

Report of the Governor's/
Massachusetts Bar Association's
Commission on the
Unmet Legal Needs of Children

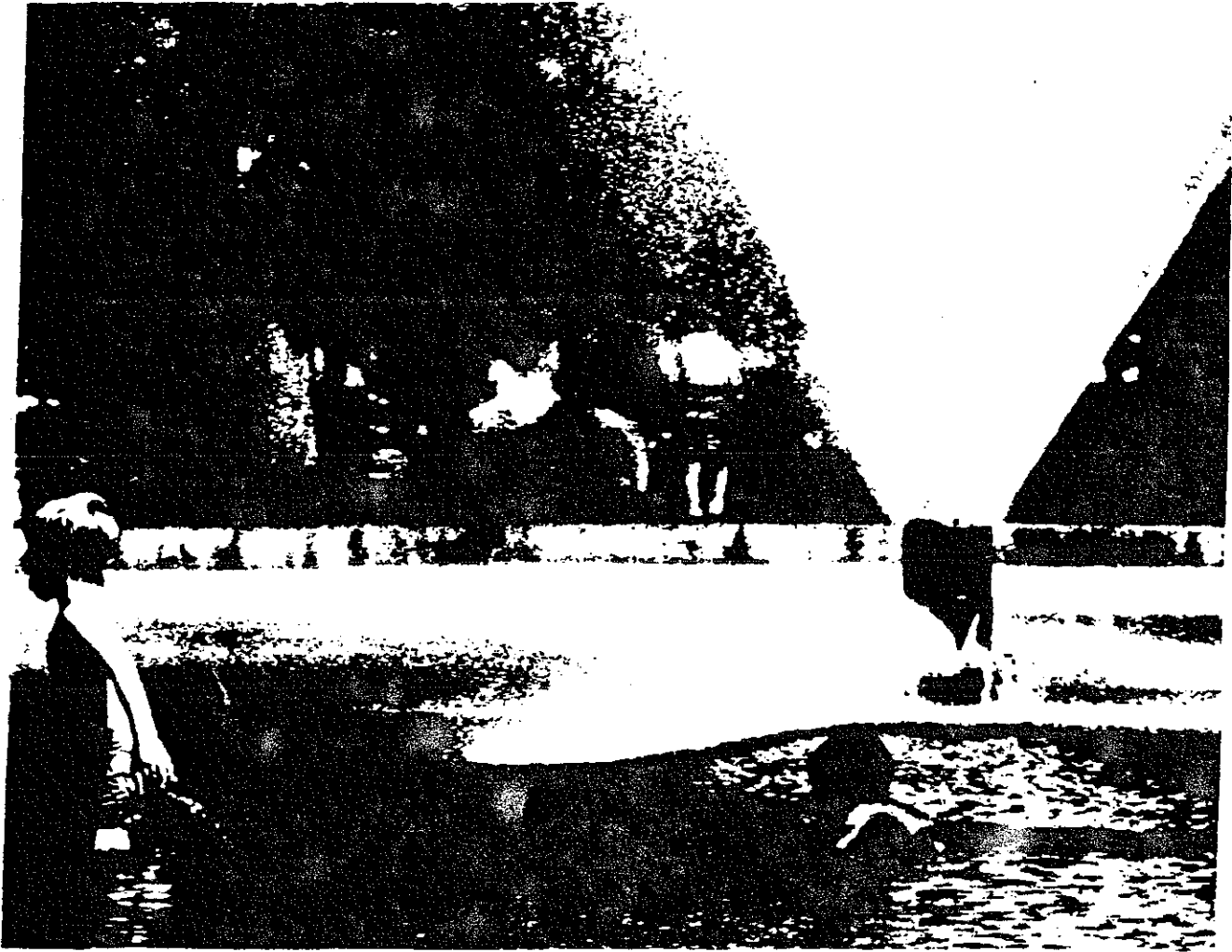


Photo by Andrew Doerfer

A Special Note of Thanks

On behalf of the children of Massachusetts, the Commission extends its deepest appreciation to the Massachusetts Bar Association, for its generosity in underwriting the printing of this report.

About Our Cover

The Commission extends its appreciation to the Anti-Defamation League (ADL) of the B'nai B'rith — whose mission is to defend the unique dignity and worth of every man, woman and child, regardless of race, religion or creed — for contributing the cover artwork on this report. The illustration was inspired by the award-winning "A World of Difference" campaign initiated by the ADL in 1985, and was co-sponsored by the ADL, WCVB-TV/Channel 5, the Greater Boston Civil Rights Coalition and Shawmut Bank. Hundreds of the Commonwealth's children responded to this call for understanding and compassion by sending their paintings, drawings and other artwork to the campaign.

Our cover artist, Michael Sullivan, was a sixth-grader at the Furnace Brook School in Marshfield, Mass. when he created our cover illustration. His teacher, Martine Anderson, asked her students to draw pictures about prejudice and its effects. Racial prejudice was the students' dominant theme, and nearly all of the pictures portrayed only adults. But prejudice has many faces. Through his artwork, Michael chose to spotlight the importance of children, to show that "Kids Are People Too."

Publication Design by Kristen Fowks Barbagallo
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In Memoriam

Neil J. Houston, 1945 — 1987

This report is dedicated to the memory of Commission member Neil Houston, with appreciation for the vision, courage and generosity he displayed in all that he did, and in particular for his longstanding commitment to improving children's lives.

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Photo by William T. G. Litant
Michael S. Greco (left), Massachusetts Bar Association President 1985-86; Honorable Sheila E. McGovern and S. Stephen Rosenfeld, Commission Co-Chairs.

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Twenty-Two Recommendations to Address the Unmet Legal Needs of Children in Massachusetts

- | | <i>See page</i> |
|---|-----------------|
| 1. Legislation should be introduced to better define the types of endangerment that justify state intervention in families for the care and protection of children. | 5 |
| 2. All courts with authority to intervene in families for the care and protection of children should adopt uniform time guidelines to track cases from beginning to end. | 7 |
| 3. The District, Juvenile, and Probate Court Departments should adopt uniform rules and procedures for handling care and protection cases. | 10 |
| 4. G.L. c.210, §3 should be amended to require that in contested cases where parental rights may be terminated, the court shall appoint counsel for the child. | 12 |
| 5. G.L. c.210, §3 should be amended to better define the grounds for termination of parental rights, and to mandate that when children's interests and parental rights conflict, the child's interests shall prevail. | 13 |
| 6. Legislation should be introduced creating a Children's Services Division within the Committee for Public Counsel Services, as an experimental pilot project in two courts, to provide children's advocacy and representation through appropriately trained and qualified attorneys and support staff. The Children's Services Division shall supplement, but not replace, representation currently being provided by the private bar. | 16 |
| 7. By legislative or administrative order judges, court personnel, attorneys, and Guardians Ad Litem handling cases involving children should attend continuing education programs on developmental, psychological and evidentiary issues pertaining to children. For judges and court personnel, such programs should be regarded as part of their regularly assigned duties. | 18 |
| 8. Compensation for attorneys appointed by the court to represent children should be increased to \$60/hour plus reasonable out-of-pocket expenses, exclusive of travel, for work performed in or out of court, and judges should have the discretion to cap the total amount paid. | 21 |
| 9. In the initial stages of proceedings involving CHINS, care and protection or delinquency the court should consider, on the record, whether the child should be referred to the local educational agency for a Chapter 766 Team evaluation, if the facts indicate possible impairment of the child's ability to progress effectively in a regular education program. Parents or legal guardians — or children themselves, if over 14 — should be parties to such consideration. In addition, the Office for Children should receive funds to support research and advocacy related to children's special education and other needs. | 22 |

10. The Chief Administrative Judge of the Trial Court should establish a committee to develop and promulgate uniform, comprehensive written rules or standards for every Department of the Trial Court, including Probation, which govern Termination of Parental Rights Actions (G.L. c.210); Care and Protection Actions (G.L. c.119, §24 or §23C); Children in Need of Services (CHINS) (G.L. c.119, §52 *et seq.*). 23
11. *Define G.A.L. (Guardian Ad Litem) Role by Statute:* Legislation should be introduced to clarify and define the functions of G.A.L.s in cases where children are involved. G.A.L.s should function as Next Friend of the Minor, Investigator or Evaluator, but not as Attorneys/Advocates, as they have in the past. 25
12. G.L. c.215, §56A should be amended to give the court discretion to appoint counsel for children in cases of disputed custody and in cases where the court determines that visitation, support, or other substantial rights of children are at stake. Judges should also have the authority to assess said counsel's fees and expenses to the parties, on the finding of ability to pay, or to the Commonwealth of Massachusetts, subject to a cap to be determined by the court. 26
- If, in a given case, both a G.A.L. and an attorney are appointed by the court to protect the children's best interests, the G.A.L.'s services shall be to the court on the children's behalf. That means that G.A.L.s, if asked by the court to make recommendations, shall do so based on their own perception of what is in the children's "best interests," which may or may not coincide with the children's wishes. Attorneys, by contrast, shall represent the children's position, consistent with an attorney's representation of any other client.
13. Motions to appoint a G.A.L. may be made by children's attorneys, attorneys to other parties, or on the court's own initiative, but the decision to appoint a G.A.L. should be at the discretion of the court. The court should also specify whether the appointee will function as a G.A.L. Next Friend, a G.A.L. Investigator, or a G.A.L. Evaluator. A G.A.L. Next Friend should be an attorney; a G.A.L. Investigator should be an attorney, social worker or other appropriate professional; and a G.A.L. Evaluator should be a mental health professional, such as a psychiatrist, psychologist, or licensed independent clinical social worker. The G.A.L.'s duties, and timeframes for submission of reports, should be specified in the court forms. 26
14. *Economic Support:* G.L. c.208, §34 should be amended to add an additional mandatory criterion, namely, "the present and future needs of dependent children," in cases of divorce where children are involved. Children's needs shall be the court's primary concern in determining the distribution of marital assets, and in assessing alimony and child support. 29
15. *Fiduciary Obligations of Parties to Divorce:* To assure full and realistic financial disclosure, Rule 401 of the Domestic Relations Special Rules should be revised to recognize marriage as a "partnership," to impose fiduciary responsibilities of full disclosure upon the parties to divorce, and to authorize sanctions for failure to do so. 30
16. *Emotional Support:* G.L. c.208, §31 should be amended to require divorcing parents who request shared legal custody to demonstrate their ability to cooperate in protecting the child's interests by developing a mutually acceptable parenting plan, prior to the date the court renders its final judgment. At a 31

minimum, this plan should provide for decision-making concerning the child's education, regular and emergency health care, religious training and observance (if any), and procedures for resolving parental disputes concerning child-raising decisions and duties after divorce.

A proposed amendment of G.L. c.208, §31 is attached, as Appendix III.

