently obtained as a resu

the published summons shall simply state that a proceeding concerning the child is pending in the court and an order making an adjudication will be entered therein. The summons shall be published once a week for a period of three weeks, making three publications in all. If the names of one or both parents or the guardian are unknown, they may be summoned as "The parent(s) or guardian of (naming or describing the child), found (stating the address or place where the child was found)."

(3) Service as provided in this section shall vest the court with jurisdiction over the parents or guardian in the same manner and to the same extent as if the person served were served personally within this state.

(4) The court may authorize payment of travel expenses of any party summoned. Except as provided in this subsection, responsibility for the payment of the cost of service of summons or other process on any party, and for payment of travel expenses so authorized, shall be borne by the party issuing the summons or requesting the court to issue the summons. When the Children's Services Division issues the summons or requests the court to issue the summons, responsibility for such payment shall be borne by the county. [1959 c.432 §9; 1969 c.591 §298; 1979 c.284 §141; 1987 c.606 §7]

419.490 Compliance with summons; issuance of warrant of arrest. (1) No person required to appear as provided in ORS 419.486 shall without reasonable cause fail to appear or, where directed in the summons, to bring the child before the court.

(2) If the summons cannot be served, if the person to whom the summons is directed fails to obey it or if it appears to the court that the summons will be ineffectual, the court may direct issuance of a warrant of arrest against the person summoned or against the child. [1959 c.432 §10]

419.492 Power of court to proceed when child is before court; exceptions. If the child is before the court, the court has jurisdiction to proceed with the case notwithstanding the failure to serve summons upon any person required to be served by ORS 419.486, except that:

(1) No order entered pursuant to ORS 419.523 may be entered unless ORS 419.525 is complied with.

(2) No order for support as provided in ORS 419.513 may be entered against a person unless that person is served as provided in ORS 419.488 (1).

(3) If it appears to the court that a parent or guardian required to be served by ORS 419.486 was not served as provided in ORS 419.488, or was served on such short notice that the parent or guardian did not have a reasonable opportunity to appear at the time fixed, the court shall, upon petition by the parent or guardian, reopen the case for full consideration. [1959 c.432 §11]

419.494 Appointment of person to appear in behalf of child. In any proceeding the court may appoint some suitable person to appear in behalf of the child. [1959 c.432 §12]

419.496 Hearing on each case separately at special session of court; exceptions. Juvenile court hearings shall be held at a special session of the court for that purpose and each case shall be heard separately, except that two or more cases may be heard together in the following instances:

(1) Proceedings consolidated as provided in ORS 419.559.

(2) Cases involving violations of motor vehicle laws or ordinances where none of the cases involves death or serious injury to persons.

(3) Cases arising in whole or in part out of a single transaction or series of related transactions. [1959 c.432 §13]

419.498 Conduct of hearing; court-appointed counsel; witnesses; payment of costs. (1) The hearing shall be held informally by the court without a jury and may be continued from time to time. During the hearing of a case filed pursuant to ORS 419.476 (1)(b) to (e), the court, on its own motion or upon the motion of a party, may take testimony from or confer with any child appearing as a witness and may exclude from the conference the child's parents and other persons if the court finds such action would be likely to be in the best interests of the child. However, the court shall permit an attorney for each party to attend the conference, and the conference shall be reported.

(2)(a) If the child, the parent or guardian requests counsel but is without sufficient financial means to employ suitable counsel possessing skills and experience commensurate with the nature of the petition and the complexity of the case, the court may appoint suitable counsel to represent the child. Whenever requested to do so, the court shall appoint counsel to represent the child in every case filed pursuant to ORS 419.476 (1)(b) to (g). Whenever requested to do so, the court shall appoint counsel to represent the child in every case filed pursuant to ORS 419.476 (1)(a) in which the child would be entitled to court appointed counsel if the child were an adult charged with the same offense.

3. Evidence—In general

In juvenile delinquency proceedings, trial judge did not err in permitting assistant district attorney to conduct redirect examination beyond scope of cross-examination, thereby allowing police officer to testify to matters concerning identification of juvenile defendant and investigation of burglarized premises. In Interest of Gonzalez, 386 A.2d 586, 255 Pa.Super. 217, 1978.

4. —— Admissibility of evidence

Neither interrogating officers' statements nor evidence of juvenile's statement were admissible in delinquency proceedings where interview was held in absence of subject's parents or any other person in a guardianship relationship or attorney or any other person to guide or assist him. In re Curry, 424 A.2d 1380, 284 Pa.Super. 37, 1981.

A juvenile's confession is inadmissible unless an opportunity to consult with a parent or other adult is afforded. Com. ex rel. Reyes v. Aytch, 369 A.2d 1323, 246 Pa.Super. 287, 1976.

Juvenile's "confession" to juvenile officer and physical evidence seized from vehicle were inadmissible at delinquency adjudication hearing where confession and evidence were the product of illegal arrest. In Interest of Waldron, 353 A.2d 43, 237 Pa.Super. 298, 1975.

Where court based an adjudication of delinquency on the combination of the totality of competent, circumstantial evidence that was presented, the admission of hearsay evidence as to the damage to the cars was not error. In re Appeal of Gillen, 98 Montg. 401, 1974, affirmed in part and reversed in part 344 A.2d 706.

5. —— Sufficiency of evidence

Evidence in delinquency proceeding brought against child who was nine years old at time she allegedly stabbed another child was insufficient to rebut presumption of incapacity arising when child between ages of seven and 14 is alleged to have committed criminal act, and insufficient to satisfy state's burden of proving all elements of crimes charged, that is, aggravated assault and possession of instrument of crime, beyond a reasonable doubt. Com. v. Durham, 389 A.2d 108, 255 Pa.Super. 539, 1978.

6. Review

In examining a child custody case, scope of Superior Court's review is quite broad and, although the court cannot nullify the fact-finding of a hearing judge, it is not bound by finding which has no competent evidence to support it. In re Sharpe, 374 A.2d 1323, 248 Pa.Super. 74, 1977.

No ground for excepting to juvenile court's ruling sustaining Commonwealth's objection to attempt by defense counsel to elicit from police officer details of another person's involvement in crime was preserved for review, where subsequent colloquy between court and juvenile's counsel, demonstrated that exception taken to court's ruling was quickly abandoned by juvenile's counsel. Appeal of Cowell, 364 A.2d 718, 243 Pa. Super. 177, 1976.

§ 6337. Right to counsel

Except as otherwise provided under this chapter a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and if he is without financial resources or otherwise unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if applicable. The court may continue the proceeding to enable a party to obtain counsel. Counsel must be provided for a child unless his parent, guardian, or custodian is present in court and affirmatively waive it. However, the parent, guardian, or custodian may not waive counsel for a child when their interest may be in conflict with the interest or interests of the child. If the interests of two or more parties may conflict, separate counsel shall be provided for each of them.

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978.

Official Source Nc
Reenactment o
1972 (No. 333), §

Infants ⇐16.9

1. Construction

Where county
attorneys opport
gent juveniles i
pendency proceec
cepted, and cons
in form of actu
was not argued
was invalid for
likely, for purp
junction, that at
ly prove existe
est." Northern
Inc. v. Lackawa
678, D.C.1981.

For purposes
relief, there cou
in county's det
certain lawsuits
taliation for
contract with l
for representat
delinquents. Id

On record, it
of temporary
county would
pendency and
with legal servi
suits against c
and accordingl
on claim of Fir
as requirement
tive relief, was

Constitution
mental body to
because they d
ular clients, ar
ter individuals
court through
actions, and
county's term
had only one
representation
sufficient shov
porary injunc
deprivation of
representatior
or without rat

Juvenile mu
to consult wit
er interested
of constitutio

shall be expedited in any case in which such detention has been ordered.

(e) *Hearing in Providence.* Any hearing required by this Rule may be held in Providence where unavailability of counsel or the schedule of the court precludes hearing in the county in which the case is pending.

Reporter's Notes. This Rule is designed to comply in substance with G.L. §§ 14-1-21 through 14-1-27, and to follow existing practice by providing for a probable cause hearing after the initial detention, and to comply with the holdings and implications of *Morris v. D'Amario*, 416 A.2d 137 (R.I. 1980) and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

9. Arraignment, adjudicatory hearing. — (a) *Arraignment.* When a child appears before the court for arraignment in accordance with the summons, the court shall explain the right to counsel and determine whether the parties are represented and shall appoint counsel for the child where necessary. Upon request, or on its own motion, the court may appoint separate counsel to represent the child where it appears that the interests of the child and the child's parent or any other represented party may conflict. The court shall inform the child of (or satisfy itself on the record that the child has been informed by counsel) of (1) the nature of the charges against the child, (2) the maximum sentence that could be imposed, (3) the benefit of the presumption of innocence, (4) the right to remain silent, (5) the right to confront and cross-examine his or her accusers and the witnesses against him, (6) the right to testify and to call witnesses in the child's own defense, (7) the right to have the state prove the child's guilt beyond a reasonable doubt, (8) the right to appeal any delinquency finding to the Rhode Island Supreme Court, and (9) the consequence of trial as an adult for all crimes if a child has been twice adjudicated as delinquent by reason of felonies. Upon finding that the child understands these rights and consequences, the court may inquire of the child whether the child admits, denies or with consent of the court admits sufficient facts to submit to the court's jurisdiction. Failure or refusal of the child to admit the allegations shall be deemed a denial of them. If any or all of the allegations admitted by the child are sufficient for an adjudication of delinquency or waywardness, the court may take testimony to corroborate the admissions or may proceed directly to the adjudication.

(b) *Determination of Disputed Facts.* If any essential averment of the petition is in issue, the court shall determine the order and method of presentation of evidence. Any testimony admissible under the Rules of Evidence shall be admitted. Compulsory process shall issue on behalf of the child or any other party to compel testimony in the child's behalf. The court shall grant a continuance when necessary to ensure a fair presentation of the issues.

(c) *Findings, Quantum of Proof.* The court shall find the facts alleged in the petition to be established only by proof beyond a reasonable doubt, and if the court so finds it shall set forth the findings of fact upon which it bases its determination in adjudicating the

...ry determination of guilt ...e inappropriate at such a hear... ...hen considering whether to ...risdiction over a juvenile ac... cused of murder, the family court judge uses the public interest as his criterion. State v McCoy (1985) 285 SC 115, 328 SE2d 620.

ADJUDICATORY HEARING

Rule 42

Scheduling the Adjudicatory Hearing

...date for the adjudicatory hearing shall be set at the earliest ...able date but always within 40 days from the filing of the ...on unless otherwise delayed by order of the Court, which ...shall set forth the reasons for the delay. Failure to schedule ...judicatory hearing within the prescribed 40 days period shall ...perate as a ground for dismissal except upon an affirmative ...ng of material prejudice.

...h and Practice References—
...m Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 46.
...JS, Infants § 99.

CASE NOTES

...matic dismissal was not war... ...in a case involving a 47-day ...uling period where there was no showing of material prejudice. Re Price (1981) 277 SC 169, 284 SE2d 356.

Rule 43

Notice of Adjudicatory Hearing

...tice of the adjudicatory hearing shall be served on both ...nts and both shall be ordered to be present, and if the child is ...iving with the parents, the guardians or persons with whom ...hild resides. The parent or guardian shall be required to be ...nt and not excused from attendance except by the judge ...showing of sickness or other justifiable cause.

...h and Practice References—
...m Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 43.
...JS, Infants § 99.
...m Jur Trials, Juvenile Court Proceedings § 63.

Rule 44

Notice of Commitment

...ery delinquency proceeding there shall be served upon the ...his parents, guardians, or persons with whom the child ...a notice that he has a right to be represented by an ...ey and if the parents are not able to employ an attorney,

5. DAK.

or as soon thereafter as may be, the court shall proceed to hear the evidence. The court may, in any case when the child is not represented by any person, appoint some suitable person to act on behalf of the child.

Source: SL 1909, ch 298, § 4; 1915, ch 119, § 9; RC 1919, § 9980; SDC 1939, § 43.0309; SL 1961, ch 212; 1968, ch 164, § 7.

Bifurcated Hearings in Neglect and Dependency Cases.

Hearings on a petition alleging that a child is neglected or dependent are by statute bifurcated; the first hearing is an adjudicatory hearing at which petitioner has burden of proving by a preponderance of the evidence that the child is neglected or dependent; if the child is so proven to be dependent or neglected, then findings of fact and conclusions of law supporting an order of adjudication must be entered and a dispositional hearing held. People in Interest of P.M. (1980) 299 NW 2d 803.

Collateral References.

Evidence rules, applicability to juvenile delinquency proceedings, 43 ALR 2d 1128.

26-8-22.1. Duty to inform of constitutional and legal rights. At his first appearance before the court, the child and his parents, guardian, or other custodian shall be fully informed of their constitutional rights and legal rights, including the right to be represented by counsel at every stage of the proceedings.

Source: SDC 1939, § 43.0309 as added by SL 1968, ch 164, § 7.

See Colo Rev Stat Ann 1973, § 19-1-106.

Failure to Inform.

In proceeding on petition to declare child to be dependent, including unwed mother's waiver and consent to adoption, where there was noncompliance with statutes regulating hearings, including failure to make a verbatim record, failure to inform of legal and constitutional rights, failure to inform of right to move for new trial and to appeal, and failure to follow dispositional hearing procedure, fundamental rights of the parent were denied and county court should have vacated order surrendering child when the defects were timely brought to the court's attention. In re D.L.F — (1970) 85 SD 44, 176 NW 2d 486.

Collateral References.

Duty to advise accused as to right to assistance of counsel, 3 ALR 2d 1003.

Right to and appointment of counsel, 60 ALR 2d 691.

Right to jury trial in juvenile court delinquency proceedings, 100 ALR 2d 1241.

26-8-22.2. Counsel for indigents — Appointment and compensation. If the child or his parents, guardian, or other custodian requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court, where the petition is for the determination that the child is either in need of supervision or delinquent, or when the petition is for determination of whether the child is neglected or dependent, and the termination of parental rights is stated as a possible remedy in the summons, the court may appoint and fix compensation for counsel without such request if it deems representation by counsel necessary to protect the interest of the child or of other parties. Compensation of counsel shall not exceed that provided in §§ 23A-40-3 and 23A-40-4, which, together with the necessary costs and expenses incident to the proceedings in either the juvenile

or reviewing court, or both, shall be paid by the county in which the adjudicatory hearing is held.

Source: SDC 1939, § 43.0309 as added by SL 1968, ch 164, § 7.

Cross-References.

Appointment and compensation of counsel for indigent defendants, §§ 23A-40-3, 23A-40-4.

Inherent Power of Court to Protect Child's Interests.

Though under this section the court may at its discretion appoint counsel to protect the interests of the child in a dependency and neglect hearing, the court itself also has the inherent power to protect those interests. People in Interest of D. K. (1976) 245 NW 2d 644.

Opinions of Attorney General.

Liability of county for costs incurred in juvenile delinquency proceedings, Opinion No. 77-96.

Reimbursement of expense of appointed counsel by parents, Opinion No. 83-39.

Collateral References.

Representation by parent, right of juvenile court defendant to be represented during court proceedings by parent, 11 ALR 4th 719.

26-8-22.3. Duty to inform unrepresented persons of right to new trial and right to appeal. If the child and his parents, guardian, or other custodian were not represented by counsel, the court shall inform them at the conclusion of the proceedings that they have the right to file a motion for a new trial, and that if such motion is denied they have the right to appeal.

Source: SDC 1939, § 43.0309 as added by SL 1968, ch 164, § 7.

26-8-22.4. State's attorneys to represent state. Upon the request of the court, the state's attorney shall represent the state in any proceedings brought under this chapter.

Source: SDC 1939, § 43.0309 as added by SL 1968, ch 164, § 7.

Opinions of Attorney General.

Adoption of dependent or delinquent child, state's attorney to represent state upon request by court, Opinion No. 71-25.

Law Reviews.

South Dakota Juvenile Procedure: Ten Years After Gault: Still Unconstitutional, 22 SD LRev 56 (1977).

26-8-22.5. Considerations of court at adjudicatory hearing. At the adjudicatory hearing, which shall be conducted as provided in §§ 26-8-22 to 26-8-22.4, inclusive, the court shall first consider and determine whether the allegations of the petition are supported by evidence beyond a reasonable doubt in cases concerning delinquent children or children in need of supervision, or by a preponderance of the evidence in cases concerning neglected or dependent children.