17. *Creation of Court Intake Centers:* Intake Centers staffed with clinical social workers should be created within each probate court to provide education and evaluation, as well as direction and access to necessary services, for couples involved in divorce proceedings and custody disputes. 32
18. Mechanisms should be established to identify all cases pertaining to a single family unit. 35
19. Procedures to coordinate and consolidate cases affecting a single family unit should be implemented by the Courts. 36
20. Mental health clinics should be established, under the aegis of the Department of Mental Health, for all courts in which child and family issues are heard. 37
21. Legislation should be introduced authorizing court-appointed counsel for minor children alleged to be victims of child abuse in cases where statutory authority for such appointments does not currently exist, and funds should be appropriated by the legislature to underwrite the cost of such representation. 37
22. Increased funding should be made available to encourage expanded use of mediation by the courts — particularly in CHINS cases — as an informal alternative for families willing to try mediation before resorting to litigation. 37



Photo by Andrew Doerfer

Chapter I

Introduction

This Commission owes its creation to Michael S. Greco, President of the Massachusetts Bar Association (MBA) from 1985-86. In late 1985, he approached Governor Michael S. Dukakis with the proposal that the MBA and the Governor's office undertake a survey of the legal needs of children in Massachusetts. The Governor immediately agreed that such a study made excellent sense. To our knowledge, this is the first effort ever initiated in Massachusetts to canvass this important subject in a broad and general way. Under the joint chairmanship of Sheila E. McGovern, First Justice of the Middlesex Probate and Family Court, and S. Stephen Rosenfeld, Chief Legal Counsel to Governor Dukakis, the Commission began its work in January, 1986. Its membership included lawyers, judges, state officials responsible for addressing children's problems, mental health professionals and several other persons from diverse backgrounds, all united in their concern for the problems of children.

The subject is sprawling and hard to encompass. The Commission could have easily gone in several directions at once, producing in the end an extensive catalogue of children's issues. One of the dozens of early candidates for our attention was the issue of "latchkey children" — children left to fend for themselves after school. With parents at work, and no supervision, these children exist in every community, and there is a widespread belief that drug abuse and low-level criminal behavior are serious problems among substantial, but undocumented, numbers of them.

This serious issue could consume a Commission's attention all by itself, as could several others we considered. Our subcommittee on divorce and custody, for example, very much wanted to include a recommendation for educational programs within the public schools, because the members believed that children need to be given insight into the economic and emotional realities and responsibilities of marriage and divorce. They also believed that children needed life skills and values education, so that they could examine positive and negative aspects of values and skills — through the study and analysis, for example, of different religions — and to focus upon such issues as self-esteem, commitment, loyalty, respect, friendship, problem-solving, sensitivity, and the ability to listen and to hear.

We recognized the real danger, however, that were the

Commission to succumb to the temptation to take on every issue that deserved attention, we would stretch our limited resources so thin as to barely scratch the surface of these complex questions, thereby contributing little to the resolution of any one of them. Moreover, although the Commission members' backgrounds offered collectively the depth of knowledge and experience essential for addressing several children's issues, it certainly did not suffice for all. It was clear that, at the beginning, choices had to be made, and that broad as the subject was, limits had to be imposed.

After extensive review and discussion, the Commission resolved the following:

1. Our collective experience was best directed exclusively to those needs of children related in some way to our legal system. Thus, insofar as the need for more resources was pertinent, it was legal and court resources — not welfare and housing resources — that we felt qualified to examine.
2. Even within the confines of the legal system, the issues are numerous, and accordingly we resolved to concentrate on those issues that by consensus we agreed were either most immediately pressing or were not being addressed by some other commission. For example, the way in which courts deal with criminal cases involving sexual abuse of children — one of the most pressing current social issues — has been the subject of recent legislation and already is being studied by the Commission on Violence Against Children.

In short, we resolved to attempt, as much as we were able, to examine closely a relatively few areas, particularly those where we felt we could actually recommend specific improvements that have a reasonable chance of being implemented. To this end, we created seven subcommittees, with the understanding that each subcommittee would concentrate on a limited number of legal problems that were immediate and particularly troublesome. Our hope was that each subcommittee could distill its work into two or three recommendations, but because there were so many different issues that simply could not be ignored, a few of the subcommittees were unable to limit their recommendations to three.

For approximately 20 months, these seven subcommit-

tees participated in committee and sub-committee meetings, engaged in research, consulted with other experts, made or heard presentations at Commission meetings, and prepared subcommittee reports. The work of the subcommittee on Poverty and the Unmet Legal Needs of Children is the subject of the last part of this introduction. The remainder of this volume contains the six additional subcommittee reports.

But this volume is not simply a compilation of the subcommittee reports. They have been reviewed, revised, and subjected to extensive discussion by the Commission, and then edited to transform them into chapters of the overall Commission report. Moreover, as anyone who has struggled to resolve difficult questions knows, broad social problems like the issues dealt with here cannot be neatly compartmentalized. As the months passed, the subcommittees discovered that their work overlapped.

Efforts were made to blend closely-related issues into a single recommendation, to streamline this report, but in one instance this could not be done. Recommendation #3 contains a focused, detailed discussion concerning the importance of implementing uniform rules and procedures for handling care and protection cases in all courts where such cases are heard. We hope that this will serve as a foundation stone for the more sweeping and inclusive Recommendation #10, which calls for development of uniform rules and standards for every Department of the Trial Court, to govern cases in which children are involved.

Inevitably, not every member agreed with every recommendation in this report. But it can truly be said that this document draws upon the efforts and expertise of the entire Commission, not just a small group, and in the spirit of the strong consensus which was achieved, the members of the Commission felt comfortable enough with the overall thrust of the work that they willingly lent their names to the entire report.

These chapters reveal three broad and interrelated areas where much needs to be done:

- First is the area of state intervention into family life for the avowed purpose of protecting children. This category includes, for example, temporary removal of a child from his or her parents on account of neglect or abuse, as well as permanent termination of parental rights. The inherent tension between notions of due process and preservation of intact families, and the need to move resolutely to protect endangered children, can never be fully resolved. The attempt to deal with that tension led the Commission to propose new and more specific statutory guidelines for state intervention.
- The second broad area of concern lies with examination of court proceedings directed at children — how efficiently they function, how well they fulfill their

purposes, and the fairness of the purposes themselves. Here we have addressed, for example, the clear need for improvements in the structure and use of Guardians Ad Litem and the need for a serious second look at the concept of shared legal custody of children of divorced parents.

- The third important area cuts across all the others — the universally emphasized issues of resources and training. The need here goes well beyond simply having more, although there is no serious question that more is needed in court resources, legal resources dedicated to representation of children, and education of judges, lawyers and other court personnel. But beyond seeking more, what this report points out is that not only the quantity but the character of the resources and training is critically important. As perhaps the best example, several of us began with the assumption that the education regarding children most needed by judges and lawyers is better grounding in the applicable laws and decisions — in other words, better continuing legal education. The Commission acknowledges this obvious need as elementary, but steps well beyond to suggest that what is fundamentally needed is a different type of knowledge — now largely lacking — a deeper appreciation of children's developmental stages and needs, and an understanding of how the court's treatment of children serves either to meet those needs or to make matters worse.

These are the organizing themes of the Commission's report — state intervention, court procedures, and resources and training. There is one final theme, however, that transcends all others, and that the Commission acknowledges is simultaneously central to our subject and beyond our scope. This is the link between children's unmet legal needs and children's poverty. Initially, a subcommittee was formed to explore this realm, but we soon recognized that poverty affected the issues being addressed by every other subcommittee. In our judgment there is no doubt, for example, that alleviation of poverty among the Commonwealth's children would mitigate, if not remove, each of the unmet legal needs explored in the report.

Despite the substantial efforts of state government in recent years, poverty among children is growing. In Massachusetts, children constitute 38 percent of the poor, a larger proportion of the poor than in the nation as a whole, even though Massachusetts has a smaller-than-average proportion of children in the population than the rest of the country¹. Moreover, the proportion of children living in poverty increased 52 percent in the years 1970-80². Recent reports have revealed a dramatic increase in infant mortality in Boston — 32 percent between 1984 and 1985 — a situation directly associated with poverty.³

To a significant extent, children who are subjected to legal proceedings are there because they are poor, and their families are poor. For the middle class, private social service institutions are available to address many family problems. Without this private buffer, families in poverty are more likely to have their problems brought into the judicial process. For example, eight out of every 10 children removed from their homes for reasons of abuse or neglect come from families below the federal poverty guidelines¹. The various invocations of court jurisdiction — abuse, neglect, delinquency, children in need of services, indeed, even most issues of child support — occur not simply because the children are poor, but because the courts in many instances are the social service systems of last resort.

The interconnection between poverty and the legal system as it affects children is no accident. From their earliest origins, court proceedings and state interventions were deemed necessary by the governing classes to place the state *in loco parentis* in cases where children were viewed as being at serious risk. As a given, the children were poor. Almost inevitably, so too were the parents. Here, as in so many other settings, the legal process was assigned the task of responding to what had not yet been acknowledged as social needs, requiring social rather than judicial responses.

The ultimate inadequacy of relying on courts to treat the underlying social causes of children's suffering has led Commission members, understandably, to call for increases in social resources, whether they be enhanced welfare benefits, expanded human service programs, or such other needed resources as decent and adequate housing. We believe increased funding is essential, but we also believe that even with added resources, the need for the changes recommended in this report would remain. Problems of poverty will not go away. Moreover, family stress and breakdowns at all income levels are bound to demand a legal response, and so the judicial system itself must be analyzed and improved.

All the same, what we can demand, at a minimum, is assurance that when judicial and governmental intervention in children's lives occurs, it does so only when the circumstances warranting intervention are unambiguous and free from class or cultural bias. We must guard against any tendency to penalize a family's poverty rather than seeking to alleviate it.

For example, the subcommittee that was concerned with issues of due process has proposed a carefully-drawn statute to govern proceedings for care and protection of abused or neglected children, as well as preliminary guidelines to assist the judiciary in determining when court intervention is appropriate in a given case. Taken together, the proposed statute and judicial guidelines provide a firm foundation for ensuring that grounds for intervention are rooted not in the child's economic condition, but in the fact of the child's endangerment, while maintaining the judicial discretion and flexibility essential to protecting children's needs and rights.

In this quest for fairness, we have proposed changes that will encourage, support and reinforce behavior on the part of parents, lawyers, judges and others that looks out first and foremost for children's needs and rights, subordinating other interests to those of the children when a conflict is revealed. Whenever, in the course of court proceedings, a parent, lawyer or judge succeeds in understanding the child's needs and responds to it — so that the child's life is improved by virtue of the court's involvement — this is a fundamental instance of what the Commission wants to make pervasive in Massachusetts. Rules and procedures cannot respond to children's needs, only adults can. Rules and procedures will, at best, channel behavior away from a misguided, unthinking course. But finding genuine solutions to the tragic dilemmas children confront requires more than rules. This is our mission, and it requires commitment, professionalism, and above all an ability to listen to children and to communicate with them, and a willingness to respect their views. These are the values and attitudes this report seeks to serve.

Finally, we are pleased that the Massachusetts Bar Association has reaffirmed its dedication to this project through the establishment of a new MBA Standing Committee on the Unmet Legal Needs of Children, which will take responsibility for implementing the recommendations contained in this report. Moreover, every member of the Commission who attended the MBA Annual Meeting on May 30, 1987 — where a special session on the Commission's work was held — was gratified to hear the incoming MBA President, John Callahan, declare that implementation of our recommendations was at the top of his own list of priorities. We thank him for his personal commitment to this important work.

¹ Carballo, Manuel, and Mary Jo Bane, *The State of the Poor in the 1980s*, p. 3 (Auburn House Publishing Co., Boston, 1984).

² *The State of the Child*, p. 14 (Massachusetts Advocacy Center, Boston, 1982).

³ *Infant Mortality in Massachusetts*, Massachusetts Department of Public Health, 1986.

⁴ *The State of the Child*, *supra* note 2, at p. 86.

Chapter II

Due Process for Children

Introduction

The Commission appointed a Due Process Subcommittee consisting of seven practitioners, two staff members, and two consultants from the Department of Social Services. It held 20 meetings to identify due process concerns, listen to expert testimony, and prepare recommendations. Between meetings, individual members were assigned to gather data, analyze reports, or consult specialists in particular areas. Although the contributors were too numerous to acknowledge in full, their insights became an integral part of this report.

The subcommittee did not confine analysis only to ways in which the Fourteenth Amendment applied to legal proceedings. Instead, it accepted the notion that "... in the context of family issues, constitutional rights are especially vague and open-ended. It is entirely illusory to believe that somehow a balance can be struck ... without reference to policy considerations."¹ Thus, the subcommittee's interim report was an omnibus list of due process concerns spanning administrative as well as judicial matters.

Choosing among the issues contained in this omnibus list was a difficult task. The Commission understood that it was setting aside compelling due process issues, many just as important as the three it chose. In adopting these

three recommendations, the Commission strongly urges the Massachusetts Bar Association's Standing Committee on Children to study the additional items, submitted in Appendices I and II, and weigh appropriate measures to resolve them.

Ultimately, the Commission achieved consensus on three recommendations dealing with the state's decision to intervene to protect children — a decision which results in "care and protection" proceedings in the Juvenile and District Court Departments (G.L. c.119, §24) and "guardianship" proceedings in the Probate and Family Court Department (G.L. c.201, §5).

Attorneys representing children, natural parents, foster parents, and state agencies emphasized several due process concerns. First, all practitioners cited the total absence of meaningful criteria to determine when the state will intervene. The result of this lack of standards is unpredictability and inconsistency in decisions by social workers and judges about when the state should intervene in families to protect children.

The second persistent theme to emerge from the Commission's canvassing of practitioners dealt with problems in the court procedures after the state has decided to intervene to protect children. Many attorneys pointed out the difficulty of effectively representing their clients —

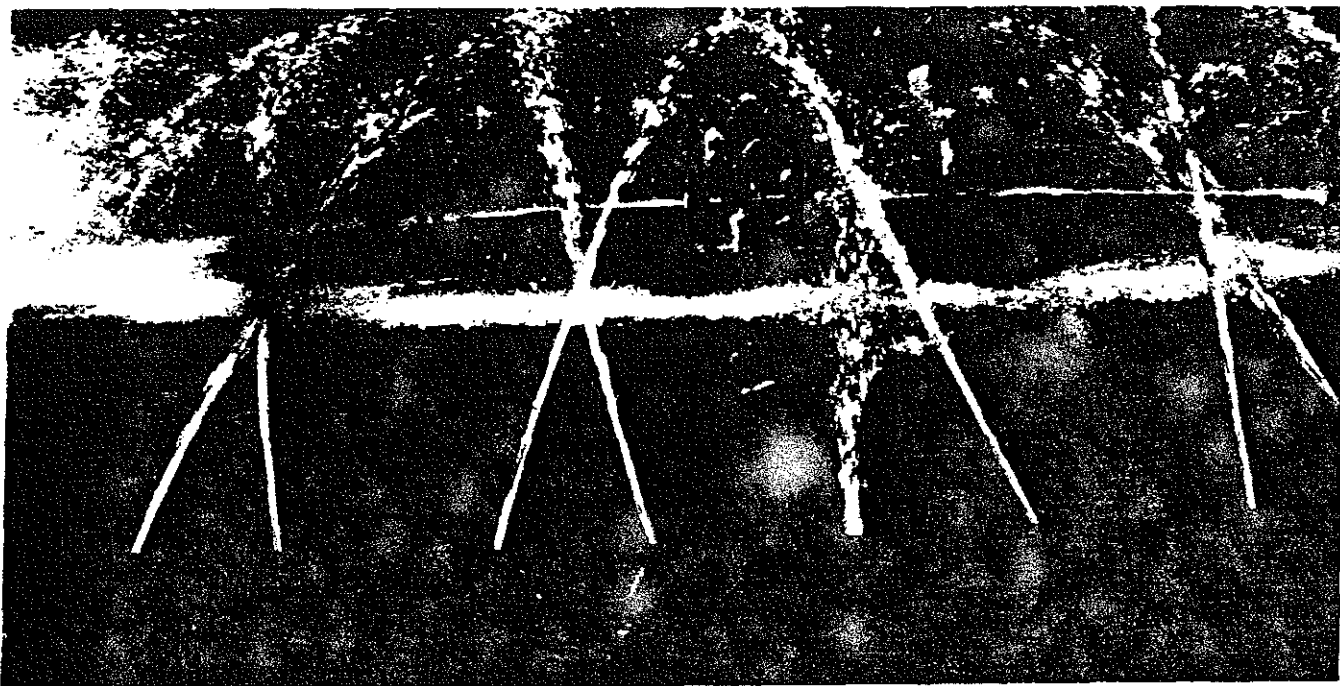


Photo by Andrew Doerfer

children, parents and state agencies — when in many courts the adjudication stage and the disposition stage of the proceedings tended to become merged or indistinguishable. Serious due process concerns were also raised about the length of time it takes to litigate the issues and get a judicial decision, and the lack of uniform court procedures in this area of law.

The Commission's due process recommendations address these areas of concern, which are fundamental issues in defining the system of state interaction with families for the welfare of children. The balancing of family autonomy and individual rights against protection of those who do not have the ability to assert their rights — the children — is an ongoing and necessary endeavor.

Recommendation #1

Legislation should be introduced to better define the types of endangerment that justify state intervention in families for the care and protection of children.

Comment

Currently, when the Commonwealth decides that children need protection, and parents disagree, either the Department of Social Services or a private child-care agency may file a petition in the district, juvenile, or probate court. Foremost, the courts must judge whether or not the evidence justifies state intervention in the child's living situation. If the decision to intervene is made, the court must then determine what form such intervention should take.

The Commission believes that it would be more consistent with notions of due process to resolve the second issue — disposition — in a second, distinct phase. That way, the decision on whether the state has a right to intervene in the first place could focus on more objective criteria dealing with whether the children have been endangered, rather than immediately focusing on the overall "best interests of the child" and "current parental unfitness," which are the legal criteria for determining the custody of the children at disposition. This recommendation focuses only on adjudication — on the initial judgment to intervene in family life to protect a child.

Current legislation provides little guidance at this key threshold. There are no criteria in the guardianship statute or in case law authorizing the social service department to accept custody of a child upon order of the probate court (G.L. c.119, §23C). The only criteria are in the care and protection statute, which allows the court to assume jurisdiction when it finds a child:

- without necessary and proper physical or educational care and discipline; or
- growing up under conditions or circumstances damaging to the child's sound character development; or

- lacking proper attention from parents, custodians, or guardians with care and custody; or
- whose parents, guardians, or custodians are unwilling, incompetent or unavailable to provide any such care.

These criteria have evolved only slightly from the language in *An Act Concerning the Care and Education of Neglected Children*, promulgated more than 120 years ago.² The language of that Act would never be suggested today, regardless of the possibility that similar family problems exist, because perspectives are radically different. Child care specialists today simply do not describe their work as making "needful provisions and arrangements" to protect children who "... are suffered to be growing up without salutary parental control and education, or in circumstances exposing them to lead idle and dissolute lives."

The Commission believes that these outdated criteria have become the source of due process problems. They are too general and reliant on context to give parties a clear idea of the circumstances likely to result in state intervention. Almost always, guidance in this area must be found in appellate court decisions which are themselves based on unique fact patterns. As a practical matter, the lack of detailed criteria results in nearly total discretion for social workers or justices, leading to different outcomes in substantially similar cases. And as the Supreme Court has pointed out, unfettered discretion in child neglect cases often results in a slant against the poor, the uneducated, and members of minority groups.³

There was a strong consensus among Commission members on the central premise of this recommendation — that children would benefit from clearer, more specific statutory grounds for state intervention into family life, to reduce the unpredictability the current process has imposed. In its efforts to create new statutory criteria to govern state intervention, the Commission consulted with attorneys, judges, and state officials, and analyzed language developed by other groups. The American Bar Association, for example, has developed criteria which are far more restrictive than those which are presented here. Ultimately, however, the nature of the underlying problems faced by children at risk proved so difficult to encompass in language that the Commission was unable to develop the specific language needed, which it could uniformly endorse.

Individual Commission members were concerned that important cases not foreseen at the present time might not be protected by the criteria listed below, and the Commission acknowledges that the language included here will require further study and amendment to be sufficient to protect children's rights and needs. As a first step in the developmental process, the following statutory grounds are presented as examples of specific categories of abuse that would qualify for state intervention.

Statutory Grounds for State Intervention

A probate, district or juvenile court may not adjudicate a child to be in need of care and protection or agency-sponsored guardianship unless it finds both that s/he is endangered and that assumption of jurisdiction is necessary for protection from future endangerment. An "endangered child" means someone who:

1. has been a victim of **serious physical harm** caused by the person responsible for the child or by another person, where the person responsible knew or should have known about the harm and failed to take appropriate action to prevent it; or
2. is being deliberately deprived of **essential care** by the person responsible at the time the petition is filed; or
3. is suffering **severe emotional damage** and the person responsible is unwilling, incompetent, or unavailable to provide or accept any reasonably appropriate treatment to address the condition; or
4. is **abandoned**.

If these proposed statutory grounds are to have a significant effect, consensus will have to be reached upon the meaning of such key terms as "serious physical harm," "essential care," "person responsible," "severe emotional damage," and "abandoned." During its deliberations, the Commission considered incorporating definitions of these terms within the proposed statutory grounds. This proved impossible, however, due to the concerns on the part of many Commission members outlined above, namely, that the suggested definitions were overly specific, and failed to provide for unforeseen cases where children were clearly in need of protection, but their circumstances eluded classification under the definitions proposed.

The Commission's solution to this dilemma was modeled, in part, after the report of the Commission on Child Support. The Child Support Commission recommended creation of an official interdisciplinary commission, composed of judges, lawyers and laypersons, to be chaired by the Chief Administrative Justice, with the mission of creating guidelines to be used by judges in determining child support.

Similarly, the Commission on the Unmet Legal Needs of Children recommends that an interdisciplinary commission be appointed to create non-binding guidelines — which could be periodically revised — for courts adjudicating care and protection cases. Such guidelines would encourage uniform adherence to the Commission's proposed statutory grounds, without creating the kind of rigidity that could only endanger the well-being of the children the Commission seeks to protect. The guidelines commission would also be charged with developing a process to encourage judges to follow its guidelines,

although absolute uniformity of application could never be assured.

The following definitions of key terms are included here as examples of the kinds of specificity the Commission on the Unmet Legal Needs of Children considered, and that the guidelines commission might wish to refine:

1. **Serious physical harm** means:
 - a. an intentionally or recklessly caused fracture of a bone or tooth, subdural hematoma, burn, soft tissue swelling as a result of trauma, impairment of the use of any organ, extensive bruising of the head, face, neck, trunk, or genitals, as well as bleeding that would normally require emergency medical attention or any other such serious physical injury.
 - b. a violation of criminal statutes prohibiting sexual activity in which a child is a willing or unwilling participant, including but not limited to permitting a child to engage in prostitution.
2. **Person responsible** means a natural parent, foster parent, guardian, employee of a home or institution, or any other person with equivalent supervision of the child.
3. **Essential care** means minimally adequate food, clothing, shelter, medical care, education, supervision, or protection from imminent physical harm. A child is not considered deprived if the people responsible are taking all reasonable measures within their financial means to prevent such deprivation.
4. **Severe emotional damage** means a condition characterized by intense anxiety, depression, withdrawal, or untoward aggression to self or others, and which has been clinically diagnosed by a licensed psychologist or psychiatrist.
5. **Abandoned** means being left without any provision for support, and without any person responsible to maintain care, custody, and control because the whereabouts of the person responsible is unknown and reasonable efforts to locate that person have been unsuccessful. The child is not considered abandoned in the latter circumstance if s/he is in the care of an adult willing and able to be responsible for the child's welfare.⁴

The suggested definitions provoked extensive discussion in the Subcommittee and the Commission as a whole. Were the criteria properly detailed or phrased? Were they worthy of replacing tests for "current parental unfitness" and "best interests of the child"? Would parents be more likely to accept adjudication when confronted with immediate documentation of harm? Later on, would parents be less hostile to court-ordered services? Would detailed threshold criteria restrict petitioners unduly? Despite honest differences of opinion on

these subjects, the Commission was united in its conviction that greater specificity was required at the outset in order to add clarity and even-handedness to court proceedings. Uniformly, the Commission was aware that its work in this area was an important and necessary first step, which must be taken further by the Massachusetts Bar Association's Standing Committee on Children.