Source: SDC 1939, § 43.0327 as added by SL 1968, ch 164, § 16; 1971, ch 166, § 2.

See Colo Rev Stat Ann 1973, § 19-3-102.

Best Interests of Child.

In dependency and neglect proceedings, explicit consideration of the child's best interests occurs after an adjudication of dependency and neglect. In re Adoption of Everett (1979) 286 NW 2d 810.

TENN.

may continue the hearing for the purpose of an examination in accordance with the procedures set forth in this rule. A continuance granted for this purpose will toll the times specified in Rule 17 regarding the time limits for adjudicatory hearings.

(c) APPOINTMENT OF EXPERT WITNESSES; DETENTION OF CHILD FOR EXAMINATION.

(1) Where the child's sanity or competency is at issue and the court has set the matter for an adjudicatory hearing or a hearing to determine the mental condition of the child, the court may appoint as many as three (3) disinterested qualified experts to examine the child and testify at the hearing. If not performed by private practitioners, such examinations shall be performed at facilities designated by the Commissioner of Mental Health and Mental Retardation. Other competent evidence may be introduced at the hearing. The appointment of experts by the court shall not preclude the state or the child from calling other expert witnesses to testify at the adjudicatory hearing or at the hearing to determine the mental condition of the child.

(2) The court, in its discretion and pursuant to the procedures set forth in Rule 15, may order the child held in detention pending such examination and hearing. [As amended by order entered January 31, 1984, effective July 1, 1984.]

Committee Comment — 1984 amendment: There are no reported cases in Tennessee addressing the question of whether or under what circumstances an insanity defense is available in juvenile court proceedings. Application of this defense in juvenile proceedings has been recognized in various jurisdictions. *See, e.g.* In re Two Minor Children, 592 P.2d 166 (Nev. 1979); State ex rel. Causey, 363 So.2d 472 (La. 1978); Winburn v. State, 32 Wis.2d 152, 145 N.W.2d 178 (1966); *see also* In re Ramon M., 22 Cal.3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978); State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948). The leading case holding the insanity defense inapplicable to delinquency proceedings, In re H.C., 106 N.Y. Super. 583, 256 A.2d 125 (1969), was subsequently held to be overridden by modifications of the New Jersey Juvenile Court Act. In re R.G.W., 135 N.J. Super. 115, 342 A.2d 869 (1975), aff'd 70 N.J. 185, 358 A.2d 473 (1976). However, at least one jurisdiction continues to preclude the insanity defense from being asserted at the adjudicatory hearing (although recognizing the claim of incompetence to stand trial). See, In re C.W.M., 407 A.2d 617 (D.C. 1979).

This rule is not intended to alter the substantive law respecting the applicability of the insanity defense to juvenile court proceedings in Tennessee or to delineate those circumstances under which such a defense may be available. Rather, it provides procedures for those cases in which "the child intends to introduce expert testimony relating to mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged."

Rule 30. Notification and Waiver of Rights of Parties. — (a) NOTIFICATION AND WAIVER WHERE RESPONDENT REPRESENTED BY ATTORNEY. Where the respondent is represented by an attorney, it is the responsibility of the attorney to fully advise the respondent of the rights which attach at any juvenile court hearing. Decisions to waive any of those rights are to be made by the respondent, after full consultation with the attorney. Nonetheless, the court remains obligated to ascertain whether rights are knowingly and voluntarily relinquished.

(b) WAIVER OF RIGHTS WHERE RESPONDENT NOT REPRESENTED BY AN ATTORNEY. Any rights guaranteed a respondent in a juvenile court hearing, under

the Constitution of Tennessee, the Constitution of the United States, any other law, or any rule of court, may be waived by the respondent who is not represented by an attorney only if the respondent has been adequately advised of the right and knowingly and voluntarily waives the right.

(c) CRITERIA FOR KNOWING AND VOLUNTARY WAIVERS. No waiver shall be accepted or deemed to have been made knowingly or voluntarily by a respondent where it appears that the respondent is or was unable to make an intelligent and understanding decision because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

(d) WAIVER BY CHILD. Where the respondent is a child, no waiver in the adjudicatory hearing shall be accepted or deemed to have been made knowingly or voluntarily by the child unless the child has consulted with a knowledgeable adult who has no interest adverse to the child.

(e) PROCEDURE FOR MAKING AND CONFIRMING OF WAIVERS. Any and all waivers of rights shall be made orally in open court, and shall be confirmed in writing by the party and the judge.

(f) NOTIFICATION OF RIGHT TO AN ATTORNEY. In all stages of juvenile court proceedings in which a respondent is by law entitled to representation by an attorney, the respondent shall be expressly informed of his right to an attorney, unless it has been waived. Where a respondent is not represented by an attorney, the court shall advise the respondent in open court of his right to an attorney and of any right he may have to an appointed attorney. The court shall not proceed with the hearing unless the respondent has waived his right to an attorney in accordance with the provisions of this rule.

(g) WAIVER OF RIGHT TO AN ATTORNEY. No respondent shall be deemed to have waived the assistance of an attorney until:

(1) The entire process of notification of the right to an attorney has been completed;

(2) A thorough inquiry into the respondent's comprehension of the right to an attorney and into his capacity to make the choice intelligently and understandingly has been made by the court and the court has determined that the respondent thoroughly comprehends his right to an attorney, has the experience and intelligence to understand, and does understand the consequences of any waiver;

(3) The respondent has knowingly and voluntarily waived his right to an attorney; and

(4) In the case of a respondent who is a child, the child has consulted with a knowledgeable adult who has no interest adverse to the child.

(h) NOTIFICATION OF RIGHTS TO RESPONDENT WHO HAS WAIVED RIGHT TO AN ATTORNEY. A respondent who has waived his right to an attorney shall be advised by the court at the outset of any juvenile court hearing of:

(1) His right to remain silent;

(2) His right to confront and cross-examine witnesses;

(3) His right to present testimony in his own behalf; and

(4) His right to a dispositional hearing following any adjudication of guilt, his right to appeal any decision of the juvenile court, the manner in which such a right can be perfected, and his right to an attorney on appeal.

missed the cause of action before it, the transfer order was not thereafter subject to attack and was not appealable. Mason v. State (App. 14 Dist.1988) 746 S.W.2d 13.

9.5. Waiver of jurisdiction

An order of juvenile court waiving or refusing to waive jurisdiction as to any offense in a certification petition alleging multiple offenses is only invalid if juvenile court retains and exercises jurisdiction over any other offense alleged in petition. Richardson v. State (App. 14 Dist.1987) 728 S.W.2d 128, review granted.

Order of juvenile court waiving jurisdiction over juvenile as to three of four offenses alleged in certification petition alleging multiple offenses was valid, and jurisdiction to try juvenile as an adult was acquired by district court, where exercise of retained jurisdiction by juvenile court did not appear of record, thus warranting presumption that jurisdiction was not exercised. Richardson v. State (App. 14 Dist.1987) 728 S.W. 2d 128, review granted.

21. —— Waiver of summons

Fact that defendant did not object to defective summons in juvenile court did not waive fatal infirmity therein with respect to failure to state that purpose of hearing was to consider discretionary transfer to criminal court. Deleon v. State (App. 7 Dist.1987) 728 S.W.2d 935.

52. Double jeopardy

Colon v. State (App. 4 Dist.1985) 696 S.W.2d 267 [main volume] ref. n.r.e.

54. —— Necessity of examining trial

Failure to hold examining trial on rape and robbery charges did not invalidate resulting convictions where defendant was indicted on the charges after he became 17 years old and state had not previously invoked juvenile court jurisdiction as to those charges. Ex parte Thomas (Cr.App.1987) 739 S.W.2d 363.

65. —— Admissibility of evidence

Trial court's admission of testimony in transfer proceeding regarding possibility and likelihood of juvenile's rehabilitation was erroneous, where deemed admission in effect at hearing stated that there was no reasonable evidence to suggest that juvenile could not be rehabilitated by use of services currently available. C____ W____ v. State (App. 5 Dist.1987) 738 S.W.2d 72.

Trial court's error in admitting testimony in transfer proceeding regarding possibility and likelihood of juvenile's rehabilitation, contrary to deemed admission, was harmless, where likelihood of rehabilitation was only one of six elements considered by court and court's unquestioned findings on other five factors, resulting in transfer of juvenile, were supported by the evidence. C____ W____ v. State (App. 5 Dist.1987) 738 S.W.2d 72.

68.5. —— Sufficiency, evidence

Evidence is sufficient to support juvenile court's findings regarding whether child should be transferred for adult proceedings, if state presents some evidence of probative value on factors outlined under Family Code, but court need not find that each factor is established by the evidence. Moore v. State (App. 14 Dist.1986) 713 S.W.2d 766.

Sufficient evidence was presented as a whole regarding statutorily defined considerations at discretionary transfer hearing which supported juvenile court's exercise of discretion in making transfer of juvenile to district court for criminal proceedings, though evidence presented regarding sophistication and maturity factor was somewhat weak. Moore v. State (App. 14 Dist.1986) 713 S.W.2d 766.

Trial court did not abuse its discretion in transferring juvenile to criminal district court and its order was supported by competent evidence under this section. C____ W____ v. State (App. 5 Dist.1987) 738 S.W.2d 72.

§ 54.03. Adjudication Hearing

[See main volume for text of (a)]

(b) At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.

(c) Trial shall be by jury unless jury is waived in accordance with Section 51.09 of this code. If the hearing is on a petition that has been approved by the grand jury under

Section 53.045 of this code, the jury must consist of 12 persons. Jury verdicts under thi title must be unanimous.

[See main volume for text of (d) to (h)]

Amended by Acts 1987, 70th Leg., ch. 385, § 8, eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 386, § 3, eff. Sept. 1, 1987.

1987 Legislation

Acts 1987, 70th Leg., ch. 385, § 8 and Acts 1987, 70th Leg., ch. 386, § 3 both required explanation by the judge of the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding, and Acts 1987, 70th Leg., ch. 385, § 8 inserted the provision relating to a 12-person jury in a hearing under § 53.045.

Section 20 of Acts 1987, 70th Leg., ch. 385 provides:

"(a) This Act applies only to offenses and conduct occurring on or after its effective date. For the purposes of this section, an offense or delinquent conduct based on an offense occurs on or after the effective date if all the elements of the offense occur on or after the effective date.

"(b) An offense or conduct that occurs before the effective date of this Act shall be prosecuted under the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose only."

Cross References

Criminal proceedings, admissibility of record of juvenile court adjudication, see Vernon's Ann. C.C.P. art. 37.07.

Hearings before referee, prohibition where petition approved by grand jury, see § 54.10(c).

Notes of Decisions

1. In general

Accomplice witness language in subsec. (e) of this section is in substance identical to Vernon's Ann. C.C.P. art. 38.14, so that it is proper to look to decisions of Court of Criminal Appeals under article 38.14 governing conviction upon testimony of accomplice as guidelines for interpretation of this section. Matter of L.G. (App. 3 Dist. 1987) 728 S.W.2d 939, ref. n.r.e.

3. Nature of proceeding

State v. L.J.B. (Civ.App.1977) 561 S.W.2d 547 [main volume] reversed 567 S.W.2d 795.

6. —— Allegations, explanation by court

Trial court's failure to explain to child allegations made against him and nature and possible consequences of proceeding was fundamental error requiring reversal of delinquency determination. I.G. v. State (App. 4 Dist.1987) 727 S.W.2d 96.

By failing to object in trial and to raise point in his brief, child did not waive trial court's failure to explain to child allegations made against him and nature and possible consequences of proceedings. I.G. v. State (App. 4 Dist.1987) 727 S.W.2d 96.

Waiver of child's right to have court explain allegations made against child and nature and possible consequences of proceedings must be made by child; attorney's role is limited to concurring in waiver. I.G. v. State (App. 4 Dist. 1987) 727 S.W.2d 96.

11. Statements

Finding that 16-year-old defendant's oral statement to police was voluntary and not result of improper inducement or coercion was supported by sheriff's testimony that defendant was not coerced or tricked and that defendant volunteered most of statement, notwithstanding defendant's testimony that sheriff told him that sheriff would do everything in his power to help defendant if defendant confessed. Littlefield v. State (App. 9 Dist.1986) 720 S.W.2d 254, review refused.

21. —— Corroboration, evidence

Undercover agent who asked juvenile whether juvenile wanted to engage in fellatio and offered to pay $10 was not "accomplice" within meaning of this section, which requires corroboration of accomplice's testimony to obtain adjudication of delinquent conduct. J.A.F.R. v. State (App. 8 Dist.1988) 752 S.W.2d 216.

24. Summary judgment

State v. L.J.B. (Civ.App.1977) 561 S.W.2d 547 [main volume] reversed 567 S.W.2d 795.

§ 54.04. Disposition Hearing

(a) The disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing. There is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) of this section, in which case, the child is entitled to a jury of 12 persons to determine the sentence.

(b) At the disposition hearing, the juvenile court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. Prior to the disposition hearing, the court shall provide the

when a juvenile who need not be detained lives outside this state or when a juvenile who need not be detained comes within one of the classes set forth in Subsection 78-3a-22(3).

History: L. 1965, ch. 165, § 29, formerly C. 1953, 55-10-91, redes. as 78-3a-30; L. 1977, ch. 81, § 2; 1977, ch. 213, § 2; 1983, ch. 83, § 6; 1988, ch. 1, § 402.

Amendment Notes. — The 1988 amendment, effective January 19, 1988, in the second sentence of Subsection (3) substituted "62A-7-201" for "55-10-49."

78-3a-33. Hearings — Conduct of — Public excluded, exceptions.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Discretion of court.
Recall hearing.

Constitutionality.

The people do not have a constitutional right of public access to juvenile court proceedings in Utah. In re N.H.B., 102 Utah Adv. Rep. 48 (Ct. App. 1989).

The presumption of openness applied in criminal trials under the first amendment does not extend to juvenile proceedings, because the state has a compelling interest in maintaining the confidentiality of juvenile court proceedings that outweighs the media's right of access. In re N.H.B., 102 Utah Adv. Rep. 48 (Ct. App. 1989).

Discretion of court.

This section absolutely excludes the press from most proceedings, but gives the juvenile court judge considerable discretion in determining whether the media may attend hearings involving acts that would constitute felonies in the adult system. In re N.H.B., 102 Utah Adv. Rep. 48 (Ct. App. 1989).

Recall hearing.

As in certification hearings, the purpose of the recall hearing is not to ascertain whether or not the child committed the offense but to determine if the best interest of the child or of the public would be served by returning jurisdiction to the juvenile court. In re N.H.B., 102 Utah Adv. Rep. 48 (Ct. App. 1989).

78-3a-35. Hearings — Record — Right to counsel — Appointment of counsel for indigent — Cost — County attorney to represent state — Special rules for certain violations — Admissibility of evidence.

(1) A verbatim record of the proceedings shall be taken by a court stenographer or by means of a mechanical recording device in all cases that might result in deprivation of custody, as defined in this chapter. In all other cases a verbatim record shall also be made unless dispensed with by the court.

(2) (a) Parents, guardians, the child's custodian, and the child, if old enough, shall be informed that they have the right to be represented by counsel at every stage of the proceedings. They have the right to employ counsel of their own choice and, if any of them requests an attorney and is found by the court to be indigent, counsel shall be appointed by the court. The court may appoint counsel without a request if it considers representation by counsel necessary to protect the interest of the child or of other parties.

(b) The cost of appointed counsel, including the cost of counsel and expense of appeal, shall be paid by the county in which the hearing is

held. Counties may levy and collect taxes for these purposes. The court may order a child, parent, guardian, or custodian for whom counsel is appointed and the parents or guardian of any child for whom counsel is appointed to reimburse the county for the cost of appointed counsel.

(c) If the child and other parties were not represented by counsel, the court shall inform them at the conclusion of the proceedings that they have the right to appeal.

(3) The county attorney shall represent the state in any proceedings in a child's case.

(4) The board may adopt special rules of procedure to govern proceedings involving violations of traffic laws or ordinances, violations of fish and game laws, and boating laws. However, proceedings involving offenses under Section 78-3a-39.5 are governed by that section regarding suspension of driving privileges.