Recommendation #2

All courts with authority to intervene in families for the care and protection of children should adopt uniform time guidelines to track cases from beginning to end.

Comment

The Commission was reminded again and again that children are harmed by delays in custody proceedings. This concern was expressed repeatedly by professionals testifying before the Commission, and it has been at the heart of recent appellate court decisions in the Commonwealth. The Supreme Judicial Court has said that no cases have a greater claim to timeliness than those involving the care and custody of children. "... Unless proceedings involving custody of a minor are expedited, they fail to accomplish their purpose. Proper resolution of such issues is essential."⁵

To reduce the harm caused by delay, the Commission recommends that the Probate, District, and Juvenile Court Departments adopt the time guidelines set forth at the end of this Recommendation. The proposed guidelines should apply to:

- Care and Protection Petitions in the District and Juvenile Court Departments (G.L. c.119, §24);
- Petitions to Dispense with Consent to Adoption in the Probate and Family Court Department (G.L. c.210, §3);
- Child Custody Petitions in the Probate and Family Court Department (G.L. c.119, §23C); and
- Guardianship of a Minor Petitions in the Family and Probate Court Department (G.L. c.201 §5).

Although all the departments have some timetables, they are neither consistent nor capable of tracking cases from beginning to end. As a result, the following story can and did unfold in the courts of the Commonwealth:

- In November, 1974, a care and protection petition was filed on behalf of a two-week old baby, who was placed in foster care.
- In September, 1977, a petition to dispense with consent to adoption was filed for the child. The Probate and Family Court allowed the petition in September, 1981, whereupon it was appealed.

- Two years later, the Appeals Court vacated the decision and remanded the case to the trial court for additional findings. A petition was filed for further appellate review.
- In February, 1984, the Supreme Judicial Court vacated the trial court decision and sent the case back for additional orders on visitation and custody, with a view toward returning the youngster to a father who had seen the child only once since the case began. After nearly ten years, the fate of the child is still undetermined.

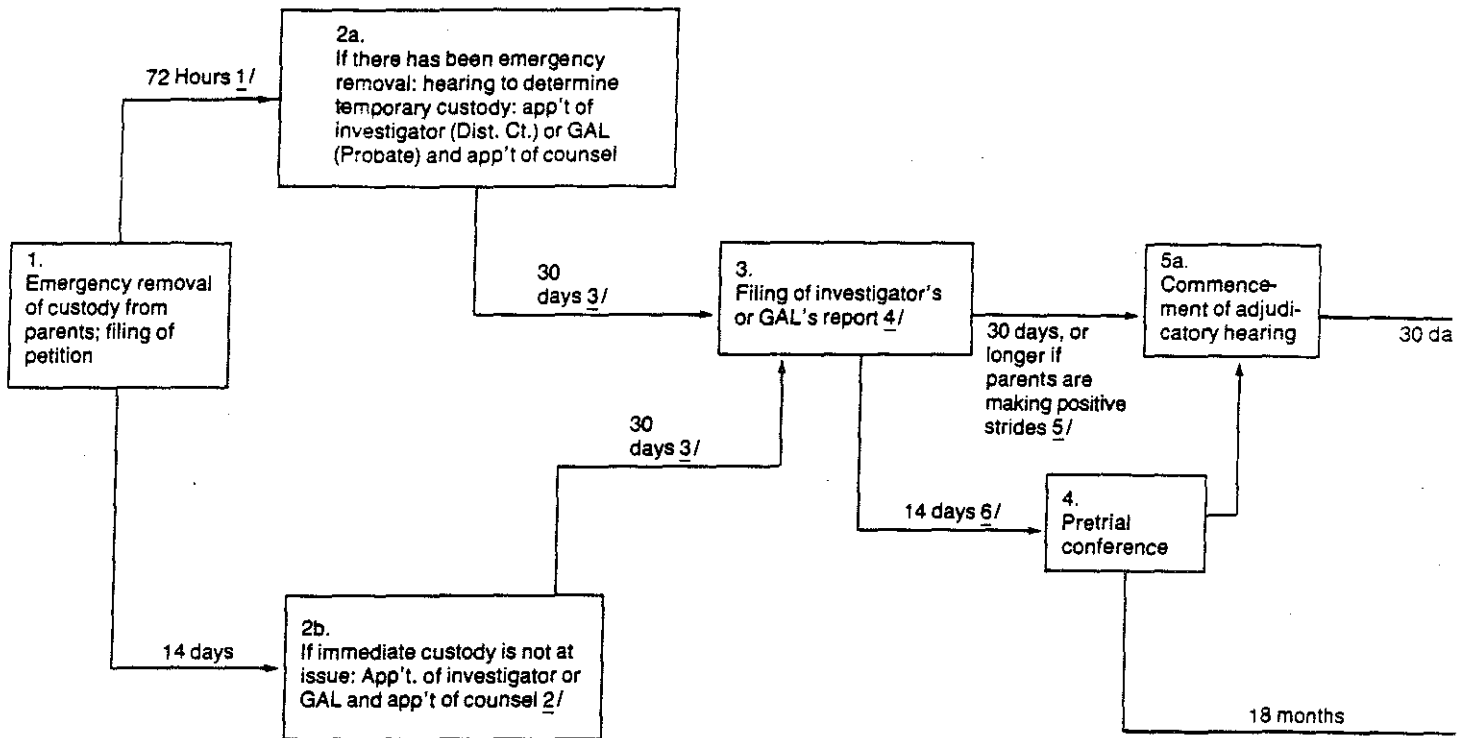
While this may be an extreme case, there are many common forms of delay that underscore the need for uniform time guidelines. For example, the Commission was told of a District Court Justice who, after trial, often keeps care and protection cases under advisement longer than six months, one more than a year. The District and Juvenile Court Departments do not have rules to govern this step; however, under the Uniform Practices of the Probate Court, justices are required to enter decrees, orders, and findings no later than 30 days after the close of trials.⁶ The Commission recommends that all court departments conform to the 30-day standard.

There are also steps for which none of the departments have time guidelines. For example, the Commission learned of a care and protection trial with 20 days of hearings held over 14 months. Because evidence was needed on "current" parental unfitness, numerous witnesses had to be recalled to testify about the course of behavior. To prevent such occurrences, the Commission believes that adjudicatory or dispositional hearings should be completed within 30 days of their commencement.

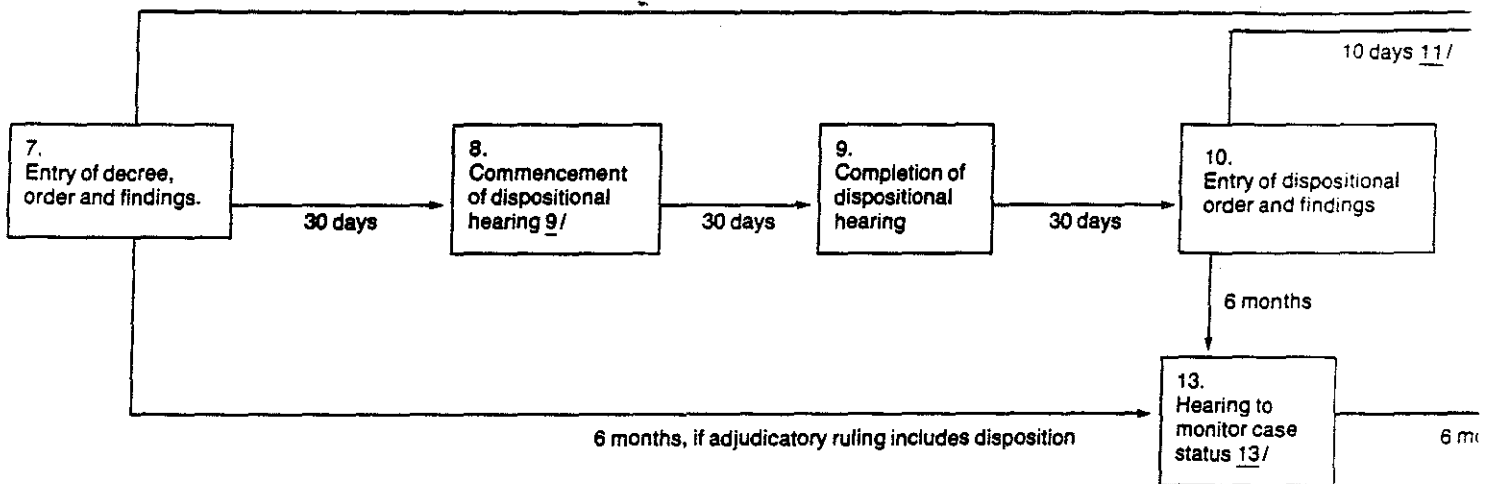
Finally, there are steps for which rules exist but are not enforced. As an example, the Uniform Practices of Probate Court call for Guardians Ad Litem to file their reports within 30 days of appointment unless the court approves otherwise.⁷ It is quite common, however, for reports to filter in months later, even as long as a year after appointment. Obviously, when reports are delayed indefinitely, parties are unable to schedule pre-trial conferences, let alone trials. The Commission urges enforcement of the 30 day rule in all court departments both for Guardians Ad Litem and Independent Investigators. The Notice of Appointment should be reprinted to state the obligation, which may serve either to improve compliance by Guardians and Investigators or to prompt Justices to specify different time periods if warranted by particular situations.

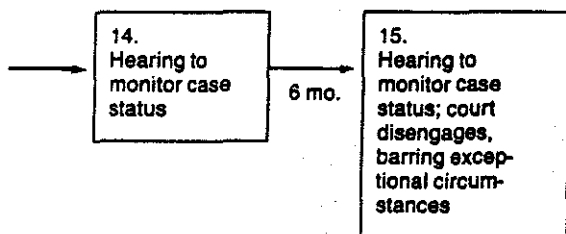
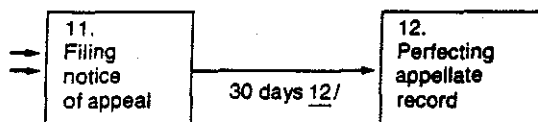
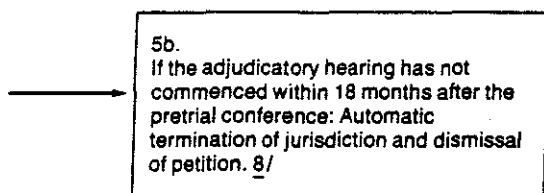
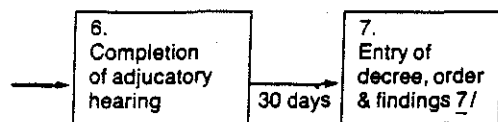
The Commission realizes that implementing uniform time guidelines will require herculean efforts. It also realizes that time guidelines will substantially affect current practices in the three court departments.⁸ Nevertheless, the Commission cannot ignore the pain caused to children when custody proceedings are delayed. It cannot overstate the due process concerns when cases continue to drift. And it cannot identify a more sensible solution to these problems than uniform time guidelines.

Time Periods in Child Custody Pr



10 days, if adjudicatory ruling includes disposition
 10 days, if appeal as of right from adjudication before disposition) 10/





1. This 72-hour deadline reflects the statutory requirements of M.G.L. c.119, §24 in the District Court. The subcommittee recommends that the same model be adopted in the Probate Court wherever emergency temporary custody is sought.

2. This recommendation would require alterations in the rules and practice regarding notice in the Probate Court.

3. This 30-day limit is already established in Probate Court, under the Uniform Practices of the Probate Court (UPPC), but it is not always adhered to in practice. The subcommittee recommends that the 30-day deadline be stated in the notice of appointment in the Probate Court, to ensure that practice follows the UPPC guideline. The subcommittee also recommends that the District Court adopt the same 30-day period as the Probate Court.

4. If other recommendations of this subcommittee, dealing with changes in adjudication standards, are adopted, there may be no need for an investigative report at this stage or the report may be of a different character.

5. This limit, with the option to expand time where parents are making positive strides, reflects the current provisions of the UPPC. There is no limit in District Court. The recommended limit would require shorter periods for discovery than are now provided for under current rules of procedure and practice.

6. The UPPC provides for a pre-trial conference within 60 days of the return date (which itself may be some 60 days after filing of the petition), and trial within 60 days after the pretrial conference. There is no comparable scheduling requirement in the District Court, although one is expected to emerge from the revision of the District Court Standards which is currently in progress. The subcommittee proposal would shorten the Probate Court time periods, and would apply the same limits in District Court.

7. At present, the UPPC allows 30 days after completion of evidence for entry of decrees, orders and findings. In District Court, there is no deadline for adjudication; however, M.G.L. c.119, §27 provides that findings must issue within 10 days after an adjudication or order of commitment.

8. This recommendation for automatic termination is adopted from the proposals of the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association (IJA/ABA) relating to abuse and neglect.

9. Practice in Massachusetts courts tends to follow a model in which adjudication and disposition are decided together; further, in almost all cases where an adjudication is made, the disposition involves removal of the child from the parents' home. The subcommittee believes, as does the IJA/ABA, that in most instances a bifurcated proceeding would be more appropriate. In a bifurcated system, the adjudicatory hearing is limited to determination of the existence of endangerment to the child — a determination that involves a rather narrow range of facts. If a child is found to be endangered, then information concerning the parents which might have been unduly prejudicial at the adjudicatory stage (for example, information about a parent's own history as an abused child) can be admitted to help the court to determine an appropriate disposition. The subcommittee also urges that alternative dispositions be given more attention than they generally receive, with in-home services ordered more often than removal of custody.

10. M.G.L. c.119, §27 presently permits appeal from adjudication. Following the IJA/ABA proposal, some members of the subcommittee would limit pre-disposition appeals to the discretion of the court, in order to avoid delaying disposition. Other members do not agree, and the subcommittee is still discussing this issue.

11. The subcommittee proposal follows the present requirement of M.G.L. c.119, §27 for the District Court. In Probate Court, the applicable rule is Mass.R.App.P. 4, providing for appeal within 30 days, or within 60 days if the Commonwealth or its agency or officer is a party. The subcommittee would make the practice uniform in all courts.

12. At present, the Interim Supplemental Rules of Appellate Procedure provide 30 days for submission of a Draft Report of the trial court proceedings, plus 10 days for objections and proposed amendments to the Report. There is no deadline for ruling on the Draft Report. The Mass. Rules of Appellate Procedure provide deadlines for filing transcripts but no deadline for completion of the record. The UPPC provides some impetus for completion of the record by assigning to the appeals clerk of the trial court the task of reviewing the status of each case monthly and reporting the same to the trial judge. The subcommittee would adopt the UPPC monthly review procedure in the District Courts and would eliminate the Draft Report altogether.

13. The Massachusetts system currently provides for automatic monitoring hearings, if the child is in foster care, after 18 months and at intervals of 12 months thereafter. M.G.L. c.119, §29B. Also, parents who are well represented by counsel can seek review and redetermination of the child's needs every six months pursuant to M.G.L. c.119, §26. The IJA/ABA recommends a series of up to three automatic monitoring hearings at 6 month intervals after disposition, regardless of the nature of the intervention ordered, and the subcommittee believes that is a wise course for adoption in Massachusetts.

Recommendation #3

The District, Juvenile, and Probate Court Departments should adopt uniform rules and procedures for handling care and protection cases.

Comment

Practitioners complained just as forcefully about varying rules among the three court departments as they did about delay. No one argued that jurisdiction by several court departments was improper in any way (although some thought probate court involvement was unnecessary). Nonetheless, the Commission was persuaded that varying rules and practices at key stages of child-endangerment proceedings raised due process questions about procedural matters such as adequate and timely notices, competent and timely legal representation, and fair rules of evidence. Accordingly, it recommends that the three court departments adopt similar procedures, encompassing at a minimum:

A. **Contents of Petitions:** A petition should contain a short, plain statement of the circumstances that form the basis of the complaint. It should specify the names of the children thought to be endangered and, if known, the persons alleged to be at fault. A petition should disclose the relief or remedy being sought from the court, and it should be accompanied by an affidavit which sets forth the details of the case.

B. **Notices:** A notice should be served personally, whenever possible, to the individuals named in the petition as well as to the child's legal representative and personal caretaker (if the latter is not otherwise named). Also, the Department of Social Services should receive notice of all complaints filed by other entities. In all actions, the notice should contain:

- the place and time by which the accused must answer the complaint or file an appearance;
- the right to counsel, including steps for the indigent to take in order to secure a court-appointed lawyer;
- the consequences of failing to appear at court when ordered to do so; and
- a description of what ordinarily happens at the hearing.

Notices should always be accompanied by a copy of the petition and affidavit. Also, they should explain any *ex parte* orders that may have been entered, and inform the defendant of his/her right to appear and challenge the order.

In non-emergency cases — those in which temporary removal is not being sought by the petitioner — the court should schedule the first hearing within two weeks after the petition is filed. Defendants should receive a notice and summons to this hear-

ing at least 72 hours in advance. In the event of an *ex parte* order of custody, the first hearing should be scheduled within 72 hours after the order is entered, and defendants should be notified at least 24 hours in advance.

C. **Arraignments:** As mentioned, an arraignment should be scheduled within two weeks after the petition is filed. At that or any earlier hearing, the court should fully explain the nature of the proceeding and its possible outcomes. Then and there, after verifying need, the court should appoint counsel for the children and the accused, as well as arrange any necessary interpretive or support services. The court should inform the parties of their right to a service or case plan, which a private agency or the Department of Social Services must provide within 45 days of filing an appearance in the case. Finally, the court should explain any temporary orders or special procedures — for example, the purpose, possible results, and loss of privilege were a psychiatric or psychological examination to be ordered.

D. **Temporary Custody Hearings:** Application for an *ex parte* order of temporary custody should be made by motion, together with an affidavit setting forth the supporting facts and the affiant's oath that the facts are true to the best of his/her knowledge, information, or belief. The court should not enter emergency custody orders without specific written findings supporting the conclusion that:

- the child is suffering serious physical harm;
- the defendant is probably responsible for causing the harm;
- the child will suffer serious physical harm, even death, unless the order is entered; and
- there is a clear danger that the child will be concealed or removed from the Commonwealth if the defendant is notified in advance.

Orders granting the temporary transfer of custody should be valid for a period not to exceed 72 hours. When parties are aggrieved by an order, they should have a right to the same type of appeal currently allowed in probate court under G.L. c.231, §118. In addition, they should receive immediate notice of the next hearing on temporary custody and be informed of the opportunity to examine and cross-examine witnesses.

E. **Discovery and Depositions:** Parties should be allowed to obtain discovery on any non-privileged matter, provided it is relevant to a pending action. Unless the court orders otherwise, the parties should also be permitted to stipulate in writing that valid depositions may be taken before any person, at any time or place, upon any notice, and in any manner. Parties should be allowed to record testimony from any person (and by other than stenographic means) upon leave of the court, which should be freely given when justice demands.

Requests for leave should be made no later than 14 days after a party makes an initial appearance. Written notice should be sent within seven days to all the other parties, and depositions should be completed no later than seven days before an adjudicatory hearing. All other issues relevant to depositions in custody matters should be governed by the existing rules of domestic relations procedure.

Upon motion, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Unless an alternative is agreed upon by the parties in written stipulation, depositions should be taken before a person appointed by the court in which the action is pending, or before an officer duly authorized to administer oaths by the government of the locale in which the examination is taking place.

F. **Interrogatories, Production of Documents, and Requests for Admission:** Subject to specific time limits, Rule 33 of the Domestic Relations Procedures should govern interrogatories. Likewise, Rules 34, 35 and 36 should govern the production of documents and requests for admission.

G. **Investigators, Guardians Ad Litem (G.A.L.) and Their Reports:** Investigators and/or G.A.L.s reports should be filed no later than 30 days after appointment of the investigator or G.A.L. The guidelines for G.A.L.s adopted by the Probate and Family Court should apply to all investigations, whether by G.A.L.s or investigators in care and protection and related matters, except that such reports should be confined to reports of facts and should not include an evaluation and recommendation section. Such reports must be available to all counsel no less than one week before the pretrial conference described in Paragraph H, below.

H. **Pretrial Conference:** All contested cases shall be pretried. Such a pretrial shall be conducted in accordance with Rule 16 of the Rules of Domestic Relations Procedure. The pretrial conference shall be held within 14 days of the filing of the G.A.L.'s or investigator's report. All parties must be present with counsel at the pretrial. If, after a pretrial, no

settlement is reached, the trial should commence within 60 days after the pretrial unless the court orders otherwise.⁹ All such trials should be scheduled for consecutive days until completion.

I. **Trial:** The trial should be divided into two parts. The first, adjudication, should consist of a determination by the court of whether or not state intervention is needed. Under the current statutory scheme, this would be a determination of whether or not a parent is currently unfit to provide for the interests and needs of the child. Under the Commission's proposed statutory grounds for state intervention, this determination would be of whether the child is an endangered child within the meaning of the Commission's proposed definition. If, after completion of this stage, the court determines that state intervention is unwarranted, the case would be dismissed. Should intervention be deemed appropriate, the case should be scheduled for a hearing on disposition, to occur no later than 30 days after adjudication. The court must then determine disposition — what orders are necessary to protect and foster the best interests and needs of the child. If the court determines the child should be placed in the "permanent" custody of the Department of Social Services, a further hearing should be scheduled, to occur within two weeks, to review DSS's proposed permanent plan for the child.¹⁰

J. **Reviews:** The Commission recommends that court hearings be held every six months to review the status of care and protection cases. At the first two hearings, the court must weigh the impact of services on parents and children, and must consider dispositional recommendations as well. By the third hearing — after 18 months have elapsed — the court must be prepared to make final determinations and disengage from the cases, barring exceptional circumstances.

K. **Miscellaneous:** Although the Commission has not analyzed each rule specifically, it recommends that the Mass. Rules of Domestic Relations Procedure (M.R. Dom. Rel. P.) should be applied, in general, to these proceedings. Some modifications may be needed, and further study should be undertaken in this regard.