(5) For the purpose of determining proper disposition of the child and for the purpose of establishing the fact of neglect or dependency, written reports and other material relating to the child's mental, physical, and social history and condition may be received in evidence and may be considered by the court along with other evidence. The court may require that the person who wrote the report or prepared the material appear as a witness if the person is reasonably available.

(6) For the purpose of establishing the fact of neglect or dependency, the court may in its discretion consider evidence of statements made by a child under eight years of age to a person in a trust relationship.

History: L. 1965, ch. 165, § 34; 1971, ch. 134, § 4, formerly C. 1953, 55-10-96 redes. as 78-3a-35; L. 1981, ch. 91, § 3; 1983, ch. 163, § 1; 1989, ch. 188, § 5.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, inserted the subsection designations throughout; substituted "in this chapter" for "herein" at the end of the first sentence of Subsection (1); added the second sentence of Subsection (4); and made minor stylistic changes.

78-3a-39. Adjudication of jurisdiction of juvenile court — Disposition of cases — Enumeration of possible court orders — Considerations of court.

When a child is found to come within the provisions of Section 78-3a-16, the court shall so adjudicate. The court shall make a finding of the facts upon which it bases its jurisdiction over the child. However, in cases within the provisions of Subsection 78-3a-16(1), findings of fact are not necessary. Upon adjudication the court may make the following dispositions by court order:

(1) The court may place the child on probation or under protective supervision in his own home and upon conditions determined by the court.

(2) The court may place the child in the legal custody of a relative or other suitable person, with or without probation or protective supervision, but the juvenile court may not assume the function of developing foster home services.

(3) The court may vest legal custody of the child in the Division of Family Services, Division of Youth Corrections, or other public agency, department, or institution, or in a child placement agency for placement

summons; warrants

noned as herein provided who, witho
appear, may be proceeded against as

annot be served, or if it is made to
rving the summons will be ineffectua
child requires that he be brought fort
the court, a warrant may be issued
, or the child.
mmoned or notified to appear, a par
tive or person having the child with
do so, a warrant may be issued for

etition filed under this chapter shall n
esence of the state's attorney, one or bo
or custodian of the child, or, if one h
ian ad litem appointed by the court, an
a petition alleging delinquency or, that
supervision under paragraph (C) of sec
title.—1967, No. 304 (Adj. Sess.), § 1
d 1973, No. 246 (Adj. Sess.), § 11.

History

Sess.). Subsection (d): Omitted reference to al
added provisions relating to § 632(a)(12)(C).

ments. For effect on existing commitments prio
246 (Adj. Sess.), see note set out under § 63

party the court or the clerk of the court
urt's own motion, it may issue subpoena
l testimony of witnesses and production
under this chapter.—1967, No. 304 (Adj.
65.

gs

is chapter shall be conducted by the juve-
in an orderly manner and separate from
t specifically within its jurisdiction.

(c) Except in hearings to declare persons in contempt court, the general public shall be excluded from hearings under this chapter and only the parties, their counsel, witnesses and other persons accompanying a party for his assistance and such other persons as the court finds to have a proper interest in the case or in the work of the court, may be admitted by the court. If the court finds that it is to the best interest and welfare of the child, his presence may be temporarily excluded, except while a charge of his delinquency is being heard at the hearing on the petition.

(d) There shall be no publicity given by any person to any proceedings under the authority of this chapter except with the consent of the child and his parent or guardian.—1967, No. 304 (Adj. Sess.), § 21, eff. July 1, 1968.

Annotations

1. Question of fact. Whether an allegedly neglected child is without the proper parental care or control necessary for its well-being within the meaning of § 632 of this title is a question of fact, to be determined on the facts of the particular case. In re Rathburn (1970) 128 Vt. 429, 266 A.2d 423.

2. Safeguards against abuse. Safeguards against abuse of powerful parens patriae doctrine include notice, counsel, full hearing at which minutes of proceedings are kept, and an order containing the court's findings. In re J. M. (1973) 131 Vt. 604, 313 A.2d 30.

§ 652. Juvenile proceedings

A child charged with a delinquent act need not be a witness against, nor otherwise incriminate, himself; any extra-judicial statement, if constitutionally inadmissible in a criminal proceeding, shall not be used against him; and evidence illegally seized or obtained shall not be used over objection to establish the charge against him. A confession out of court is insufficient to support an adjudication of delinquency unless corroborated in whole or in part by other substantial evidence.—1967, No. 304 (Adj. Sess.), § 22, eff. July 1, 1968.

§ 653. Guardian ad litem, counsel

(a) The juvenile court, at any stage of a proceeding under this chapter, on application of a party or on its own motion, shall appoint a guardian ad litem or counsel for a child who is a party to the proceeding, if he has no parent or guardian or custodian appearing on his behalf or their interests conflict with those of the child, or in any other case where the court believes the interests of the child require such guardian or counsel.

whether he is within or without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8.01-316 and 8.01-317.

B. Service of summons may be made under the direction of the court by sheriffs, their deputies and police officers in counties and cities or by any other suitable person designated by the court.

C. Proof of service may be made by the affidavit of the person other than an officer designated in subsection B hereof who delivers a copy of the summons to the person summoned, but if served by a state, county or municipal officer his return shall be sufficient without oath.

D. The summons shall be considered a mandate of the court and willful failure to obey its requirements shall subject any person guilty thereof to liability for punishment as for contempt. (Code 1950, §§ 16.1-167 to 16.1-170; 1956, c. 555; 1977, c. 559; 1984, c. 594; 1987, c. 632.)

Section set out twice. — The section above is effective July 1, 1989. For the version of this section in effect until July 1, 1989, see the preceding section, also numbered § 16.1-264.

Editor's note. — Amendments made by Acts 1987, c. 632, as amended by Acts 1988, c. 17, are now further postponed to July 1, 1989.

The 1987 amendment, effective July 1, 1989, substituted "in cases in which" for "in cases where" in the second sentence of the first paragraph of subsection A and inserted "in need of supervision" in clause (i) of that sentence.

§ 16.1-265. Subpoena. — Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing. (1977, c. 559.)

ARTICLE 6.

Appointment of Counsel.

§ 16.1-266. (Effective until July 1, 1989) Appointment of counsel. — A. Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition terminating residual parental rights or is otherwise before the court pursuant to subsection A 4 of § 16.1-241, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child.

B. Prior to the detention review hearing or the adjudicatory or transfer hearing by the court of any case involving a child who is alleged to be in need of services or delinquent, such child and his or her parent, guardian, legal custodian or other person standing in loco parentis shall be informed by a judge, clerk or probation officer of the child's right to counsel and of the liability of the parent, guardian, legal custodian or other person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267 and be given an opportunity to:

1. Obtain and employ counsel of the child's own choice; or

2. If the court determines that the child is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159 and his or her parent, guardian, legal custodian or other person standing in loco parentis does not retain an attorney for the child, a statement of indigence substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such child, and the court shall appoint an attorney-at-law to represent him; or

3. Waive the right to representation by an attorney, if the court finds the child and the parent, guardian, legal custodian or other person standing in

ty of a deposition upon inability of party offering deposition to obtain attendance of witness by process or other means. State v. Goodard (1984) 38 Wash.App. 509, 685 P.2d 674.

Findings in juvenile case were not inadequate where written findings were not required at time case was decided and trial court's oral opinion adequately set forth facts upon which it relied in reaching its decision. State v. Fisher (1985) 40 Wash.App. 888, 700 P.2d 1173.

No reversible error occurred where defense counsel acknowledged that no prejudice arose from failure to hold juveniles disposition hearing within limits of JuCR 7.12(a), and where there was no purposeful or oppressive delay. State v. Eugene W. (1985) 41 Wash.App. 758, 706 P.2d 235.

13.40.140. Juveniles entitled to usual judicial rights—Notice of—Open court—Privilege against self-incrimination—Waiver of rights, when

(1) A juvenile shall be advised of his or her rights when appearing before the court.

(2) A juvenile and his or her parent, guardian, or custodian shall be advised by the court or its representative that the juvenile has a right to be represented by counsel at all critical stages of the proceedings. Unless waived, counsel shall be provided to a juvenile who is financially unable to obtain counsel without causing substantial hardship to himself or herself or the juvenile's family, in any proceeding where the juvenile may be subject to transfer for criminal prosecution, or in any proceeding where the juvenile may be in danger of confinement. The ability to pay part of the cost of counsel does not preclude assignment. In no case may a juvenile be deprived of counsel because of a parent, guardian, or custodian refusing to pay therefor. The juvenile shall be fully advised of his or her right to an attorney and of the relevant services an attorney can provide.

(3) The right to counsel includes the right to the appointment of experts necessary, and the experts shall be required pursuant to the procedures and requirements established by the supreme court.

(4) Upon application of a party, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents, or other tangible objects at any hearing, or such subpoenas may be issued by an attorney of record.

(5) All proceedings shall be transcribed verbatim by means which will provide an accurate record.

(6) The general public and press shall be permitted to attend any hearing unless the court, for good cause, orders a particular hearing to be closed. The presumption shall be that all such hearings will be open.

(7) In all adjudicatory proceedings before the court, all parties shall have the right to adequate notice, discovery as provided in criminal cases, opportunity to be heard, confrontation of witnesses except in such cases as this chapter expressly permits the use of hearsay testimony, findings based solely upon the evidence adduced at the hearing, and an unbiased fact-finder.

(8) A juvenile shall be accorded the same privilege against self-incrimination as an adult. An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding may not be received in evidence at an adjudicatory hearing over objection. Evidence illegally seized or obtained may not be received in evidence over objection at an adjudicatory hearing to prove the allegations against the juvenile if the evidence would be inadmissable in an adult criminal proceeding. An extrajudicial admission or confession made by the juvenile out of court is insufficient to

support a finding that the juvenile committed the acts alleged in the information unless evidence of a corpus delicti is first independently established in the same manner as required in an adult criminal proceeding.

(9) Waiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.

(10) Whenever this chapter refers to waiver or objection by a juvenile, the word juvenile shall be construed to refer to a juvenile who is at least twelve years of age. If a juvenile is under twelve years of age, the juvenile's parent, guardian, or custodian shall give any waiver or offer any objection contemplated by this chapter.

Enacted by Laws 1977, Ex.Sess., ch. 291, § 68, eff. July 1, 1978. Amended by Laws 1979, ch. 155, § 66, eff. March 29, 1979; Laws 1981, ch. 299, § 11, eff. May 19, 1981.

Appropriation—Effective date—Severability—Laws 1979, ch. 155: See Historical Note following § 13.04.011.

Effective dates—Severability—Laws 1977, Ex.Sess., ch. 291: See Historical Note following § 13.04.005.

Law Review Commentaries

Juveniles: waiver of rights. 16 Gonzaga L.Rev. 415 (1981).

Library References

Infants ⇐68.

C.J.S. Infants §§ 42, 43, 45 to 49, 198 to 208.

United States Supreme Court

Custodial interrogation, explicit waiver of right to counsel unnecessary to support finding of waiver, see North Carolina v. Butler (1979) 99 S.Ct. 1755, 441 U.S. 369, 60 L.Ed.2d 286.

Juvenile's request for parole officer not invocation of rights under Fifth Amendment, see Fare v. Michael C. (1979) 99 S.Ct. 2560, 442 U.S. 707, 61 L.Ed.2d 197.

Notes of Decisions

A juvenile charged with an offense under Juvenile Justice Act of 1977 is not constitutionally entitled to a jury trial, since, although legislature has changed philosophy and methodology of addressing personal and societal problems of juvenile offenders, it has not converted procedure into a criminal offense atmosphere totally comparable to an adult criminal offense scenario; because Juvenile Justice Act of 1977 measures up to the "essentials of due process," jury trials are not necessary in juvenile adjudicatory proceedings. State v. Lawley (1979) 91 Wash.2d 654, 591 P.2d 772.

Juvenile, who was arrested on suspicion of theft of a motorcycle and who said he did not wish to be represented by an attorney after having been asked twice by the court, made a knowing, intelligent, expressed and voluntary waiver of counsel as required by this section. State v. Rhodes (1979) 92 Wash.2d 755, 600 P.2d 1264.

If juvenile understands that he has a right to remain silent after he is told that he has that right, and that his statements will be used against him in a court, constitutional requirement that juvenile understand his rights is met. Dutil v. State (1980) 93 Wash.2d 84, 606 P.2d 269.

Validity of waiver of right to counsel and to remain silent of juvenile over age of 12 is established by totality of circumstances of which presence of parent, guardian or counsellor is just one circumstance bearing on question whether confession was freely and voluntarily given and not a necessary prerequisite of admissibility. Dutil v. State (1980) 93 Wash.2d 84, 606 P.2d 269.

For juvenile to be transferred to adult offender status, all that is required is that, if legislature has provided for option of adjudication of juvenile offenses in juvenile court, and mechanism for transfer to adult court, state must provide juvenile an opportunity for hearing which comports with essentials of due process and fair treatment prior to entry of order declining juvenile jurisdiction. State v. Sharon (1982) 33 Wash.App. 491, 655 P.2d 1193, affirmed 100 Wash.2d 230, 668 P.2d 584.

Juvenile offender has no constitutional right to be tried in juvenile court. State v. Sharon (1982) 33 Wash.App. 491, 655 P.2d 1193, affirmed 100 Wash.2d 230, 668 P.2d 584.

Where, prior to entry of order of declination of juvenile jurisdiction, juvenile court afforded juvenile opportunity for

---

Revision of article. — Acts 1975, c. 126 amended and reenacted this article, substituting present §§ 49-5-1 to 49-5-15 for former §§ 49-5-1 to 49-5-19, which was entitled "Juvenile Courts." No detailed explanation of the changes made by the 1975 act has been attempted, but, where appropriate, the historical citations to the former sections have been added to corresponding sections in the amended article.

Acts 1977, c. 65 amended and reenacted most of the sections of this article and added new sections. The effect of the act was to revise the entire article. No detailed explanation of the changes made by the 1977 act has been attempted, but, where appropriate, the historical citations to the former sections have been added to corresponding sections in the revised article. Sections 49-5-4 to 49-5-6 and § 49-5-12 were not amended by the 1977 act.

Textbooks. — Law of Domestic Relations in West Virginia (Morris), § 15-6.

W. Va. Law Review. — For comment on due process in juvenile court proceedings, see 70 W. Va. L. Rev. 78 (1967); 76 W. Va. L. Rev. 16 (1973).

For comment, "Waiver of Juvenile Jurisdiction After Adjudication of Delinquency Violates Double Jeopardy Clause of Fifth Amendment," see 78 W. Va. L. Rev. 428 (1976).

For survey of developments in West Virginia criminal law and procedure for the year 1977, see 80 W. Va. L. Rev. 126 (1977).

For article, "Seen and Not Heard: Recent Legislation Affecting Child Welfare in West Virginia," see 80 W. Va. L. Rev. 231 (1978).

"Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 357 (1985).

The legal effect of the 1977 amendments was to repeal prior West Virginia law with respect to juvenile delinquency proceedings. Gibson v. Bechtold, 161 W. Va. 623, 245 S.E.2d 258 (1978).

The 1977 amendments are to be applied to pending cases as well as to cases arising after their passage. Gibson v. Bechtold, 161 W. Va. 623, 245 S.E.2d 258 (1978).

Juvenile jurisdiction arises at the time of the commission of the act of delinquency; consequently, the general rule under such statute is that it is the age at the commission of the offense which determines juvenile court jurisdiction. State ex rel. Smith v. Scott, 160 W. Va. 730, 238 S.E.2d 223 (1977).

Right to jury trial. — Legislature did not intend to require a right to a jury trial at every hearing stage even though these hearings could involve questions of fact. In re E.H., 276 S.E.2d 557 (W. Va. 1981).

---

§ 49-5-1. Jurisdiction of circuit courts over persons under eighteen years of age; constitutional guarantees; right to counsel; hearings.

(a) The circuit court of the county shall have original jurisdiction in proceedings brought under this article.

If during a criminal proceeding against a person in any court, it shall be ascertained or shall appear that the person is under the age of nineteen years and was under the age of eighteen years at the time of the alleged offense, the matter shall be immediately certified to the juvenile jurisdiction of the circuit court, and the circuit court shall assume jurisdiction of the case in the same manner as cases originally instituted in the circuit court by petition: Provided, That for violation of a traffic law of West Virginia, magistrate courts shall have concurrent jurisdiction with the circuit court, and persons under the age of eighteen years shall be liable for punishment for violation of such traffic laws in the same manner as adults except that magistrate courts shall

have no jurisdiction to impose a sentence of confinement for the violation of traffic laws.