¹ Mnookin, R.H., *In the Interest of Children*, p. 32 (W.H. Freeman and Co., 1985).

² St. 1866, c.283.

³ See *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁴ There was a second standard for abandonment debated to a deadlock in the Subcommittee. Half the members agreed, and half disagreed, with a proposal to consider a child abandoned if s/he "... has been placed in voluntary care with the Department of Social Services for at least six months and the person responsible is unable or unwilling to receive the child back."

⁵ *Custody of a Minor*, 389 Mass. 755, 764, Footnote 2, 452 N.E. 2d 483 (1983). Also, *Custody of a Minor (no. 1)* 391

Mass. 752, 463 N.E. 2d 324, 238 (1984).

⁶ See UPPC, Xa(11) and Xb(11).

⁷ See UPPC, Xa(7) and Xb(7).

⁸ Currently, the vast majority of cases are heard by either the District or Juvenile Court Departments, depending upon whether a juvenile court exists in the county in which a particular case is heard. It was suggested that probate court jurisdiction was unnecessary in child endangerment cases, and should be eliminated. Although the suggestion makes intuitive sense, it requires additional study.

⁹ See, Uniform Probate Practices Xb(10).

¹⁰ See, *Care and Protection of Three Minors*, 392 Mass. 704, 714-718 (1984).

Chapter III

Termination of Parental Rights

Introduction

Judges, legislators, attorneys, and others who work within the legal system must grapple with complex, painful issues when they are forced to intercede in family life to protect the safety and well-being of children at risk. One of the most wrenching decisions a judge must make is to terminate parental rights when the biological parents are opposed. Yet there are clearly times when this decision must be made.

If it has been demonstrated that either long-term or substantial parental abuse or neglect exists, the state has an obligation to protect the child, even if this calls for termination of the biological parents' rights to the child. Under G.L. c.210, §3, parental rights can be terminated by a decision of the Probate and Family Court, rendered in response to a petition to dispense with the need for parental consent to adoption. In so doing, "the state does not act to punish misbehaving parents; rather it acts to protect endangered children."¹ The only acceptable reasons to terminate the natural parents' rights are to protect the child from further destructive abuse or neglect, and to place the child with adoptive parents who are able to provide necessary parental care and support.

In recent years, both the United States Supreme Court and the Massachusetts Supreme Judicial Court have emphasized that a natural parent's fundamental right to custody of a child cannot be terminated without due process of law.² Yet a legal dilemma arises, because the controlling statutory standard is still "the best interests of the child."³ Case law demands that despite a parent's constitutionally protected custody rights, the court "shall"⁴ terminate parental rights if it finds, by clear and convincing evidence, that parents are "currently unfit to provide care and protection for their children," and that "it is in the best interests of the children that their relationship with the parents be terminated."⁵

While the Commonwealth is strongly committed to protecting family integrity, whenever this can safely be done, its overriding obligation is to protect the safety and other compelling interests of the child. The Commission believes it is imperative for courts, social service agencies and the bar to bear in mind that when a child is threatened with serious physical or emotional harm, "the first and paramount duty of courts is to consult the welfare of the child."⁶ While the biological parents' due

process rights must be protected, the central focus of termination proceedings must be the children's needs.⁷

The Commission's Subcommittee on Family Needs, Rights and Obligations studied and analyzed the issue of termination of parental rights, and developed two recommendations pertaining to counsel for the child and statutory standards in termination cases, which the Commission has endorsed. Because the role of the Probate and Family Court judge is so crucial to protecting children's needs and rights, a third recommendation — on mandatory continuing judicial education — was developed by the Subcommittee. To avoid redundancy, however, this third recommendation has been blended into the chapter on Legal Resources and Judicial Education. It is the Commission's hope that these recommendations will improve both the quality and the timeliness of judicial decision-making in proceedings designed to protect a child's most basic rights.

Recommendation #4

G.L. c.210, §3 should be amended to require that in contested cases where parental rights may be terminated, the court shall appoint counsel for the child.

Comment

In care and protection proceedings, in Massachusetts, children have a statutory right to counsel.⁸ But in termination of parental rights cases, no such right to court-appointed counsel is guaranteed by statute to the child.⁹ It seems anomalous for the law to recognize that children need independent counsel in care and protection cases — where state intervention is temporary — while ignoring the need for counsel in termination cases, where the consequences are permanent.

An attorney for a children's service agency is not the equivalent of a zealous, independent advocate for the child alone. An attorney representing the petitioning child care agency cannot function as an exclusive, independent advocate for the interests of the child, for example, if — as in the case of the Department of Social Services (DSS) — the agency's statutory mandate is partially to "assist, strengthen and encourage family life for the protection and care of children."¹⁰ This is only one

example of the many ways in which the interest of the child and of the particular agency "may diverge."—

The appointment of counsel for children in termination cases will significantly benefit the child. One area in which counsel can be expected to have an impact is in reducing unnecessary delay, which seriously interferes with the child's emotional development, particularly at critical times in the child's developmental life. Once a petition has been filed, there can be significant periods of inactivity unless one of the attorneys actively seeks a trial. Delay offers a tactical advantage to the natural parents by giving them added time to patch up their parenting efforts and show a lack of "current" unfitness at the time of the trial. An attorney who is representing the child's interests exclusively would have a duty to prod the other parties and the court and to resist delays, which are generally harmful to the child.¹²

But the most important role the attorney will fulfill is as an independent advocate for the child on the question of whether adoption and final separation from the natural parents is in the best interests of the child. Experienced practitioners believe that counsel for the child would have inherent credibility in the eyes of the court as an independent representative of the child's interests, unencumbered by the potentially competing interests which can affect attorneys for child service agencies, or DSS. An attorney specifically appointed to represent the child has no institutional interests to consider, while an agency attorney may be under substantial policy and caseload pressures to settle a termination case with a compromise plan.

The proposal for statutory independent counsel for children enjoys a broad base of support. It was repeatedly suggested to the Commission by attorneys who represent either children's protection agencies, parents or children in termination cases. Several states already require independent counsel for the child in contested termination cases, either by statute or appellate court decisions,¹³ and similar requirements are included in model acts on termination of parental rights.¹⁴

The Commission is convinced that appointed counsel for the child should be mandated in all contested termination cases, to provide an independent advocate exclusively for the child's interests, and that counsel for the child should also be appointed in such other cases as may be necessary, at the discretion of the court, as under current law. The court's decision will have a permanent impact on the child's life, and the benefits to be gained by guaranteeing counsel for the child far exceeds the relatively small economic cost to the state.

Recommendation #5

G.L. c.210, §3 should be amended to better define the grounds for termination of parental rights, and to mandate that when children's interests and parental rights conflict, the child's interests shall prevail.

Comment

G.L. c.210, §3, which governs termination of parental rights, states that a decree dispensing with consent to adoption shall be issued if the child's best interests will be served. The statute further stipulates that the court shall consider ability, capacity, fitness and readiness of the child's parents to assume parental responsibility, in an effort to determine where the child's best interests lie.

As the Commonwealth's Supreme Judicial Court has applied this statute, neither criterion — the "best interest of the child" nor "parental fitness" — can be viewed independently.¹⁵ The tests "are not separate and distinct but cognate and connected,"¹⁶ the Court has ruled.

The Court has also ruled that to dispense with the natural parent's consent to the child's adoption, "current parental unfitness"¹⁷ must be proved, and that if "returning custody to the natural parents would be seriously detrimental to the welfare of the child, then the parents could be considered to be unfit."¹⁸ Termination of parental rights is not permitted unless it is shown that the natural parents "have grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard," or "unless some factor such as lengthy separation and a corresponding growth in the ties between the child and the prospective adoptive parents indicate(s) that the child would be hurt by being returned to the natural parents."¹⁹

Recognizing the importance of these governing legal principles, the Commission nonetheless believes that judicial decision-making for the protection of children would be facilitated and improved by a set of specific statutory grounds for termination of parental rights. The Commission's objective is not to alter the governing principle established in recent years by the Supreme Judicial Court, but to codify into the General Laws a set of several particular grounds which would warrant termination if coupled with a finding that termination is in the best interests of the child. The proposed statutory grounds specify particular types of endangerment or neglect which under existing principles would warrant a finding of current unfitness.

The statutory grounds that we recommend are set forth below, and are taken from the *Model Act to Free Children for Permanent Placement*, prepared by the Law and Child Development Project of Boston College

Law School.²⁰ Other model statutes, several of which have already been cited, include comparable sets of specific statutory grounds for termination.²¹

In assessing the proposed additions to the current statute, some examples and comparisons may be of help. G.L. c.210, §3 currently presumes that if a child has been in the care of DSS or a licensed child care agency for more than one year, the child's best interest will be served by terminating parental rights. This presumption has been ruled unconstitutional because it shifts the burden of proof to the parent, contravening the requirement that it is the state's obligation to provide clear and convincing evidence that there are grounds for termination of the natural parent's rights.²²

Although this form of a presumption is procedurally invalid, the Commission believes that as public policy, permitting termination after more than one year of agency custody is still sound. If the child's needs are to be held paramount, Massachusetts law should continue to include absence of custody for more than one year as a ground for termination, provided that conditions harmful to the child still exist. This recommendation is reflected in §§(d)(3) and (f) of the Commission's proposed statutory grounds, and in the *Model Act*. A comparable ground can be found in the American Bar Association's standards, as well.

A second example of the proposed statutory grounds for termination is a prior adjudication of abuse or neglect, accompanied by mental illness or use of alcohol or drugs that renders the parent "consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time." [See §§(d)(2) and (e)(1), below.] A third ground would be a prior adjudication for abuse or neglect accompanied by "repeated and continuous failure" by the parent to provide the child with "adequate food, clothing, shelter, and education as defined by law, or other care and control necessary for his physical, mental or emotional health and development." [See §§(d)(2) and (e)(3), below.]

Prior to 1972, Massachusetts law provided several specified grounds for termination of parental rights, such as a parent who is "hopelessly insane," who is imprisoned on a third drunkenness conviction within one year, or who is convicted as a "common nightwalker" and neglects the child.²³ While the Commission does not seek to revive the pre-1972 grounds, it is convinced of the need for a new set of statutory grounds to adequately define the concept of current parental unfitness. The grounds set forth in the *Model Act* are well-tailored to this purpose and keep the interests of the child paramount.

Finally, the Commission believes that a clear, overall policy statement should be included in the termination of parental rights statute, as well. The following statement, taken from the *Model Act*, §1(b)(4), includes the essential

points: "It is the policy of the Commonwealth that the interests of the child shall prevail if the child's interests and parental rights conflict."