As used in this section, "violation of a traffic law of West Virginia" means violation of any law contained in chapters seventeen-A, seventeen-B, seventeen-C and seventeen-D of this Code except sections one and two [§§ 17C-4-1 and 17C-4-2], article four (hit and run) and sections one [§ 17C-5-1] (negligent homicide), two [§ 17C-5-2] (driving under influence of alcohol, controlled substances or drugs) and four [§ 17C-5-3; see editor's note] (reckless driving), article five, chapter seventeen-C of this Code.

(b) Any child shall be entitled to be admitted to bail or recognizance in the same manner as a person over the age of eighteen years and shall have the protection guaranteed by article III of the constitution of West Virginia.

(c) The child shall have the right to be effectively represented by counsel at all stages of proceedings under the provisions of this article. If the child, parent or custodian executes an affidavit showing that he cannot pay for an attorney appointed by the court or referee, the court shall appoint counsel, to be paid as provided for in article twenty-one [§ 29-21-1 et seq.], chapter twenty-nine of this Code.

(d) In all proceedings under this article, the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. In all such proceedings the general public shall be excluded except persons whose presence is requested by a child or respondent and other persons the court finds to have a legitimate interest.

Except as herein modified, at all adjudicatory hearings, the rules of evidence applicable in criminal cases shall apply, including the rule against written reports based upon hearsay. Unless otherwise specifically provided in this chapter, all procedural rights afforded adults in criminal proceedings shall be applicable. Extrajudicial statements, other than res gestae, by a child under fourteen years of age to law-enforcement officials or while in custody, shall not be admissible unless made in the presence of the child's counsel.

Extrajudicial statements, other than res gestae by a child under sixteen years of age but above the age of thirteen to law-enforcement officers or while in custody, shall not be admissible unless made in the presence of the child's counsel or made in the presence of and with the consent of the child's parent or custodian who has been fully informed regarding the child's right to a prompt detention hearing, his right to counsel including appointed counsel if he cannot afford counsel, and his privilege against self-incrimination. A transcript or recording shall be made of all transfer, adjudicatory and dispositional hearings. At the conclusion of any hearing, the court shall make findings of fact and conclusions of law, and the same shall appear of record.

(e) The court reporter shall furnish a transcript of the relevant proceedings to any indigent child who seeks review of any proceeding under this article if an affidavit is filed stating that the child and his parent or custodian are unable to pay therefor. (1936, 1st Ex. Sess., c. 1; 1939, c. 105; 1941, c. 73; 1959, c. 17; 1968, c. 31; 1975, c. 126; 1977, c. 65; 1978, c. 14; 1981, c. 183; 1982, c. 95.)

(5) No person operating an approved or licensed home in compliance with this section is subject to civil or criminal liability by virtue of false imprisonment.

Historical Note

Source:
L.1977, c. 354, § 40, eff. Nov. 17, 1978.
L.1979, c. 300, § 26, eff. May 15, 1980.
1985 Act 176, § 211, eff. April 10, 1986.

Cross References

Jurisdiction, see § 48.14.

Wisc

Library References

Asylums ⇐5.
C.J.S. Asylums and Institutional Care Facilities §§ 11, 12.

48.23. Right to counsel

(1) Right of children to legal representation. Children subject to proceedings under this chapter shall be afforded legal representation as follows:

(a) Any child alleged to be delinquent under s. 48.12 or held in a secure detention facility shall be represented by counsel at all stages of the proceedings, but a child 15 years of age or older may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made and the court accepts the waiver. If the waiver is accepted, the court may not transfer legal custody of the child to the subunit of the department administering corrections for placement in a secured correctional facility or transfer jurisdiction over the child to adult court.

(b) 1. If a child is alleged to be in need of protection or services under s. 48.13, the child may be represented by counsel at the discretion of the court. Except as provided in subd. 2, a child 15 years of age or older may waive counsel if the court is satisfied such waiver is knowingly and voluntarily made and the court accepts the waiver.

2. If the petition is contested, the court may not place the child outside his or her home unless the child is represented by counsel at the fact-finding hearing and subsequent proceedings. If the petition is not contested, the court may not place the child outside his or her home unless the child is represented by counsel at the hearing at which the placement is made. For a child under 12 years of age, the judge may appoint a guardian ad litem instead of counsel.

(c) Any child subject to the jurisdiction of the court assigned to exercise jurisdiction under this chapter under s. 48.14(5) shall be represented by counsel. No waiver of counsel may be accepted by the court.

(d) If a child is the subject of a proceeding involving a contested adoption or the involuntary termination of parental rights, the court shall appoint legal counsel or a guardian ad litem for the child.

represented by counsel; but no such parent may waive counsel. A minor parent petitioning for the voluntary termination of parental rights shall be represented by a guardian ad litem. If a proceeding involves a contested adoption or the involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made.

(b) If a petition under s. 48.13 is contested, no child may be placed outside his or her home unless the nonpetitioning parent is represented by counsel at the fact-finding hearing and subsequent proceedings. If the petition is not contested, the child may not be placed outside his or her home unless the nonpetitioning parent is represented by counsel at the hearing at which the placement is made. However, the parent may waive counsel if the court is satisfied such waiver is knowingly and voluntarily made and the court may place the child outside the home even though the parent was not represented by counsel.

(3) Power of the court to require representation and appoint guardians ad litem. At any time, upon request or on its own motion, the court may appoint a guardian ad litem for the child or any party and may appoint counsel for the child or any party, unless the child or the party has or wishes to retain counsel of his or her own choosing.

(3m) Guardians ad litem or counsel for abused or neglected children. The court shall appoint counsel for any child alleged to be in need of protection or services under s. 48.13(3), (10) and (11), except that if the child is less than 12 years of age the court may appoint a guardian ad litem instead of counsel. The guardian ad litem or counsel for the child shall not be the same as counsel for any party or any governmental or social agency involved.

(4) Providing counsel. In any situation under this section in which a child has a right to be represented by counsel or is provided counsel at the discretion of the court, except for situations arising under sub. (2) where the child entitled to representation is a parent; and counsel is not knowingly and voluntarily waived; and it appears that the child is unable to afford counsel in full, or the child so indicates; the court shall refer the child to the authority for indigency determinations specified under s. 977.07(1). In any situation under sub. (2) in which a parent is entitled to representation by counsel; counsel is not knowingly and voluntarily waived; and it appears that the parent is unable to afford counsel in full, or the parent so indicates; the court shall refer the parent to the authority for indigency determinations specified under s. 977.07(1). The court may appoint a guardian ad litem in any appropriate matter. In any other situation under this section in which a person has a right to be represented by counsel or guardian ad litem or is provided counsel or guardian ad litem at the discretion of the court, compe-

(5) Counsel of any party is entitl own expense in a

(6) Definition. attorney acting a rights of the part any party in the

Source:
L.1955, c. 575, § 7.
St.1955, § 48.25(5).
St.1975, § 48.25(5).
L.1977, c. 29, § 37.
L.1977, c. 354, § 4.
L.1977, c. 355, § 2.

Adoption, placement
Paternity, rights of c
Procedure, see § 48.

Adoption and te
Wisconsin: Strainin

Infants ⇐68.1, 68
C.J.S. Infants §§

Indigent persons.
termination of pare
Department of Soci

In general 1
Duty of judge to a
Guardian ad litem

1. In general
Trial court, in pr
termination of pa
ceeding without de
er, parties were re
yer had been "enga
of representation i
tion. Matter of M..
116 Wis.2d 432.
Juvenile adjudic
United States Supr
venile's right to co

tem and independent counsel or guardian ad litem shall be provided and reimbursed in any manner suitable to the court regardless of the person's ability to pay.

(5) Counsel of own choosing. Regardless of any provision of this section, any party is entitled to retain counsel of his or her own choosing at his or her own expense in any proceeding under this chapter.

(6) Definition. For the purposes of this section, "counsel" means an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented, and who may not act as guardian ad litem for any party in the same proceeding.

Historical Note

Source:
L.1955, c. 575, § 7.
St.1955, § 48.25(5), (6).
St.1975, § 48.25(5), (6).
L.1977, c. 29, § 373, eff. July 1, 1978.
L.1977, c. 354, § 42, eff. Nov. 17, 1978.
L.1977, c. 355, § 2, eff. May 24, 1978.
L.1977, c. 447, § 68, eff. July 9, 1978.
L.1977, c. 449, § 101, eff. Nov. 18, 1978.
L.1979, c. 300, §§ 27, 28, eff. May 15, 1980.
L.1979, c. 356, § 6, eff. July 1, 1980.

Former Sections:
St.1975, § 48.23 was renumbered as § 48.28 by L.1977, c. 354, § 41, eff. Nov. 17, 1978.

Cross References

Adoption, placement of children with nonrelatives, see § 48.837.
Paternity, rights of claimants, see § 48.423.
Procedure, see § 48.42.

Law Review Commentaries

Adoption and termination proceedings in Wisconsin: Straining the wisdom of Solomon. Stephen W. Hayes and Michael J. Morse. 66 Marquette L.Rev. 439 (1983).

Library References

Infants ⇐68.1, 68.7(1), 205.
C.J.S. Infants §§ 41 to 67, 198, 199.

United States Supreme Court

Indigent persons, appointment of counsel, termination of parental status, see Lassiter v. Department of Social Services of Durham City, 1981, 101 S.Ct. 2153, 452 U.S. 18, 68 L.Ed.2d 640.

Notes of Decisions

---

1. In general

Trial court, in proceeding which resulted in termination of parental rights, erred in proceeding without determining that, absent waiver, parties were represented, and even if lawyer had been "engaged," there was no evidence of representation in sense required by this section. Matter of M.A.M. (1984) 342 N.W.2d 410, 116 Wis.2d 432.

Juvenile adjudications rendered prior to United States Supreme Court decision that juvenile's right to counsel at delinquency hearing was as crucial as adult's right to counsel at trial could not be considered for sentencing purposes, even to extent of showing pattern of conduct, if right to counsel had been denied in the juvenile proceeding; overruling Neely v. State, 47 Wis.2d 330, 177 N.W.2d 79, to the extent that it holds to the contrary. Stockwell v. State (1973) 207 N.W.2d 883, 59 Wis.2d 21.

2. Duty of judge to advise of rights

Decision determining that parental-termination statutes gave parent right to representation in court unless there was waiver and that, in any case, trial court had duty to make full explication of statutory rights, right to representation, right to continuance, right to request jury trial and right to request substitution of

Notes of Decisions

Factors considered 15.5
Statement of reasons 26

6. Extent of waiver of jurisdiction

State v. Johnson, (App.1984) 358 N.W.2d 824, 121 Wis.2d 237 [main volume] review denied 367 N.W.2d 223, 122 Wis.2d 783.

15. Evidentiary hearings

"Due process evidentiary hearing" determines whether jurisdiction in criminal court can be maintained on charge brought after juvenile becomes 18. State v. Montgomery (1989) 436 N.W.2d 303, 148 Wis.2d 593.

Adult criminal court had subject matter jurisdiction to hold due process evidentiary hearing to determine whether criminal court jurisdiction could be maintained on charge after juvenile turned 18. State v. Montgomery (1989) 436 N.W.2d 303, 148 Wis.2d 593.

15.5. Factors considered

Decision of whether to waive juvenile jurisdiction lies within sound discretion of juvenile court which must keep in mind that best interest of ... Interest of C.W. (App.1987) 419 N.W.2d 327, 142 Wis.2d 763.

Juvenile court had no authority to deny juvenile waiver on grounds that another court might give a more lenient sentence than juvenile court thought was appropriate. In Interest of C.W. (App.1987) 419 N.W.2d 327, 142 Wis.2d 763.

Where evidence is properly before juvenile court with respect to each criteria for juvenile waiver, court is required to consider each of the criteria and set forth in record specific findings with respect to criteria. In Interest of C.W. (App.1987) 419 N.W.2d 327, 142 Wis.2d 763.

22. Findings

Juvenile court, in deciding whether to grant juvenile waiver, abused its discretion by failing to consider all statutory criteria and by failing to make findings as to those criteria. In Interest of C.W. (App.1987) 419 N.W.2d 327, 142 Wis.2d 763.

23. Effect of procedural defects

State v. Lewandoski (App.1985) 364 N.W.2d 550, 122 Wis.2d 759 [main volume] review denied 371 N.W.2d 375, 123 Wis.2d 548.

26. Statement of reasons

Statement of relevant facts and reasons motivating juvenile court's granting or denying juvenile waiver must be carefully delineated in the record. In Interest of C.W. (App.1987) 419 N.W.2d 327, 142 Wis.2d 763.

SUBCHAPTER IV. HOLDING A CHILD IN CUSTODY

48.21. Hearing for child in custody

Notes of Decisions

Hearing 4

. Hearing

Stipulation by parties prior to custody hearing that parties had agreed to "continue the status quo" for 30 days to allow the situation "to cool," and so information could be gathered for formulation of recommendations to court constituted waiver of right to immediate custody hearing, and thus, conference at which stipulation was made was not abortive custody hearing which failed to comply with this section. In Interest of G.H. (1989) 441 N.W.2d 227.

3.23. Right to counsel

(1) **Right of children to legal representation.** Children subject to proceedings under this chapter shall be afforded legal representation as follows:

* * * * * * *

am) A child subject to a sanction under s. 48.355(6)(d) shall be entitled to representation by counsel at the hearing under s. 48.355(6)(c).

* * * * * * *

d) * * * Except as provided in par. (e), if a child is the subject of a proceeding involving a contested adoption or the * * * termination of parental rights, the court shall appoint legal counsel or a guardian ad litem for the child.

e) If a child is being adopted by his or her stepparent, the court is not required to appoint legal counsel or a guardian ad litem for the child in the adoption proceedings.

* * * * * * *

knowingly and voluntarily made and the court accepts the waiver.

★ ★ ★ ★ ★ ★ ★

(4) **Providing counsel.** In any situation under this section in which a * * * person has a right to be represented by counsel or is provided counsel at the discretion of the court, except for situations arising under sub. (2) where the child entitled to representation is a parent; and counsel is not knowingly and voluntarily waived; and it appears that the * * * person is unable to afford counsel in full, or the * * * person so indicates; the court shall refer the * * * person to the authority for indigency determinations specified under s. 977.07(1). In any situation under sub. (2) in which a parent is entitled to representation by counsel; counsel is not knowingly and voluntarily waived; and it appears that the parent is unable to afford counsel in full, or the parent so indicates; the court shall refer the parent to the authority for indigency determinations specified under s. 977.07(1). The court may appoint a guardian ad litem in any appropriate matter. In any other situation under this section in which a person has a right to be represented by counsel or guardian ad litem or is provided counsel or guardian ad litem at the discretion of the court, competent and independent counsel or guardian ad litem shall be provided and reimbursed in any manner suitable to the court regardless of the person's ability to pay.

★ ★ ★ ★ ★ ★ ★

Historical Note

History—

Subsec. (1)(am) created by—

1987 Act 27, § 880j, eff. Aug. 1, 1987.

Subsec. (1)(d) amended by—

1987 Act 383, § 3, eff. May 3, 1988.

Subsec. (1)(e) created by—

1987 Act 383, § 4, eff. May 3, 1988.

Subsec. (2m) created by—

1987 Act 27, § 880je, eff. July 1, 1988.

Subsec. (4) amended by—

1987 Act 27, § 880jm, eff. July 1, 1988.

1987 Legislation:

1987 Act 383, § 25(1)(b) provides:

"(b) The treatment of sections 48.23(1)(d) and (e), 48.355(2c), 48.365(2m)(a), 48.41(2)(a) and (b), 48.415 (intro.), (4)(a) to (c), (6)(a)2 and (b), 48.42(4)(a), 48.43(1)(intro.) and (6), 48.465, 48.81 and 48.91(2)(a) and (b) of the statutes applies to dispositional orders, extension of dispositional orders and adoption and termination of parental rights petitions filed on judgments granted on or after the effective date [May 3, 1988] of this paragraph."

48.237. Civil law and ordinance proceedings initiated by citation in the court assigned to exercise jurisdiction under this chapter

★ ★ ★ ★ ★ ★ ★

(2) The procedures for issuance and filing of a citation, and for forfeitures, stipulations and deposits * * * in ss. 23.50 to 23.67, 23.75 (3) and (4), 66.119, 778.25, 778.26 and 800.01 to 800.04 except s. 800.04(2)(b), when the citation is issued by a law enforcement officer, shall be used as appropriate, except that this chapter shall govern taking and holding a child in custody, s. 48.37 shall govern costs * * *, penalty assessments and jail assessments, and a capias shall be substituted for an arrest warrant. Sections 66.119(3)(c), 66.12(1) and 778.10 as they relate to collection of forfeitures do not apply.

★ ★ ★ ★ ★ ★ ★

Historical Note

History—

Subsec. (2) amended by—

1987 Act 27, § 880jp, eff. Aug. 1, 1987.

...ceipt of jurisdic

★ ★

(2)(a) As part of the inta
nary screens and intake co
custodian. If sub. (2m) apl
under s. 48.547 if the child

(b) No child or other per
in a multidisciplinary scree

(2m)(a) In counties that
shall be conducted for:

1. Any child alleged to

2. Any child alleged to
least 2 prior adjudications
or a local ordinance that s

3. Any child alleged t
worker to be directly mo
alcohol beverages or contr

4. Any child 12 years o
screen.

5. Any child who cons
parents.

(b) The multidisciplinary
other than those specified

★ ★

Historical Nc

History—

Subsec. (2)(a) renumbered fi
ed by—

1987 Act 339, § 22, eff. A

Subsec. (2m) created by—

1987 Act 339, § 23, eff. A

Notes of Decis

Transferred cases 1

1. Transferred cases

When juvenile intake worke
another county, 40-day time

48.243. Basic rights: dut

(1) Before conferring wi
worker shall personally ini
parents and children 12 yea
the need for protection or s
and:

★ ★

(b) The nature and possi
s. 48.17 * * *, 48.18 and 4

★ ★

Meaning of "this act". — For the definition of "this act," referred to in this section, see § 14-6-201(a)(xxiii).

§ 14-6-221. Reports of medical or mental exami... of results; copies.

The results of any medical or mental examination authoriz... the court shall be reported to the court in writing and signe... making the examination. The results may not be considered b... to adjudication but may be considered only in making a dispos... act or W.S. 14-6-219. Copies of the examination reports ... available to the child's parents, guardian, custodian or attorne... (Laws 1971, ch. 255, § 22; W.S. 1957, § 14-115.22; W.S. 19... Laws 1978, ch. 25, § 1; 1984, ch. 67, § 1.)

Meaning of "this act". — For the definition of "this act," referred to in this section, see § 14-6-201(a)(xxiii).

§ 14-6-222. Advising of right to counsel require... ment of counsel; verification of finan... tion.

(a) At their first appearance before the court the child an... guardian or custodian shall be advised by the court of the... represented by counsel at every stage of the proceedings includi... to employ counsel of their own choice.

(b) The court shall upon request appoint counsel who may b... ad litem to represent the child if the child, his parents, guardia... other person responsible for the child's support are unable to ob... appointment of counsel is requested, the court shall require th... parents, guardian, custodian or other person legally responsibl... support to verify their financial condition under oath, eith... affidavit signed and sworn to by the parties or by sworn tes... part of the record of the proceedings. The affidavit or sworn ... state they are without sufficient money, property, assets or ... counsel in their own behalf. The court may require further ... financial condition if it deems necessary. If the child requests ... parents, guardian, custodian or other person responsible ... support is able but unwilling to obtain counsel for the child, ... appoint counsel to represent the child and may direct rei... counsel fees under W.S. 14-6-235(c).

(c) The court may appoint counsel for any party when ne... interest of justice. (Laws 1971, ch. 255, § 23; W.S. 1957, § 1... 1977, § 14-8-123; Laws 1978, ch. 25, § 1; 1984, ch. 67, § 1.)

...nces. — As to right to assigned ...signment procedure generally, ...R.Cr.P.

...s. — For article, "Child Protec... ...ted Role for Members of the ...e Bar," see IX Land & Water L. ...).

Am. Jur. 2d, ALR and C.J.S. references. — Duty to advise of right to assistance of counsel, 3 ALR2d 1003.

Right to and appointment of counsel in juvenile court proceedings, 60 ALR2d 691; 25 ALR4th 1072.

23. Privilege against self-incrimination; rights of parties generally; demand for and conduct of jury trial.

...ild alleged to be delinquent may remain silent and need not be a ...inst or otherwise incriminate himself, whether before the court ... by subpoena or otherwise.

...rty to any proceeding under this act is entitled to:

...A copy of all charges made against him;

...Confront and cross-examine adverse witnesses;

... Introduce evidence, present witnesses and otherwise be heard in ...n behalf; and

... Issue of process by the court to compel the appearance of ...es or the production of evidence.

...rty against whom a petition has been filed or the district attorney ...d a trial by jury at an adjudicatory hearing. The jury shall be ...f jurors selected, qualified and compensated as provided by law for ...civil matters in the district court. The jury may be drawn from the ...f the district court or a special jury panel may be drawn from "jury ... three (3)" containing the names of persons residing within five (5) ...e city or town where the trial is to be held, whichever the court ...mand for a jury trial must be made to the court not later than ten ...fter the party making the demand is advised of his right to a jury ...posit for jury fees is required. Failure of a party to demand a jury is ...this right. (Laws 1971, ch. 255, § 24; W.S. 1957, § 14-115.24; W.S. ...3-124; Laws 1978, ch. 25, § 1; 1981, Sp. Sess., ch. 22, § 1.)

...nces. — As to trial by jury ...h. 11 of title 1. As to examina... ...d alternate jurors, see Rule 47, ...R.Cr.P.

..."this act". — For the definition ...ferred to in this section, see ...(iii).

...— For comment, "The Insti... ...Statute: Three Challenges to ...t of Juvenile Offenders," see ...ter L. Rev. 643 (1982).

...ALR and C.J.S. references. ...le court to require testimony ...LR 1229.

Admissions or confessions; self-incrimination in juvenile delinquency proceedings, 43 ALR2d 1133.

Cross-examination of witnesses in juvenile delinquency proceedings, 43 ALR2d 1144.

Privileged communications in juvenile delinquency proceedings, 43 ALR2d 1145.

Right to jury trial in juvenile court delinquency proceedings, 100 ALR2d 1241.

Applicability of double jeopardy to juvenile court proceedings, 5 ALR4th 234.

EXHIBIT 3

CHILD ADVOCACY GUIDELINES

GUIDELINES FOR ATTORNEYS FOR CHILDREN IN ABUSE, NEGLECT OR DEPENDENCY PROCEEDINGS

CHILDREN'S RIGHTS PROJECT

LEGAL ASSISTANCE FOUNDATION

OF CHICAGO

343 S. Dearborn St.
Chicago, Ill. 60604
(312) 341-1070

Guidelines for Attorneys for Children in Abuse, Neglect or Dependency Proceedings in Illinois

A. Prior to the Shelter Care Hearing 1/

* 1. Clarify your role. Are you being appointed as attorney only or as attorney and guardian ad litem? 2/ Be sure you understand the differing obligations imposed by these differing roles. Be prepared to withdraw as guardian ad litem or as attorney if you find representation of the child's "best interests" conflicts with representation of the child's objectives. Be prepared to explain your role to your client.

2. Prepare your client to meet with you by first introducing yourself to the child's caretaker if the child is too young to understand what a lawyer is.

* 3. Meet with your client. Explain the purpose of the interview: 1) to get to know each other; 2) to let you explain what will be happening in court; and 3) to find out information from the client about the case. Unless your client cannot speak, 3/ you should try to learn from your client her view of the facts, her wishes concerning placement, and any problems she is experiencing that require the attention of counsel (e.g. school placement problems, lack of medical care etc.).

* 4. Advise your client about what to expect at the shelter hearing and at subsequent hearings. Explain who are all the participants at the hearing. Explain your role and contrast it with the roles of the other participants. Explain your clients rights in foster care (using "Your Rights in Foster Care and Shelters" other brochure) and given the client key phone numbers she may need if she experiences problems in care. Explain the attorney-client privilege and the importance of regular contact between you and your client. Make sure you can reach your client and she can reach you.

5. If your client is above the age of consent for release of records, 4/ secure from your client consent for release of information from DCFS, mental health agencies, therapists and schools. If your client is below the age of consent, prepare a motion for a court order authorizing release of information to you.

6. Speak with the DCFS investigator(s), police investigator(s) and caseworker(s). Ask the following questions, at a minimum:

a) how long has she been assigned to the case? What other workers have been assigned?
b) who has she spoken to about the allegations--when? for how long? what did each person say?
c) what are the allegations that are the basis of the petition? other facts that support the allegations?
d) what is her recommendation concerning placement of your client?

e) has she considered alternatives to placement? what alternatives were considered and what conclusions did she reach about each alternative? why?
f) what is the permanency goal for the child? what type of order/services/ service plan will she be seeking or developing in the near future; long term? to meet that goal?
g) what services providers are or have been involved with the child or family?

You may also wish to use this opportunity to discuss with the caseworker services and plans you believe your client needs.

7. Contact and interview any identified service providers, school personnel, medical or mental health professionals, or other witnesses.

* 8. Determine whether your client should testify at the shelter care hearing. 5/ If so, prepare your client to testify.

9. Discuss with the assistant states attorney possible dispositions, such as returning your client home under a protective order under Ill. Rev. Stat. ch. 37 Section 802-25, a continuance under supervision under Section 802-20 or "other such order" under Section 802-20(4), including dismissal if there is no probable cause to believe your client is abused, neglected or dependent. If all the parties agree to such an order, make sure your client understands and can comply with all of its conditions. 6/ Situations in which a prompt return home order are apppropriate include (but are not limited to): a) cases in which the perpetrator is no longer in the home and the child's custodial parent is taking appropriate action against him; b) cases in which your client has retracted allegations of abuse and other evidence of abuse is lacking; c) neglect cases in which supportive services (such as cash assistance or homemaker services) could promptly remedy the lack of care provided to your client; d) abandonment cases in which the custodial parent has returned after an explained absence where the client was adequately care for during the absence.

10. Seek permission from the parents' attorney to interview the parents. 7/

10. If appropriate, seek an independent mental health or other medical evaluation of your client and/or his family, pursuant to Section 802-11, 802-19.

11. If no hearing is held within 48 hours of the state's taking protective custody, file for a writ of habeas corpus.

B. At The Shelter Care Hearing

1. Consider making a "special appearance" under lllinois Code of Civil Procedure Rule 2-301 if your client has not been served with process and has any reason to object to court

jurisdiction.8 /

* 2. Be prepared to present evidence and argument on the three elements at issue in a temporary custody hearing under Section 802-10(1):

a) probable cause to believe the minor is abused, neglected or dependent.9/
b) immediate and urgent necessity that the minor be placed in a shelter care facility.10/
c) reasonable efforts made or good cause shown why reasonable efforts cannot prevent or eliminate the necessity of removal of the minor from his or her home. 11/

3. Prepare cross-examinations of the DCFS investigator and assigned caseworker, the parents, and any other witnesses you anticipate will be called by other parties.

* 4. Demand a speedy trial under Section 802-14 and demand affidavits pursuant to Ill.Supreme Court Rule 231 when any continuance is requested by an opposing party.12/

5. Request all necessary medical and psychological evaluations to prepare the case for trial. See Sections 802-11; 802-19, making physical exams mandatory in abuse cases, discretionary in neglect cases; Section 802-21(2) (investigation and disposition report for court).

6. Make a motion for the court to order preventive or reunification services.

7. Request a specific visitation order, setting forth the regular time and place of visits, responsibility for transportation, and designated person to supervise visits if supervision is necessary. 13/

*8. Give copies of all court orders to your client and maintain copies in your files.

C. When the Petition for Adjudication of Wardship is Filed

1. Review the petition for legal sufficiency. Petitions must allege facts, not legal conclusions. File a motion to dismiss the petition for failure to state a cause of action if insufficient facts are alleged.14/

2. If the petition is sufficient, file discovery. Discovery may include requests for production, interrogatories, requests to admit, and notices of depositions. An adversary's "open file" policy does not constitute an adequate answer to formal discovery requests.15/

3. Move to join any persons as parties respondent against whom your client needs any orders of protection. Section 802-

13(4).

D. In the Interim Before Trial

* 1. Contact your client to determine if her needs are being met.

2. If necessary services have not been provided for your client, consider moving for a writ of mandamus (Section 802-28(2), a report of the custodian or guardian (Section 802-28) or other interim relief.16/

* 3. Contact DCFS to a) secure copies of family service plans; b) determine what progress the family has made toward reunification or other resolution; c) ascertain if your client is experiencing any problems requiring your attention.

4. Send a confirming letter to DCFS concerning promised services and documents, requesting notification of any change in your client's placement or services, and requesting copies in advance of court dates of any reports DCFS writes or secures. Confirm in writing when documents are received that all documents responsive to your request have been furnished.

5. Determine if a non-custodial parent is capable of paying child support, and if so, consider seeking a support order.

* 6. Review carefully any reports by DCFS, service providers, psychiatric or psychological evaluations and other materials produced to assess your client or her family.

* 7. Renew any motion for a speedy trial if trial date exceeds the statutory time period.

* 8. Secure all discovery.

* 9. Contact all known witnesses.

* 10. Prepare direct and cross examinations.

*11. Determine if the parties can agree to a disposition without trial. 17/

* 12. Prepare your client for direct and cross examination, unless it is clear that neither you nor your opposing consel will call your client to testify.

* 13. Prepare for and attend the pretrial conference held 60 days after the filing of the petition. Know the status of the case and prepare to move for any orders you need before trial. If a pretrial conference under Section 802-14(b)(2) is not held, move to schedule one.

E. At Trial

* 1. Request an in camera examination of your client if she must testify and doing so may be traumatic for her.

* 2. Move to seclude non-party witnesses.

* 3. Object to the admission of any evidence contrary to your client's interests if such evidence is arguably inadmissiable under the rules of evidence. 18/ See Section 802-18.

* 4. Present testimony in your client's case-in-chief.

* 5. Cross examine adverse witnesses

6. Explain the court's ruling to your client; explain the upcoming dispositional hearing.

F. Prior to Dispositional Hearing

* 1. Explore with your client her wishes as to placement and services and the reasons for such wishes. Discuss alternative placements. Do not promise that she will receive particular placement, but promise to investigate any placement she proposes. Discuss with your client any reasons why a desired of placement is inappropriate or unavailable.

* 2. Review all DCFS service plans and discuss with the DCFS worker and any private agency workers the family's ccompliance with the plan. Discuss DCFS's or private agency's plans for placement and continuing services.

* 3. If continuing placement is a possible dispositional order, discuss with your client the visitation she would like with one or both parents.

* 4. Review all reports in the case, including school records, medical records, DCFS files, and mental health reports. Seek court orders in advance of the dispositional hearing to compel production of any reports you cannot otherwise secure.

5. Request the public defender's or private attorney's permission to speak to the child's parents to determine what disposition they are seeking.

6. If time permits, consider visiting the foster home and the natural parents' home.

* 7. Explain to your client possible outcomes of the hearing and their effect on him.

* 8. Discuss with opposing counsel possible agreements as to disposition without a hearing.

F. At the Dispositional Hearing

* 1. Present your recommended dispositional plan. See Section 802-22. Introduce evidence from service providers and/or independent experts concerning the appropriate plan. Clearly state the child's wishes and advocate for these wishes unless you have clarified that your role is to advocate for the child's "best interests". See Section 802-27(2) regarding the court's duty to ascertain and consider the child's views and preferences to the extent appropriate in the particular case.

* 2. Prepare your client to testify if you plan to call her as a witness or if she may be called by an adverse party.

* 3. Secure written dispositional orders which conform to Sections 802-23 and 802-27, and include the permanency plan in the cazse as a part of the dispositional order. Provide copies of these orders to your client, her parents and foster care provider.

G. After Disposition

* 1. Explain the court's ruling and its effect to your client.

* 2. Explain any continuing role you will have in subsequent proceedings. Make sure your client knows when and how to contact you.

* 3. Explain to your client his right to appeal and the statutory appeal deadlines. Assist the client in filing a notice of appeal pursuant to Illinois Supreme Court Rule 303 if he wishes to appeal. If the appeal is meritorious, assist the client in prosecuting the appeal or in securing alternative counsel.