A somewhat similar statement of statutory policy is contained in the National Council of Juvenile Court Judges *Model Statute for Termination of Parental Rights*, §12(5): "In considering any of the above basis for terminating the rights of a parent, the Court shall give primary consideration to the physical, mental or emotional condition and needs of the child." The Commission believes that such a statement of statutory purpose is necessary to provide clear guidance to the judiciary, the bar and children's service agencies, and to keep the interests of the child paramount — our central concern.²⁴

Suggested Additions to G.L. c.210, §3:

- (d) An order of the court to dispense with the necessity of parental consent shall be made on the grounds that such is in the child's best interest, in light of considerations in sections (e) through (h), where one or more of the following conditions exist:
- (1) the child has been abandoned;
 - (2) the child has been adjudicated in need of care and protection in a prior proceeding;
 - (3) the child has been out of the custody of the parent for the period of one year and the court finds that:
 - (i) the conditions which led to the separation still persist, or similar conditions of a potentially harmful nature continue to exist;
 - (ii) there is little likelihood those conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and
 - (iii) the continuation of the parent/child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.
- (e) When a child has been previously adjudicated in need of care and protection, the court in determining whether or not to terminate the parent/child relationship shall consider, among other factors, the following continuing or serious conditions or acts of the parents:
- (1) emotional illness, mental illness, mental deficiency, or use of alcohol or controlled substances rendering the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
 - (2) acts of abuse or neglect towards any child in the family; and

- (3) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, and education as defined by law, or other care and control necessary for his physical, mental, or emotional health and development. However, a parent or guardian who, legitimately practicing his religious beliefs, does not provide specific medical treatment for a child, is not for that reason alone a negligent parent, and the court is not precluded from ordering necessary medical services.
- (f) Whenever a child has been out of the physical custody of the parent for more than one year, the court shall consider, pursuant to section (d)(3), among other factors, the following:
- (1) the timeliness, nature and extent of services offered or provided by the agency to facilitate reunion of the child with the parent;
 - (2) the terms of a social service contract agreed to by an authorized agency and the parent and the extent to which all parties have fulfilled their obligations under such contract.
- (g) When considering the parent/child relationship in the context of either paragraph (e) or (f), the court shall also evaluate:
- (1) the child's feelings and emotional ties with his birth parents; and
 - (2) the effort the parent has made to adjust his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home in the foreseeable future, including:
 - (i) the extent to which the parent has maintained regular visitation or other contact with the child as part of a plan to reunite the child with the parent;
 - (ii) the payment of a reasonable portion of substitute physical care and maintenance if financially able to do so;
 - (iii) the maintenance of regular contact or communication with the legal or other custodian of the child; and
 - (iv) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time.
 - (h) The court may attach little or no weight to incidental visitations, communications, or contributions. It is irrelevant in a termination proceeding that the maintenance of the parent/child relationship may serve as an inducement for the parent's rehabilitation.

¹ *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 592 (1981).

² *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982) [clear and convincing evidence standard must be applied in termination of parental rights]; *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 799 (1983) [declared unconstitutional a statutory presumption that termination is in the child's best interests if the child has been in state custody for more than one year].

³ G.L. c.210, §3; *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 397 Mass. 659, 670 (1986). [hereinafter "*Petition-1986*"].

⁴ G.L. c.210, §3(b).

⁵ *Petition-1986*, 397 Mass. at 670.

⁶ *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 586 (1981).

⁷ See G.L. c.210, §3, *Petition-1986*, 397 Mass. 659, 662-663, 670; cf. *Wyman v. James*, 400 U.S. 309, 318 (1971).

⁸ G.L. c.119, §29: If the child "is not able to retain counsel, the court shall appoint counsel for said child." *Id.*

⁹ G.L. c.210, §3; see Probate and Family Court Department, Uniform Practice X a(7). In contested termination petitions, counsel "may be appointed to represent the best interests of the child."

¹⁰ G.L. c18B, §(a).

¹¹ R.W. Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning*, 8 Family Law Quarterly 257, 300 (1979).

¹² See J.A. Stahlin, *Permanency and the Law in Massachusetts*, 1986 *Boston Bar Journal*, March/April at 29, 36n. 37. [The author "has not yet encountered a case where undue delay was even in part the fault of the child, who is the one potentially harmed when the consequences of

the delay are disregarded."]

¹³ See *In re Child X*, 617 P.2d 1078 (Wyo. 1980); *In re T.M.H.*, 613 P.2d 468 (Okla. 1980).

¹⁴ Law and Child Development Project of Boston College Law School, *Model Act to Free Children for Permanent Placement*, §12(a) and (d) (Family Law Reporter Reference File 201: 0077, 1979); National Council of Juvenile Court Judges, *Model Statute for Termination of Parental Rights*, §7(1) (Family Law Reporter Reference File 201: 0069; 1977); ABA/Institute of Judicial Administration, Final Juvenile Justice Standards Commission, *Standards Relating to Abuse and Neglect*, §8.3 B(7) (1981).

¹⁵ *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 641 (1975); *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 591 (1981) (hereinafter "*Petition-1981*").

¹⁶ *Little Wanderers*, *supra*.

¹⁷ *Petition-1981*, 383 Mass. at 587, 589.

¹⁸ *Petition-1981*, 383 Mass. at 590.

¹⁹ *Id.*

²⁰ *Model Act to Free Children for Permanent Placement*, §4, prepared by the Law and Child Development Project of Boston College Law School (Family Law Reporter Reference File 201: 0077; 1979)

²¹ See also R.M. Horowitz and H.A. Davidson, *Legal Rights of Children* 387-97 (1984).

²² *Petitions of the Department of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 802-803 (1983).

²³ G.L. Ann. c.210, §3 (Supp. 1986 at 248).

²⁴ See *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 588 (1981).

Chapter IV

Legal Resources and Judicial Education

Introduction

The Commission's goal is to promote improvements in judicial education and in legal resources available to children, to ensure that the legal needs of the Commonwealth's children are met, that children are assisted in achieving the basic legal safeguards accorded to adult citizens, that their entitlement to services and protection is fought for zealously, and that the legal system serve as a conduit to the non-legal services children need, if enforcement of their legal rights is to be more than a sterile and empty gesture. Because decisions concerning children have such far-reaching and immeasurable effects, the Commission is concerned that judges deciding matters directly involving children receive all possible assistance. The Commission believes that one vital way to assist judges is to make sure that children are represented by ardent and informed advocates.

Recommendation #6

Legislation should be introduced creating a Children's Services Division within the Committee for Public Counsel Services, as an experimental pilot project in two courts, to provide children's advocacy and representation through appropriately trained and qualified attorneys and support staff. The Children's Services Division shall supplement, but not replace, representation currently being provided by the private bar.

Comment

Based on its canvassing of judges and practitioners, the Commission has identified as a major problem the uneven quality of representation of children in court and administrative hearings. Six major contributing causes appear to be at fault:

- (1) Inadequate training, experience and supervision of attorneys representing children;
- (2) Lack of defined standards governing the performance of attorneys advocating for children, in spite of significant efforts made by the Committee for Public Counsel Services (CPCS) to establish performance standards or guidelines for the attorneys it appoints;
- (3) "Corner cutting," based on low levels of reimbursement of appointed advocates;
- (4) Perception by the bar that legal matters directly involving children are "kiddie matters" — at best, professional stepping-stones for the young and inexperienced; at worst, punishment for inadequate or unmotivated practitioners.
- (5) Lack of support and input to lawyers from non-legal professionals even though understanding of non-legal issues often is essential to represent children adequately.
- (6) Lack of information and appropriate continuing education on the legal and non-legal needs of children and changing resources available to assist children.

The Commission concluded that the only appropriate way to address these deficits is to create a statewide mechanism for the provision of coherent, competent legal advocacy, backed by social service support. In order to be effective, such a statewide mechanism needs to provide centralized training, and ensure that the advocates are held accountable for the quality of their representation.

Consequently, the Commission has concluded that the best approach to meeting the need for adequate legal resources for children is to build on the existing statewide agency — CPCS — to create a Children's Services Division as a pilot project in two courts. Building on CPCS would allow the Children's Services Division to:

- (1) tap existing resources and expand them — including secretarial, support and administrative resources;
- (2) establish the Children's Services Division on the current CPCS organizational model;
- (3) build on and expand CPCS's internal training and accountability;
- (4) demonstrate cost-effectiveness. When CPCS expanded its criminal operations, it demonstrated that it could do so in a cost-effective, competent manner;
- (5) eliminate the need to fragment legal services to children who often enter the legal system through one avenue (e.g., juvenile delinquency proceed-

ings), but who may be involved in multiple, or even simultaneous legal proceedings (e.g., care and protection, CHINS).

The Commission proposes that Recommendation #6 be implemented in the following ways:

- (1) Amend G.L. c.211D, §6, to provide that a Children's Services Division with public and private counsel departments shall be created within CPCS; and that the Children's Services Division may represent youngsters in all proceedings in which they are directly involved, specifically, delinquencies, CHINS and care and protection proceedings. Further amend G.L. c.211D, §6, to allow CPCS's Children's Services Division to represent children in the Probate and Family Court, for example, in proceedings under G.L. c.210, §3 (1984 Ed.).
 - (2) Amend G.L. c.211D, §9, so that each attorney participating in the Children's Services Division, without limitation, will be required to take an approved course of training in the fundamentals of trial practice in children's matters (no waiver for experienced attorneys). The Commission also is recommending mandatory training for the judiciary and court personnel, and believes it would be anomalous to exclude experienced attorneys from training but mandate such training for experienced judges.
 - (3) Amend G.L. c.211D, §13, to provide that the Children's Services Division may appoint non-legal staff and procure office space.
 - (4) Amend G.L. c.211D, §14, to establish that the Children's Services Division may represent children in all appeals and related post-conviction remedies.
 - (5) Establish a two-year pilot project in which the Children's Services Division will be responsible for representation of all children in selected courts. To implement this pilot project:
 - (a) Courts to be part of the pilot project will be selected based on consultations with the Chief Justice of the particular trial department. Counsel shall have authority to appear in any other court in which there are related proceedings;
 - (b) Based on the courts selected to be part of the pilot project, adequate staffing and support personnel will be provided so that the Children's Services Division can represent all children in CHINS, care and protection and delinquency proceedings in those courtrooms. Based on CPCS's experience in metropolitan areas representing juveniles in delinquencies alone, the pilot project would require a minimum of 4-5 attorneys in the public counsel arm of the Division, and a supervising attorney/team leader who could also represent children, as well as a supervising attorney/administrator of the private counsel arm of the division;
- (c) In addition, the pilot project for the Children's Services Division will need to be appropriately staffed by support personnel, including but not limited to:
 - one investigator (to prepare delinquencies, defenses, conduct visits and evaluations);
 - two or three social workers, or one or two social workers and one educational specialist to assist attorneys in interviews, evaluation, analysis of records, referrals for 766 Team evaluations, analysis of treatment or dispositional alternatives and proposed settlement offers;
 - (d) The private counsel arm of the Children's Services Division will, at minimum, represent children in cases where there are conflicts (i.e., two child defendants "in any matter before any court on the same case or arising out of the same incident," or two siblings — one the alleged abuser, the other allegedly in need of care and protection). See, e.g., G.L. c.211D, §6(a)(i)(ii). To be effective, private counsel appointed under the aegis of the Children's Services Division must have access to the Children's Services Division's staff;
 - (e) Under the pilot project, the Children's Services Division should be housed in one or more of the existing offices of CPCS, to be chosen based on proximity to the court(s) selected, and should use existing secretarial staff. One additional secretary should be hired to service the Division, as well;
 - (f) The Children's Services Division will institute an internal training program for its legal and non-legal staff working with the Office for Children, Department of Social Services, and existing private programs, such as the Boston Juvenile Advocacy Institute of the New England School of Law, the Disabilities Law Center, and the North Shore Children's Law Project, as well as the courts;
 - (g) A portion of time of one of the social workers or the educational specialist of the Children's Services Division will be addressed to developing a clearinghouse and newsletter for attorneys on seminars, courses, workshops, books, videos and other audiovisual materials pertaining to the legal and non-legal needs of juveniles;

- (h) Present funds budgeted for appointment of private counsel in courts selected for the CPCS pilot project will be allocated to fund the pilot project itself. Additional funds will be requested from the Legislature if available funds are deemed inadequate.