H. Review Hearings

1. Move that the court hold an 18 month review hearing under Section 802-28(3) whenever 18 months has elapsed without such a hearing for your client.

2. Contact your client to determine her current needs and to ascertain any problems concerning placement and services.

3. Secure a copy of the DCFS service plan and other records concerning the child's medical, psychological, and educational needs.

4. Discuss with the DCFS caseworker her views as to the case status, appropriate goals in the case, and recommendations concerning continued placement and services.

5. Consult with any attorneys who previously were assigned

to the case.

6. Consider securing an independent social work or psychological assessment if DCFS's recommendations or report seem inadequate.

7. Prepare any motions for any relief your client needs.

7. Prepare your client for the hearing and prepare to question DCFS workers and others involved with the case.

8. Attending the review meeting or hearing. Consider seeking administrative review or a relief from the juvenile court on motion if necessary services or appropriate goals are not provided at the review.

I. At Any Time, As Appropriate

1. Seek an order on behalf of your client for child support against any parent able to pay support, pursuant to Section 806-9.

2. If adoption is a reasonable goal for your client, seek the filing of a petition to terminate parental rights. Move to terminate parental rights if your client wishes to be adopted and the case satisfies the statutory grounds for adoption under Ill. Rev. Stat. ch. 40 Sections 1501 et seq. 19 /

3. Seek "report of the guardian" under Section 802-28 if DCFS or other guardian has failed to take appropriate action on behalf of your client.

4. Move to alter any dispositional order which is no longer appropriate, pursuant to Section 802-23(b)(3), 802-28(3).

5. Move to vacate court jurisdiction if you client so wishes and understands the consequences of such an order; oppose any motion to vacate jurisdiction or to terminate guardianship if your client wishes to remain in placement.

Unless otherwise indicated, cites are to the Juvenile Court Act, Ill. Rev. Stat. ch. 37 Sections 801 et seq. (1987 recodification).

* Indicates action which is mandatory in providing minimally adequate representation.

1/ Shelter care hearings, also known as temporary custody hearings or detention hearings must occur within 48 hours of the time DCFS or other authorized person takes protective custody of the child, otherwise protective custody lapses. See Section 802-9; 802-10(6). For this reason, counsel will likely not have time to interview all DCFS workers, service providers and parents before the hearing.

2/ Illinois law provides for appointment of both an attorney and a guardian ad litem for nearly all children who are the subject of abuse or neglect reports. See Sections 801-5(1) and 802-17. A lawyer is bound by the Canons of Professional Responsibility zealously to pursue the lawful objectives of his client. A guardian ad litem is bound to seek the "best interests" of his client. These roles may conflict, for example, when a client seeks a goal that clearly is severely detrimental to her.

3/ It can be useful for counsel, paraprofessional staff, or a social worker employed by counsel to "interview" even babies, for the following reasons: a) counsel may observe signs of abuse or neglect; b) counsel may observe the interaction between the infant and his parents or other care providers; skilled counsel may detect special needs of the infant; d) placement problems -- including a lack of a placement or lack of assigned caseworkers-- may be detected by trying to arange an interview and e) counsel may be more motivated to work for a child he has met in person than one he has never met or spoken with.

4/ See Section 801-8 regarding release of juvenile court records to counsel (counsel is entitled to inspect and copy court records).

5. Testifying need not be traumatic for all children if they are adequately prepared. For some children, testify can be as cathartic as it is for some adults; for others, testifying can be extremely traumatic if it forces them into frightening emotional conflicts with their parents. Children's testimony can be extremely persuasive and can often affect the outcome of a case. In determining whether a child should testify, consider:

a) the child's age, maturity and communication skills--how reliable is her testimony?

b) the extent of the child's knowledge of facts at issue;

c) the child's wishes about testifying;

d) your ability to prepare the child for direct and cross-examination;

e) the likelihood of hostile or difficult questions on cross-examination;

f) whether testifying presents emotional conflicts or

benefits for the child;

g) how the particular judge views children's testimony.

Illinois law presumes that children are competent to testify in abuse, neglect or dependency proceedings, Section 801-19(4)(b), but this presumption may be overcome by evidence of incompetence. The traditional test for competence is whether a child can distinguish truth from lies.People v. Sims 251 N.E. 2d 795 (check).

6. Consequences of violation of such conditions may include a contempt citation (section 802-26) and renewed proceedings on the underlying petition for adjudication of wardship. Section 802-20(5).

7. When any party is known to be represented by counsel, an attorney ethically cannot contact the party without permission of that counsel. Code of Professional Responsibility, DR 7-104.

8. But note that service of process on minors is now excused under the Act. Section 802-15(1). This excuse of service is arguably unconstitutional. A special appearance should be filed to avoid waiving arguments against the court's assumption of jurisdiction without service of process.

9. See Sections 802-3, and 802-4 for definitions of abuse, neglect, and dependency.

10. See Section 802-10.

11. See Section 802-10, P.A. 1492 and federal law concerning reasonable efforts at 42 U.S.C. 671 and 45 C.F.R. 1356.21(d).

12. Rule 231 requires a motion for a continuance of any trial, supported by an affidavit setting forth facts establishing sufficient reason for granting a continuance. See, e.g., Mann v. People, 98 Ill. App. 3d 448, 424 N.E. 2d 883, 54 Ill. Dec. 133 (4th Dist. 1981).

13. The Agreed Order in Bates v. Johnson, 84 C 10054 (N. D. Ill. June 5, 1986) provides that DCFS will provide weekly in-home visits between natural parents and children in DCFS temporary custody or with "return home" permanency goals. A juvenile court order, may, however, provide for a different frequency or location for visits.

Specific court orders which set forth how visitiation will be arranged, who will provide transportation, who will supervise, setting a regular time for visits, and what to do in the event of cancellation can assist the parties and promote smoother visitation.

Supervision of visits is a restriction on visitation which should not be required in the absence of a court order. The Juvenile Court of Cook County (but not other counties) believe, however, that all visits must be supervised, however, in the absence of a court order to the contrary.

14. See Section 802-13 (allegations of fact are required); Illinois Code of Civil Procedure Section 2-603(a); In re Harpman, 134 Ill. App. 3d 393 (4th Dist. 1985).

15. The open file policy is not sufficient. Parties are entitled to documents reasonably obtainable by opposing counsel, not just documents counsel already has obtained and maintained in a file.

16. Since juvenile court proceedings are civil in nature, see Section 802-18(1) and People ex rel Hanrahan v. Felt, 48 Ill. 2d 171; 269 N.E. 2d 1 (1971), the Illinois Code of Civil Procedure's provisions for injunctive relief, Ill. Rev. Stat. ch 110 sections 11-101 et seq., should be available in juvenile court.

17. In Cook County, cases settled by means of a protective order normally are set for periodic progress reports and then dismissed on a motion of the assistant state's attorney.

18. See Section 802-18 regarding evidence at adjudicatory hearings. The preponderence of the evidence standard applies, as does the hearsay rule, except as specifically enumerated--i.e. previous statements by the minor regarding allegations of abuse or neglect are admissible. Section 802-18(4)(c).

19. Any party may file a petition under the Act. See 803-15 and see,e.g., In re Jennings, 368 N.E. 2d 864, 68 Ill. 2d 125, 11 Ill. Dec. 256 (1977); Konczak v. Byra, 35 Ill. App. 3d 217, 371 N.E. 2d 136, 13 Ill. Dec. 441 (2d Dist. 1977). If the state's attorney refuses to prosecute the petition, however, counsel may have to seek an order compelling prosecution.

Bibliography Concerning Duties of Children's Counsel:

Protecting Children Through the Legal System, National Legal Resrouce Center for Child Advocacy (1981)

Foster Children in the Courts

NY State Bar Association Standards for the Representation of Juveniles

Legal Aid Society of New York, Training Manual for Law Guardians

Supervision of visits is a restriction on visitation which should not be required in the absence of a court order. The Juvenile Court of Cook County (but not other counties) believe, however, that all visits must be supervised, however, in the absence of a court order to the contrary.

14. See Section 802-13 (allegations of fact are required); Illinois Code of Civil Procedure Section 2-603(a); In re Harpman, 134 Ill. App. 3d 393 (4th Dist. 1985).

15. The open file policy is not sufficient. Parties are entitled to documents reasonably obtainable by opposing counsel, not just documents counsel already has obtained and maintained in a file.

16. Since juvenile court proceedings are civil in nature, see Section 802-18(1) and People ex rel Hanrahan v. Felt, 48 Ill. 2d 171; 269 N.E. 2d 1 (1971), the Illinois Code of Civil Procedure's provisions for injunctive relief, Ill. Rev. Stat. ch 110 sections 11-101 et seq., should be available in juvenile court.

17. In Cook County, cases settled by means of a protective order normally are set for periodic progress reports and then dismissed on a motion of the assistant state's attorney.

18. See Section 802-18 regarding evidence at adjudicatory hearings. The preponderence of the evidence standard applies, as does the hearsay rule, except as specifically enumerated--i.e. previous statements by the minor regarding allegations of abuse or neglect are admissible. Section 802-18(4)(c).

19. Any party may file a petition under the Act. See 803-15 and see,e.g., In re Jennings, 368 N.E. 2d 864, 68 Ill. 2d 125, 11 Ill. Dec. 256 (1977); Konczak v. Byra, 35 Ill. App. 3d 217, 371 N.E. 2d 136, 13 Ill. Dec. 441 (2d Dist. 1977). If the state's attorney refuses to prosecute the petition, however, counsel may have to seek an order compelling prosecution.

Bibliography Concerning Duties of Children's Counsel:

Protecting Children Through the Legal System, National Legal Resrouce Center for Child Advocacy (1981)

Foster Children in the Courts

NY State Bar Association Standards for the Representation of Juveniles

Legal Aid Society of New York, Training Manual for Law Guardians

Child Advocacy Within Legal Services Programs

Faculty: Robert Brenner
Southwestern Pennsylvania
Legal Aid Society, Inc.

Kathi Grasso
Child Advocacy Division
Legal Aid Bureau of Baltimore, Inc.

Patrick Murphy
Office of the Public Guardian

PENNSYLVANIA CHILD ADVOCACY PROJECT

ANALYSIS/PROPOSAL

Project Directors
Child Advocacy Committee
June 1989

The Casey Administration proposal to fund establishment of a Children's Advocacy Project presents a unique opportunity to carefully design, from inception, a comprehensive, effective approach to meet the need for legal representation of those least able, by virtue of age and dependency, to protect and assert their own interests. The Governor himself highlighted the prioritization of such concern in his "State of the Commonwealth" Address this past January:

> We feed our children, we put clothes on their bodies, but first and foremost we must make them safe from violence and neglect.

At this point, the Department of Public Welfare has requested the Pennsylvania Legal Services Center to formulate a plan to implement such statewide advocacy initiative. PLSC has, in turn, sought the assistance of Pennsylvania legal services programs in developing such plan. While knowledge of/experience with the particular subject area of child advocacy representation is, with a few exceptions, quite limited among local programs, their involvement in developing and assisting implementation of such effort is crucial in helping to insure that the standards of legal representation adopted by such advocacy project meet the high qualitative levels achieved by statewide legal services during the past two decades. This study seeks to identify the considerations that should

govern design of such project and to define the optimal use of such child advocacy funding.

SUMMARY OF FINDINGS/RECOMMENDATIONS

A summary of the study's findings and recommendations is set forth below:

A. Pennsylvania's Child Advocacy Project should attempt, in this "demonstration" year, to establish a solid programmatic foundation upon which future, more expansive efforts may be predicated.

B. The Project's primary focus must be on effective, comprehensive individual representation. The Project's twofold guiding objectives provide a thematic coherence to this statewide enterprise: (1) preference for preservation of the child, under established safe and secure conditions, in his/her own home; (2) where placement is necessary, insuring a safe and stable home environment and plan for expeditious reunion with family or alternative permanent home-based placement. The consistency of such objectives with state and federal statutory goals strengthens their character and authority.

1. At present, across the Commonwealth, legal representation of children is largely pro forma; with a very few exceptions, children are not provided effective legal advocacy.

2. In order to provide legal representation commensurate with such objective, a broad-based concept of child advocacy must be adopted by the Project; the ABA Standards well-define the necessary constituent elements.

3. The Administration's proposed $1 million funding for child advocacy provides a unique opportunity to remedy the pattern of "benign neglect" that has generally characterized services until now. Such funding will permit the creation and implementation of four model projects and supporting components that will serve to guide future, more expansive efforts to provide every child in need access to effective advocacy and representation.

C. The Project's secondary focus must be directed at "issue-oriented advocacy", identifying and effectively responding to specific problem areas adversely affecting substantial numbers or children within a locale, region and/or across the Commonwealth.

D. In order to fully exploit the benefit of this demonstration year grant, a number of "new child advocacy projects" should be established to implement the enterprise. These innovative model projects, by virtue of their population-specific design and function, will accentuate with sharp definition and visibility the crucial importance of effective child advocacy, enhancing prospects for its acceptance as an essential, inherent element of the juvenile justice system.

E. Staffing of such model projects should reflect an interdisciplinary mode consistent with the socio-legal character of this field of advocacy.

F. Projects should be selected for implementation in both urban and rural environments and distributed among target areas of differing population sizes, with necessary adjustments effected to conform to the unique aspects of each respective setting.

G. Projects should be evaluated utilizing "functional standards": for individual representation, the ABA standards: for "issue-oriented advocacy", the implementation plan.

H. A Child Advocacy Support Component should be established in order to assure provision of necessary technical, training, and evaluative input to such projects.

I. A Statewide Coordinator for Child Advocacy should be retained by PLSC to insure implementation of the statewide Project, as well as to establish continued effective relations with DPW. Additionally, as statewide issues adversely affecting child advocacy are identified, a Child Advocate Ombudsman should be created to develop appropriate strategies to address them.

I. GENERAL CONSIDERATIONS

At the outset, two primary factors must be recognized as central to Project analysis and planning:

A. The funding level -- $1,000,000 -- constitutes a limited resource for child advocacy purposes; to insure comprehensive effective legal representation to the total Pennsylvania child population would require many multiples of this annualized budget;

B. How that limited resource is utilized -- the objectives, structure, and processes developed in this first year of Project funding -- will have a substantial, determinative impact in defining the scope and character of future legal advocacy programs evolving from this initial implementation phase. Ideally, establishing such enterprise from inception affords its creators the unique opportunity to carefully craft a plan that can articulate clear objectives; formulate "ideal" standards and design concomitant programmatic formats directed at their attainment; and, integrate an effective evaluative process into the essential structure of such project that will permit detailed assessment and, where necessary, further refinement in this initial year of child advocacy development.

II. PROJECT OBJECTIVES

As will be revealed below, the predominant thrust of the Pennsylvania Child Advocacy Project must be directed at meeting the needs of individual children requiring effective advocacy in juvenile dependency proceedings. As a secondary, more limited purpose, such project should initiate efforts to identify and effectively respond to various specific local, regional and/or statewide problem areas which substantially adversely impact upon Pennsylvania's children.

A. EFFECTIVE INDIVIDUAL REPRESENTATION

Federal and state legislation as well as studies of the plight of children in the legal system suggest a strong twofold thematic emphasis upon which such advocacy project's individual representation efforts should be predicated: (1) a preference for preservation of the child, under safe and secure conditions, in his/her own home; (2) where placement outside the home is necessary, insuring that necessary services are provided to the child in a safe, nurturing environment and that the child is reunited as expeditiously as possible with the natural family or placed in an alternative permanent home.

1. PRESERVATION IN OWN HOME/REASONABLE EFFORTS

Pennsylvania's current Juvenile Act identifies its central purpose as "preserv(ing) the unity of the family wherever possible" and "separating the child from (the)

parents only when necessary for (the child's) welfare or in the interest of public safety." 42 Pa. C.S.A. 6301 (6) (1) (3). The state's Child Protection Services Law of 1975 reflects a similar home-based emphasis. Moreover, the federal government has sought to encourage states to preserve children in their own homes and discourage outside placement through the provisions of the "Adoption Assistance and Child Welfare Act of 1980", Public Law 96-272, 42 U.S.C. 620 et seq., by requiring that before a state can receive federal reimbursement for foster care placements, the judge must find the state has made "reasonable efforts" to prevent placement of the child or to reunite the child with his/her own family; moreover, placements must be reviewed every 6 months by court/administrative body, with a full judicial review after 18 months, in order to determine whether the child may be returned home.

Equally essential to the home-based focus is the need to insure that the child in his/her own home is provided the requisite assistance/services to guarantee freedom from conditions of abuse and/or neglect. The "reasonable efforts" criteria established by P.L. 96-272 establishes an <u>affirmative</u> obligation on states to assist the child/family in preserving the child in the home.

2. **A SAFE AND APPROPRIATE PLACEMENT AND PERMANENCY PLANNING**

In those cases where removal from the home is deemed necessary by the Court to best serve the child's interests, the state's obligation to provide effective, comprehensive planning/assistance is no less stringent. If the placement is intended to represent a limited, finite period after which it is contemplated the child will return to the home, emphasis must be placed on insuring that all required services and other aspects of planning are expeditiously and effectively provided in order to minimize that period of removal. If the prospects for eventual return to the home are less certain, statutory prescriptions require a "permanency planning" approach designed to effect the eventual establishment of an alternative safe, stable, home environment. The child has a right and interest in permanence and stability within a caring family, rather than as a chronic ward of an institution or as a foster child in a succession of homes. Finally, whatever the duration of placement, the child is afforded through federal statutory authority (Public Law 96-272) the right to adequate care and guarantee against abuse or neglect.

B. ISSUE-ORIENTED ADVOCACY

While individual child advcocacy in dependency proceedings will, of necessity, be the project's dominant concern, a secondary focus must be targeted at identifying and developing effective responses/strategies to those more generally impacting "problem areas" within the

legal-economic-social-medical matrix that are determined to place the rights and interests of Pennsylvania's children "at risk".

III. DEFINING "CHILD ADVOCACY"

As the studies described below indicate, the traditional view of such advocacy in a legal proceeding has been quite narrowly drawn, often constituting little more than pro forma representation in a largely pre-determined pro forma proceeding. As a result, such representation has had little effect in securing the child's rights/remedies prescribed by the statutory mandates cited above.

To the degree that the Child Advocacy Project seeks to assert/enforce the legal interests of its vulnerable clientele, it must adopt, ab initio, a far broader definition of such representation. In this regard, the American Bar Association has established a set of detailed guidelines which, with only minor modifications, would quite effectively encompass such charge (a copy is appended to this analysis). These standards create a concept of representation that transcends in both depth and duration of representation the far more limited counsel traditionally provided. Moreover, they recognize and require respect for the sentiments of the child-as-client, an element minimalized/negated by present practices. This comprehensive set of guidelines reflects the characteristics inherent in child advocacy representation: the frequency of

dispositional/review hearings: the requirement for continuous monitoring: the need for special sensitivity in eliciting and assessing the child's preferences; the ability to maintain effective representation over a substantial (often multi-year) period of time.

The cumulative import of such prescriptions is to require the child advocate to adopt a representational approach significantly broader in dimension than that satisfactory for more routine limited-issue matters:

> The traditional tasks of an attorney -- thoroughly investigating facts and legal issues, presenting evidence and legal arguments, examining and cross-examining witnesses, preserving a record and taking appeals or seeking other forms of legal relief, counseling clients to aid them in making decisions and generally utilizing their advocate's persuasive skills are central to the functions of the child's attorney.
>
> However, because the client is a juvenile and because the juvenile court is a "socio-legal" court, a court whose decisions must be grounded upon the expertise and resources of social services and clinical disciplines, these tasks must be performed with an extra measure of sensitivity and specialized interdisciplinary competence. (J. Fink, "Determining the Future Child")

IV. PRESENT STATUS OF CHILD ADVOCACY IN PENNSYLVANIA

Regrettably, in current Pennsylvania dependency practice, the actual situation is quite the reverse: child representation reflects a predominant pattern of minimal involvement. Evidence of such inattention is reflected in

the limited quantitative data available regarding the scope and degree of representation. One recent statewide survey conducted by the Juvenile Law Center of Philadelphia provides statistical support confirming the generally perceived "inadequacy" of current efforts at child advocacy in Pennsylvania. Among other findings, the study determined:

1. Attorneys often are not appointed for children in dependency cases. Only 59.3% of respondents indicated that attorneys are "always" appointed in their county's dependency cases.

2. Attorneys often do not participate in the development of Family Service Plans for their clients. Thus, 66.1% of the respondents indicated they are not regularly invited to participate in developing FSP's for their clients; 50.9% of those invited do not routinely attend such planning meetings.

3. The "reasonable efforts" determination, cited previously, is often nothing more than a pro forma affirmation of country Children and Youth Agency efforts: 64.4% indicated that the "reasonable efforts" question is investigated only casually; 16.9% noted that the matter was totally excluded from judicial decision-making, the court essentially accepting

without qualification the agency's recommendation regarding placement. Indeed, 62.7% indicated that they had never experienced a judge or master who had found that "reasonable efforts" were not made to prevent placement/reunify a family.

Another, more comprehensive recent study of legal representation of children in New York State reflects similar characteristics of the practice in that jurisdiction:

> ...rampant waivers of counsel by children, a serious lack of specialized expertise and training of attorneys, failures by attorneys to utilize existing statutory mechanisms to obtain clinical and social assistance, failure to engender system accountability through appellate or special litigation, and a glaring lack of preparation, even to the extent of failures to interview clients. Knitzer, J. and Sobie, M. "Law guardians in New York State: A study of the legal representation of children" (NYS Bar Assocation 1984)

Criticizing what the study deemed to be "phantom" representation, the researchers reported seriously inadequate or only marginally adequate represention in 45% of the cases and truly effective representation in only 4%. When one compares the scope of such services presently provided with that defined by the ABA standards, underscored by state and federal statutes, it is clear that there exists a substantial statewide need for child advocacy representation of a far more intense, broader order.

V. FORMULATING THE PROJECT -- BASIC COMPONENTS

A. ESTABLISHING A "MODEL" CONSTRUCT

Given the limited nature of this initial year funding for child advocacy, optimal utilization will be achieved by establishing a limited number of carefully structured and designed demonstration projects which can serve, if additional funding is later secured, as the basis upon which a more comprehensive statewide system can be predicated.

Consistent with the governing project objectives articulated previously, the primary programmatic emphasis of each model project must be directed at providing effective legal advocacy through individual representation in dependency proceedings. Representation will begin when the petition is filed or, if the child has been removed from the home on a emergent basis, at the shelter care proceeding. Project offices will continue their representation through all phases of disposition and postdispositional proceedings (e.g., foster care reviews, family service planning meetings, termination of parental rights hearing, appeals). As part of such representation, it will be necessary to insure that during the pendency of the proceeding, both children and families are provided needed services as ordered by the court.

On a secondary basis, each project will utilize its unique focus and expertise to identify/assess selected systemic problem areas affecting children in its particular

jurisdiction (e.g., child health needs, child nutrition needs, right to special education, representation in mental health hearings, termination proceedings, etc.) and formulate effective proposals to address deficiencies noted. To maximize the number of areas investigated, it might be beneficial to distribute differing problem-area issues among the model projects: the resulting generation of several sets of analyses/proposals could thereafter be reviewed for possible application in similar situations elsewhere in the state. From a long-term perspective, improvements effected through such issue-oriented advocacy might have a significant impact in reducing the causative factors that propel many of the state's individual children into a "dependent" situation.

B. PROJECT STRUCTURE

Given the general characteristics of such demonstration projects described above, it is essential to determine the most appropriate structure to be selected for their implementation. Three principal formats might be utilized: existing child advocacy programs (currently, only 2 significant projects in state, both more restricted in design/function than that of model proposed); existing legal services programs; and "new child advocacy projects" to be incorporated for the purpose of implementing the project. A careful analysis of the benefits/detriments of these alternatives reveals a clear preference and compelling

justification for establishing the "new model project" format. Among the principal advantages of such format are the following:

1. Each project will be established, ab initio, with an overarching conceptual base, defined objectives, a representation system designed on an "ideal" model, and an integrated broadly-defined construct for youth advocacy.

2. These new model projects will be consistent in form and spirit with DPW's innovative thrust to establish an effective system of child advocacy; they will permit the state to evidence this new commitment in concrete terms by funding specifically child-centered projects which give "high-definition" to this essential need.

3. Their limited, specific focus on a specialized target group will increase their potential for securing additional child-advocacy related grants, thus enhancing services beyond that provided by the state.

4. They will be better positioned and "identified" to increase community awareness and involvement in addressing children's needs.

5. Their clearly defined structure, articulated standards and functions will enhance the prospects for effective assessment/evaluation during the initial year of implementation, and, if renewed, for measuring longer-term effectiveness of child advocacy efforts.

6. They will afford a challenging opportunity for experienced attorneys (presumably drawn from existing legal services programs) to participate in the creation of a novel, important enterprise for the 1990s.

In terms of disadvantages, the principal shortcoming is the comparatively higher start-up costs associated with creating a new organization. Such factor can, however, be offset to some degree by presumed lower personnel costs generally characteristic of new enterprises. Moreover, additional reductions might be effected through cooperative arrangement with local legal services programs for shared use of various resources (library, equipment, etc.).

In addition, at inception, the project will lack an experienced in-house staff. However, it is contemplated that the professional legal complement of such staff shall be derived, in large part, from experienced legal services attorneys interested in the new venture.

Finally, the new child advocacy projects will initially lack established networks/developed relations with social service agencies, the Court, bar and other community elements. However, the anticipated presence on staff of experienced legal services attorneys familiar to the community should expedite the process of establishing new linkages to insure effective inter-agency interaction. Indeed, from a different perspective, the very lack of such "established" character may, in fact, have a quite beneficial effect: permitting the advocacy project a unique

opportunity to define and effect acceptance of a new, broader definition of children's rights/remedies within its own social services/legal community.

C. STAFFING

With respect to composition of staffing, the predominant model of current effective advocacy projects suggests the adopting of an interdisciplinary format, employing a complement of staff attorneys (the "legal component") working in concert with social work-oriented professionals, e.g., social workers, investigators, monitors, case administrators (the "social component") in joint delivery of services. Such essential mix in staffing composition affords the project the necessary personnel required to effect the broad-based concept of advocacy delineated above.

The inclusion of the "social component" is predicated on the fact that the dependency case is, as noted above, "socio-legal" in essence. Given such multi-dimensional nature, interdisciplinary representation has been found, in a number of other jurisdictions, to be particularly effective. In essence, the attorneys establish the legal goals and parameters of the cases; the social component assists in implementation (e.g., investigation, assessment of natural home, foster home, evauations of agency "plans of service" in terms of interest of children/families, case

planning, program referrals, service monitoring, crisis intervention, etc.).

In addition to working with the attorneys in individual representation cases, such social component staff will also significantly assist in implementing the "issue-oriented advocacy" efforts carried out by each project. Thus, for example, in assessing the actual status of children's access/enforcement of rights to special education in a particular jurisdiction, the social component staff might be initially involved in research, data gathering, interviewing of children, officials, advocate groups, etc. If, as a result, substantial problems in access to special education are identified, such staff may then be involved in establishing and implementing non-litigious "alternative resolution" strategies (e.g., in the case of "rights to special education" -- preparation of materials and conducting of training for parents in effective advocacy for their children, coordinating such parents/groups to train others, etc.).

In terms of the relative distribution in staffing between legal and social component, a review of the experience of a number of projects in other jurisdictions suggests no preferred ratio. Given the "demonstrative" nature of the model, it might be beneficial to adopt different variants in staff patterns among the projects for later comparison and assessment.

D. LOCATION OF SITES

In terms of the location of project sites, the principal consideration/determinant should once again be the "demonstrative" nature of this initial year implementation. The limited number of projects funded must be recognized as the primary models for future replication.

1. Urban/Rural Mix

Given the urban-rural mix across the Commonwealth, it is essential that project sites be established in both rural and urban areas. While clearly many aspects of child advocacy representation will be similar in every jurisdiction, various differential environmental and practice-related elements in a particular locale will create unique circumstances (e.g., lack of alternative services available, problems with access to clients) affecting advocacy planning and strategy. The establishment of both urban and rural sites will allow each respectively to identify and respond to such specific conditions, providing an improved mode for future replication and expansion.

2. Differing Population Densities

Similarly, the four projects sites should be established in jurisdictions reflecting differing population densities: e.g., one project in area with population of 500,000+, another in area with 300,000-500,000, a third in area with 100,000-300,000, a fourth in area with less than

100,000. For such purposes, target populations would be defined on a county or multi-county basis.

E. DEFINING/ QUANTIFYING EACH PROJECT'S SPECIFIC GOALS

The placement of such projects in various sites with differing populations will require concomitant adjustments by each in staffing patterns and allocation of resources between primary and supplementary project objectives. Such variations, however, must be limited in order to insure that all projects in this "demonstration year" effectively pursue the Project's twofold objectives in a substantially similar manner.

More specifically, an analysis of several analogous child advocacy models in other jurisdictions suggests that each project, provided a staffing complement of six (e.g., three attorneys, three social-work support personnel), should be able to process 500-600 cases/year while also carrying out effective analysis/planning in selected "issue advocacy" areas. In some model project sites, attaining such total caseload level will allow the project to effect 100% representation of juveniles; in other areas (i.e., where annual dependency proceedings exceed 600 in number), the project will be able to accept a significant, albeit not total, percentage of children requiring representation. While the state and Project's long-term objective must be to insure all children access to comprehensive legal

representation, the limitations imposed in the annual budget for this initial year require that resources be judiciously utilized to achieve qualitative as well as quantitative results. Hence, it is essential to fix such caseload maximums in order to preclude the potential for dilution of representation efforts -- the very phenomenom which such projects are specifically designed to remedy.

F. NUMBER OF PROJECTS/BUDGET ALLOCATION

Given the moderate staffing size, described above, preliminary analysis of the cost of funding each such model project reflects an annualized budget of approximately $230,000/year. Based on such determination, the initial funding of $1 million will permit four model projects to be established. The balance of the funding will be allocated to funding a "Statewide Coordinator," "Support Component" and possible "Ombudsman", described further below.

G. NECESSITY FOR COMMITMENT

Given the crucial importance of this initiative and its potential for fundamentally altering the quality and character of child advocacy in the state, it is essential that those entrusted with the design and implementation of the initially funded projects reflect and maintain a strong commitment to achieve a successful enterprise during this first year.

VI. CHILD ADVOCACY PROJECT SUPPORT COMPONENT

To assist such model programs in the initial process of design, development, and implementation, it is necessary that that a Child Advocacy Support Component be established (possibly, though sub-contract with an existing research/training-oriented provider of services to youth). The functions of such center would be multiple: effective training, litigation support, provision of resource materials; co-participation with projects in monitoring/evaluation and in identifying regional/statewide impact issues derived from the each project's locally-focused "issue-oriented" advocacy efforts.

VII. CHILD ADVOCACY PROJECT ADMINISTRATIVE COMPONENT

To effectively administer and guide statewide implementation efforts, PLSC should establish a position on its staff for a Statewide Coordinator for Youth Advocacy. In addition to working closely with the Directors of the new projects and the Support Component, such coordinator shall serve as principal project liaision with DPW.

As the cumulative results of model project advocacy gives rise to evidence of regional or statewide issues adversely affecting children in the state, PLSC might consider establishing an additional position of Child Advocate Ombudsman, responsible for developing strategies to effectively address these more broadly-impacting concerns.

VIII. PROJECT EVALUTION

A. INDIVIDUAL REPRESENTATION

A review of the literature regarding child advocacy programs reveals a regrettable lack of established criteria that can be relied upon to evaluate the effectiveness of such efforts. Indeed, the definition of a "successful outcome" remains controversial (e.g., is preservation in a marginally adequate home necessarily preferential to placement in a superior group residence; is attainment of the child's preference, in and of itself, successful representation; etc.)

In the absence of such qualitative measures of efficacy, it is necessary, as an alternative, to adopt "functional criteria" that will permit an objective assessment and determination as to whether the scope and degree of a project's representation fulfills the required elements defined as essential to effective child advocacy. In this regard, the ABA Standards enumerated above may, with some modifications, serve as the necessary evaluative model. Clearly, if such projects are extended over a longer duration, longitudinal studies of effectiveness in more quantitatively measurable terms will become feasible (e.g., comparing the duration of foster placement for children represented by Child Advocates with those deprived such counsel).

B. ISSUE-ORIENTED ADVOCACY

A similar functional approach should be adopted in evaluating the effectiveness of this secondary programmatic focus. Thus, once a project has defined an area for exploration, a carefully delineated implementation plan shall be established upon which all future action shall be predicated. The degree of project success in such enterprise can subsequently be measured on the basis of its successful conformity to such prescribed plan.

IX. THE COMMONWEALTH'S "INTEREST"

The fact that the impetus for such child advocacy project has emerged from the Casey Administration itself represents a rather unique instance, in this "just-say-no" era, of a state not only voicing its concern about basic rights but also taking the initiative to fund the means to effect their attainment. To the degree that the project is successful in meeting its objectives, the state will have secured the intangible benefit of improving the welfare of its youngest, more vulnerable citizens.

On a more pragmatic level, such investment should, over time, yield increasingly lucrative economic dividends through a variety of cost-saving effects:

1. Direct reduction in unnecessary, repeated judicial hearings by seeking expeditious "permanency planning" resolution for cases.

2. Direct reduction in need for foster care placement through emphasis on home-based preference (average foster care placement of 3.5 years represents a cost/child of $19,000); substantial additional savings resulting from diversion of youths from group, institutional dependent care facilities.

3. Indirect reduction in potential delinquency placement costs (correlation between neglect/dependency and later delinquency well-established); such institutional placement costs, at present, may total $47,000/child.

Indeed, the cost-effectiveness of this approach is most clearly evidenced by the fact that the savings effected by a model project's diversion from foster care of only 12 average-term foster placements/year will equal in amount the annualized budget of the project itself.

X. IMPLEMENTATION CONSIDERATIONS

Optimum implementation of the Child Advocacy Project pursuant to the proposal set forth *infra* will require the committed involvement of PLSC administrative and staff personnel and those in management and service provision of

legal services programs interested in "midwifing" this new construct into being.

Upon PLSC's adoption and DPW approval of a statewide Child Advocacy Project, RFP's should be expeditiously prepared and disseminated throughout the Commonwealth seeking well-developed proposals to establish "new child advocacy projects". At the same time, legal services programs interested in developing such project in their own jurisdiction should take a number of initial preparatory steps:

1. Work with other interested community professionals, leaders and clientele to establish and incorporate a non-profit organization that may apply for funding as a model project.

2. Identify among its own staff those individuals who possess relevant expertise and interest in assuming positions with the prospective project.

3. Apprise county judges/masters of the potential establishment of this new advocacy project seeking to elicit their support and cooperation.

Following selection of the sites for model projects, this newly formed organization, supported and assisted by

legal services personnel, shall carry out necessary preparatory efforts for implementation of services: e.g., recruitment, selection of Director, staff, securing of necessary space, etc.

As implementation commences in January, 1990, legal services personnel shall withdraw from active participation with such organization, so that thereafter it may develop on its own as an independent, effective model advocate for its specialized young clientele.

Principal individuals, agencies consulted in preparation of this analysis:

National Center for Youth Law, San Francisco (Bill Grimm, Esq.)
Juvenile Law Center, Philadelphia (Sam Magdovitz, Esq.)
Legal Aid Society of New York, Juvenile Division (Janet Fink, Esq.)
Citizens Concerned for Children, Inc., Ithaca, New York (Susan Hatch)
Lawyers for Children, Inc., New York (Susan Cockfield)
Citizens' Committee for Children of New York, Inc.

(Jane Stewart)

Children Rights Project, Chicago (Diane Redleaf)

ProKids, Cincinnati (Dale Dardurff)

In addition: all comments, proposals and correspondence forwarded to Otto Hotmann by legal services programs and other interested parties.

EXHIBIT 4

RAMSEY COUNTY

GUARDIAN AD LITEM GUIDELINES

RAMSEY COUNTY GUARDIAN AD LITEM PROGRAM
VOLUNTEER PERSONNEL POLICY
MAY 1989 - Revised

The volunteer personnel policies of the Ramsey County Guardian ad Litem Program are to provide basic guidelines of rights and resopnsibilities of the volunteers and of the GAL Program.

PLACEMENT: The Program Director in cooperation with other paid staff is responsible for interviewing, screening, assigning and evaluating all volunteers.

JOB DESCRIPTIONS: Job descriptions will be provided and reviewed with each volunteer to include specific responsigilities and opportunities available.

TRAINING: Volunteers are expected to participate in 40 hours of initial training, plus field trips and on-going training for a minimum of six hours per year after the completion of initial training.

SUPERVISION: Volunteers are expected to accept supervision by Program staff. In addition, volunteers are to have monthly contact with Program Supervisors, and to initiate additional contacts whenever a problem arises on their case, prior to initiating any action.

EVALUATION: There will be regular evaluations of the volunteer GAL's work completed by their Program Supervisor - six months after the GAL becomes active in the Program and annually thereafter.

VOLUNTEER EVALUATION REPORT: There will be regular opportunities for volunteers to evaluate the Program and provide input to the Program staff.

ABSENCE/ILLNESS: Due to the importance of your role in the court process we encourage you to attend each court hearing for your client. Please notify the GAL Program staff as soon as you know you will not be able to attend a court hearing or other scheduled meeting, training or group.

TERMINATION: In the event of consistently unsatisfactory job performance a meeting will be held with the Program Director and/or Program Supervisors, to discuss the concerns and possible solutions. If the situation cannot be resolved, the volunteer will be offered other assignments or, if necessary, asked to resign.

RESIGNATION: Upon resignation of a volunteer, an exit interview will be held to discuss any suggestions or criticisms the volunteer may have. This important feedback will help our staff perfect the Program and provide the best service possible to our clients, the court, and to volunteers.

EMERGENCY INFORMATION: All volunteers are resopnsible to report any changes of address, telephone or other pertinent information to the Program staff.

DOCUMENTATION: All volunteers are required to keep accurate time sheets, client records, and reports as required. Volunteers must keep mileage sheets for reimbursement. If you choose not to be reimbursed for mileage and parking, this can be used for personal tax purposes as a deduction.

NATIONAL CASA ASSOCIATION

RECOMMENDED MANAGEMENT PRACTICES

The National CASA Association Recommended Management Practices have been developed as a guide for programs to encourage consistent quality throughout the CASA network. The Association recognizes that this network reflects the diverse communities in which programs operate, and must be sensitive to local conditions and constraints in developing effective programs. The Association has reviewed program operations and management practices from throughout the United States, and has selected those common elements which distinguish exemplary CASA programs.

In addition to the required minimum Standards, the Board of Directors of the National CASA Association strongly encourages CASA programs to adopt these recommended practices, where practicable, based upon the premise that a well run program will provide optimal representation for children.

TABLE OF CONTENTS

A. CASA PROGRAM STRUCTURE

1. A CASA program should have an Advisory Council and/or Board of Directors representing a broad section of the community.

2. The primary focus of a CASA program should be serving abused and neglected children in juvenile dependency proceedings.

3. The CASA program should have written goals and objectives, measures for obtaining those goals and objectives, and a methodology for monitoring and evaluating progress. The program's budget and financial goals should be based upon these objectives.

4. A CASA program should have a written organizational plan including job descriptions for staff and volunteers; volunteer recruiting plan; screening and training procedures; program policies and procedures; guidelines for support and supervision of volunteers; guidelines for record keeping and data collection; and a funding plan.

5. In addition to the program director, CASA programs should have adequate supervisory and support staff to ensure timely and thorough case management. A recommended volunteer/supervisor ratio is 30/1.

6. A CASA program should be recognized and supported by the court.

7. A CASA program should have state or local program standards in keeping with the standards of the National CASA Association.

8. A CASA program should be affiliated with a state CASA program, association or network, if one exists.

9. A CASA program should be a program member of the National CASA Association.

10. A CASA program should have liability protection for staff and volunteers through the court, state statute or private coverage.

B. ROLE & RESPONSIBILITIES OF A CASA VOLUNTEER

1. A CASA volunteer should:

   a. Maintain complete written records about the case, including appointments, interviews and information gathered about the child.

   b. Report any incidents of child abuse or neglect to the CASA supervisor and appropriate authorities.

   c. Interview parties involved in the case, including the child.

   d. Determine if a permanent plan has been created for the child, and whether appropriate services, including reasonable efforts, are being provided to the child and family.

e. Assure that the child's best interests are being represented at every stage of the case, attend court hearings, and make a written recommendation to the court on what decision is best for the child.

f. Monitor the case by visiting the child as often as necessary to observe whether the child's essential needs are being met, and whether judge's orders are being carried out.

g. Participate in any planning or treatment team meetings involving the child in order to keep informed of the child's permanent plan.

h. Remain actively involved in the case until formally discharged by the court.

2. A CASA volunteer should not become inappropriately involved in the case by providing direct service delivery to any parties that could (a) lead to a conflict of interest or liability problems; or (b) cause a child or family to become dependent on the CASA volunteer for services that should be provided by other agencies or organizations. Examples of inappropriate volunteer practices are:

- o Taking a child home or sheltering a child in the home
- o Giving legal advice or therapeutic counseling
- o Making placement arrangements for the child
- o Giving money or expensive gifts to the child or family

3. A CASA volunteer should only transport a child when there is liability insurance coverage for such activity. The volunteer should also have permission of the person or agency which holds custody before transporting a child.

4. A CASA volunteer should not be related to any parties involved in the case, or be employed in a position and/or agency that might result in a conflict of interest.

C. RECRUITING

1. A CASA program should produce a standardized packet of written information (brochure, information kit), in keeping with the National CASA Graphics Standards, to clearly explain the purpose of CASA, define the role and responsibilities of the CASA volunteer, and explain minimal commitment of time required.

2. The recruitment effort should be targeted to attract male and female volunteers from diverse cultural and ethnic backgrounds; and from a variety of age groups and socio-economic levels.

3. The recruiting plan should be designed to make the public aware of the problems faced by abused and neglected children who enter the courts.

4. As part of its recruiting procedure, a CASA program should refer potential volunteers to other CASA programs or the National CASA Association if the potential volunteer lives outside the program's service area.

5. The recruiting efforts should include media outreach and speaking engagements.

D. SCREENING

1. A CASA program should:

a. Have applicant submit a written application containing information about educational background, employment history, and personal experiences with child abuse and neglect.

b. Obtain and document at least two references from persons unrelated to the applicant.

c. Conduct a personal interview with the applicant.

2. CASA programs should conduct a formal security check of the volunteer applicant by screening criminal records through local and state law enforcement agencies and the Central Child Abuse Registry. If the volunteer has lived in another state within the past five years, the CASA program, if possible, should also conduct criminal records checks in that area. An applicant should be rejected if he or she refuses to sign a release of information for appropriate law enforcement checks.

E. TRAINING

1. CASA programs should:

a. Provide 40 hours of training through use of the official National Training Curriculum for CASA/GAL Volunteers, available from the National CASA Association.

b. Include instruction on:

- Roles and responsibilities of a CASA Volunteer (purpose, guidelines)
- Confidentiality and data practices (record keeping)
- Cultural Awareness (understanding differences)
- Child abuse & neglect (family & child dynamics)
- Child Development (stages of growth & behavior)
- Permanency Planning (child welfare system, community resources)
- Communication & Information gathering (report writing, interviewing techniques)
- Juvenile Court Process (laws, operation of court system)
- Advocacy (how to improve conditions for children)

(See Comprehensive Training for the CASA/GAL for detailed descriptions of each area)

2. The initial CASA volunteer training should, if possible, include an opportunity for each participant to visit the court while it is in session to observe proceedings.

3. The CASA program should provide training participants with the following written materials:

a. Copies of pertinent laws, regulations, policies

b. A statement of commitment form clearly stating the minimum expectations of the volunteer once trained

c. A copy of the National CASA Volunteer Orientation brochure

d. A training manual

4. The CASA program should use a variety of instructors, including program staff, attorneys, judges, agency representatives and other volunteers.

5. The CASA program should provide a minimum of 10 hours of in-service training per year to volunteers once they are accepted into the program.

6. The CASA program should also provide ongoing training for attorneys involved with CASA cases on how the CASA program operates, and how to effectively work with volunteers.

F. SELECTION AND APPOINTMENT OF VOLUNTEERS

1. CASA programs should notify all applicants in writing of the status of their application. The selection procedure should ensure that those not selected are treated with dignity, respect and, if possible, referred to alternative volunteer opportunities more suitable for them.

2. The judge should determine which cases are referred to the CASA program, and all appointments and assignments made by an appropriate order of the court.

3. CASA volunteers should be sworn in by the presiding judge.

4. CASA volunteers should be assigned at the earliest stages of the court proceedings, in accordance with Recommendation # 15 from the Metropolitan Judges Committee Report of the National Council of Juvenile & Family Court Judges, "Deprived Children: A Judicial Response, 73 Recommendations"

5. CASA volunteers should not be assigned more than two or three cases simultaneously; the number of cases assigned should be high enough to maintain the interest of the volunteer and low enough to ensure quality work and to avoid volunteer burnout.

6. CASA programs should be conscious of ethnic, cultural and religious diversity when appointing volunteers to cases, and select volunteers based on experience, understanding and skills to deal with these considerations.

7. CASA programs and/or the court should notify all parties and agencies involved in the case of the CASA volunteer's appointment.

8. CASA volunteers should have complete and immediate access to all records and documents pertaining to the case.

G. SUPERVISION OF VOLUNTEERS

1. CASA program staff should be easily accessible, and make every effort to provide quick and thorough guidance to the CASA volunteer when he or she is assigned to a case.

2. The CASA program supervisor should hold regularly scheduled case conferences with the volunteer to review progress of the case.

3. CASA program supervisors should process the volunteer's report to the court and consider the volunteer's concerns and recommendations in a timely manner so as not to jeopardize the best interests of the child.

4. CASA volunteers should submit all recommendations concerning the case to the program supervisor in a signed, written report. CASA program supervisors should not alter the report without the consent of the CASA volunteer. If the supervisor disagrees with the volunteer's recommendation, a second report should be submitted to the court under the supervisor's signature.

5. The CASA program should have a clear policy to guide volunteers and program staff in the case of conflict regarding the case. The plan should include at least one level of appeal to another authority (i.e. Board Grievance Committee).

6. The CASA program should have a plan for the discharge or termination of a CASA volunteer by a designated authority. Appropriate grounds for dismissal include:

   a. The volunteer takes action without program or court approval which endangers the child or is outside the role or powers of the CASA program.

   b. The volunteer violates a program policy, court rule or law.

   c. The volunteer demonstrates inability to effectively carry out CASA duties.

   d. The volunteer fails to complete required ongoing training.

   e. The volunteer falsifies volunteer application or misrepresents facts during the screening process.

7. The CASA program should evaluate all volunteers on an annual basis using a standardized evaluation form to review their performance and effectiveness. This should include an evaluation of the volunteer's work on the case, participation in on-going training, and comments from the judge and/or juvenile court officer.

8. CASA programs should practice ongoing recognition of volunteers through written and verbal acknowledgment by judges and staff, in program newsletters, and in the media.

H. RECORD KEEPING AND DATA MANAGEMENT

1. CASA programs should keep complete case assignment records; up-to-date calendar of court hearings; monthly case log system; and copies of all volunteer reports and correspondence concerning the case, including notes from phone or in-person consultations. Case files should be returned to the court when the volunteer is discharged.

2. CASA programs should collect accurate, thorough information about the children/cases that come to the program, including:

a. Number of children served per year
b. Number of volunteers assigned to cases
c. Total number of children served to date
d. Demographic information about children served (age ranges, race, sex)
e. Breakdown of types of cases (number of sexual abuse, physical abuse, neglect)
f. Number of cases closed and length of time each case was in the court system
g. Average length of time children are in out-of-home placement
h. Average length of time a child is in foster care from the time a CASA volunteer is assigned to the case until a permanent placement is made
i. The percentage of children in the jurisdiction that needed a CASA volunteer vs. those that were assigned a volunteer.
j. The rate of recidivism.

3. CASA programs should prepare annual, written budgets reflecting:

a. Funding sources and amounts
b. How funds are allocated
c. Projected expenditures
d. Breakdown of actual expenses

4. CASA programs should compile a year-end report illustrating accomplishments of the program. The report should be distributed to the National CASA Association, funders and the community.

5. CASA programs should provide staff and volunteers with a written program policies, practices and procedures manual.