It must be emphasized that even if this recommendation is enacted, and the new CPCS Children's Services Division is launched, the private bar must continue to represent children in delinquency, care and protection and termination of parental rights cases, as well as in divorce and custody disputes. The Commission's efforts to improve the quality of compensated public bar does not absolve the private bar of its responsibility to exercise compassion and professional diligence in addressing children's needs. No state agency, however well-designed, can perform this enormous task without the ongoing participation of the private bar.

The Commission acknowledges that there are several closely-related problems this recommendation does not address. First, there is the fact that the adversarial model — which some believe is detrimental to the effective solution of children's problems — remains in force. The Commission recommends that if implemented, the Children's Services Division — through its pilot project — explore alternative dispute resolution methods and modify them, if necessary, to address children's needs.

A second issue, far more complex, is that a persuasive case can be made for having the new division represent parents as well as children in state intervention cases in which the Commonwealth is required to provide court-appointed counsel to both parties under either statute or governing case law. Much of the motivation and justification for developing CPCS's Children's Services Division arises from a concern that for a variety of reasons articulated above, the private court-appointed bar is not providing sufficient quality representation to children. This, along with the other underlying problems which the recommendation outlines, applies equally to parents in state intervention cases.

Moreover, the Commission believes that children's interests are best served not only when children receive quality representation, but when their parents receive representation of equal competence. Many judges and practitioners of family law would attest that lack of experience as a parent's advocate lessens one's effectiveness as a children's advocate. Simply on practical grounds, children's interests in, for example, visitation with, remaining with or returning home to parents are ill-served if those parents do not receive vigorous representation to assist in meeting the child's interests.

By this reasoning, the ideal solution would be creation of a Family Services Division, rather than a Children's Services Division alone, so that parents as well as

children could be afforded the broad range of services described above. But because a major initiative of this type is best implemented one step at a time, we have recommended that the Children's Services Division be implemented as a test project, in two courts, to determine its feasibility and impact, and that it be evaluated within a year or two after its creation to assess whether and how it may be expanded.

Meanwhile, careful measures must be taken to assure that this pilot project does not work against the interests of those it is designed to assist. Minor mothers, for example, are among the neediest of the Commonwealth's children, and children should not be placed in a category where they would receive fewer services, less support staff, or less competent representation simply by virtue of becoming a parent. If the Commission's recommendation is implemented, steps must be taken to assure protection of these children's special needs and rights.

Recommendation #7

Judges, court personnel, attorneys, and Guardians Ad Litem handling cases involving children, by legislative or administrative order, should attend continuing education programs on developmental, psychological and evidentiary issues pertaining to children. For judges and court personnel, such programs should be regarded as part of their regularly assigned duties.

Comment

A. The Judicial Branch

Proceedings directly involving children — CHINS, care and protection and juvenile proceedings, termination of parental rights, disputed custody and criminal cases of alleged child sexual or physical abuse — present a range of complex legal and evidentiary issues as well as troubling questions about child development, and the psychological, emotional and physical symptoms and needs of children.

Many judges are well-informed, sensitive and effective in assessing the child's interest in the cases they must decide. Others, unfortunately, are hindered by misconceptions, indecisiveness, and too little attention to children's special needs. A trial judge who competently and expeditiously decides hotly contested criminal and civil cases every day may understandably feel lost trying to determine the best interests of a four-year-old in a care and protection case, or an eleven-year-old in a CHINS case.

Judicial training is not a cure-all. It will not result in perfect justice in child cases, any more than it will in other cases that come before the court. But the im-



Photo by Andrew Doerfer

portance of improving the quantity and quality of judicial training regarding children's needs was stressed by nearly every court-experienced attorney, social worker and mental health professional — as well as judges in the Probate, District, Superior and Appellate Courts — consulted by the Commission. The four questions to be answered are:

(1) For whom should training be provided?

The Commission focused primarily on judges' training needs. In the kinds of cases and proceedings at issue, however, other actors in the judicial branch play important roles. Clerks-magistrate and registers of probate, and those employed by them, necessarily become involved in these cases. In addition, because so much revolves around disposition of cases, and the handling of dispositional plans, probation and family services officers in the Probate Court are central figures. They, too, need training if the judicial system is to handle cases involving children more sensitively and effectively.

(2) What topics should such training cover?

Discussions with judges and court personnel revealed a general consensus that the most central need is for training on the stages of developmental growth of children and the emotional and psychological needs of children at different stages of their lives, particularly as those needs relate to court intervention. In addition, there was general agreement that training was needed on legal and evidentiary issues arising in cases dealing with children. Without attempting to offer an exclusive list, some of the topics training should address include:

- Stages of cognitive development in children (including development of memory; recogni-

tion of the difference between truth and falsehood; susceptibility to suggestive questioning, etc.);

- Changing emotional and psychological needs and issues for children at different stages of development;
- Effective interviewing techniques with children at various ages;
- Recognition of signs of alcohol and substance abuse in adults and children;
- Symptoms and dynamics of childhood physical and sexual abuse in victims, families of victims, and offenders;
- Profiles of physical and sexual abuse offenders;
- Application and use of various statutory privileges in different types of proceedings involving children;
- Use of alternative means of securing a child's testimony under the videotape statute and otherwise;
- Competency determinations for very young children;
- Use of expert witnesses in various types of "child" cases;
- Discovery requests — interrelationship of constitutional rights and statutory privileges;
- Available and permissible methods of making the courtroom and court experience less traumatic for children (e.g. in what circumstances may a person [mother, advocate, etc.] sit with child during testimony; how can the courtroom be made more child-size);
- Interrelationship between criminal child abuse

prosecutions and other proceedings involving same victim or family; effect on child of timing of various interrelated proceedings; methods of consolidating non-criminal proceedings;

- Criminal: offender profiles; how to evaluate treatment programs; and how to evaluate offenders' amenability to treatment and to particular treatment modalities;
- Types and quality of instructional materials that may be used to educate parties in divorce and custody cases; perhaps other types of cases;
- Responsibilities, functions and capacities of state agencies and others involved in these types of cases (e.g., Department of Social Services, Department of Youth Services, Department of Mental Health, victim witness advocates [in criminal cases], etc.).

(3) Should training be mandatory?

The courts make fundamental decisions profoundly affecting the course of children's development and emotional life. At the present time, however, there are no mandatory judicial education programs, nor do mandatory programs exist for clerk-magistrates or registers of probate. Probation officers appear to receive a day-long initial training session that includes coverage of indicators of child abuse and child abuse reporting requirements,¹ but all educational programs thereafter are voluntary.

The Flaschner Judicial Institute has been committed to high-quality judicial programs for many years, yet its programs are strictly voluntary. The Commission believes that the time has come to make these training programs mandatory. The recommendation for mandatory training is based on the conviction that greater understanding and knowledge about children are imperative if these cases are to be handled more effectively at all levels — from entry through disposition. Acquisition of that greater knowledge should not be left to the discretion of each judge, clerk or probation officer. Experience with voluntary educational programs shows that those who least need training are most likely to attend, while those who most need it often stay away.

(4) What quantity and types of training are needed?

A new statute, G.L. c.211B:4, took effect on July 1, 1987. It requires that all justices shall be provided with 15 days education leave each

calendar year, except during their first year of service, when they shall receive 20 days education leave prior to assuming the duties of justice.

The Commission recommends that part of this education leave — at least 10 hours (or 1½ days) be used for training in the subject areas described below. The Commission further recommends that the chief administrative justices of the Trial Court and of its several departments devise plans to enable other judicial personnel to attend the type of education programs described below. We recommend that probation and family service officers receive a minimum of 10 hours (or 1½ days) of training per year, and that clerks and registers also receive training, though the hours required may be fewer than ten. In all cases, these educational programs should be treated as regular assignments, not as extras to be attended on weekends, at night, or charged against vacation. The judicial system must assure that its agents are properly trained. It is not realistic or fair to expect those in the judicial branch to bear the burden of training themselves on their own time.

Clearly, the question of resources will have to be dealt with to implement the training proposals the Commission recommends. Questions have been raised about whether court sessions can be maintained, and regular court and probation functions completed, if all the judges, clerks, and other personnel periodically leave to attend the training programs outlined above. While solutions to this problem may not be easily devised, the Commission is persuaded that having well-trained judges and court personnel is so important to the quality of the judicial system that efforts must be made to accommodate the training needs herein discussed.

Many of the recommended training programs lie in such non-legal disciplines as psychology, psychiatry, medicine, and social work. Discussion and debate among disciplines is critical, and the Commission recommends that a multi-disciplinary approach be used, and that experts in each field — not just judges or lawyers — conduct the training sessions in which their specialties are involved.

Finally, the Commission recommends that continuing education not be confined to "programs," even though they have a crucial role to play. A written, loose-leaf bench book on issues relating to children, and cases involving children, could be an enormously useful resource for all

judges and court personnel, particularly if it is updated periodically with new materials on legal issues and other relevant developments. A resource library and a newsletter on children's issues and programs would also be helpful. The Commission is exploring whether these ideas for information collection and sharing might be something the Franklin Flaschner Institute could pursue.

B. Attorneys

Lawyers and judges interviewed by the Commission recognized the need to train attorneys representing children in CHINS, care and protection, juvenile delinquency and other proceedings concerning children's rights, as well as those who represent or serve as Guardians Ad Litem for children involved in custody or termination of parental rights cases. While it is likely that all lawyers representing children could benefit from training, lawyers appointed by the courts or CPCS are the ones for whom training can realistically be mandated.

Currently, CPCS provides limited training for lawyers seeking appointment as counsel in CHINS, care and protection and juvenile proceedings — specifically, a mandatory, two-day program for care and protection and CHINS cases. CPCS also offers a separate one-day course on delinquency that must be taken in conjunction with a two-day training in district court/criminal defense advocacy by lawyers seeking appointment by CPCS in delinquency matters. All lawyers seeking CPCS appointment must take the appropriate training, unless they qualify for a waiver by virtue of experience. The Commission believes these programs are a good first step, but recommends that they be expanded and that no experience waivers be granted.

Specifically, the Commission endorses an intensified initial training program, as well as continuing educational programs offered periodically thereafter one or two times per year, to be attended as a condition of continued eligibility for appointment. In addition to training, the Commission recommends that CPCS initiate some supervised practical experience. For example, lawyers seeking appointment should be required to "second-seat" or at least observe an experienced attorney handling one case, and be supervised, observed and critiqued on a case by an experienced attorney, before qualifying for individual appointments.

The Boston Juvenile Advocacy Institute (BJAI), at New England School of Law, has implemented a program along these lines for lawyers who seek appointment in the Roxbury Juvenile Court, which offers

some useful ideas in this regard. As a first step in instituting requirements for practical experience as well as course work or training, the Commission recommends that CPCS establish a mentor program so that each attorney appointed to represent a child is assigned an experienced attorney (either within the CPCS Children's Division or practicing elsewhere) to confer with regarding the case to which the attorney has been appointed.

Mandatory training programs for attorneys would be similar in content to those recommended for the judiciary. Thus, the programs should include training on topics such as the stages of cognitive development in children, changing psychological, emotional needs of children over time, effective child interviewing techniques, discovery and evidentiary issues relating to privileges, expert testimony, legal issues relating to child competency and the child as a witness in court and dispositional alternatives and resources.

The availability of resources is an important concern. Several judges, particularly those from Western Massachusetts, expressed fear that intensified, mandatory training programs might dry up the pool of lawyers available to represent children. This is a real concern, but the Commission believes that it must be answered by creating a more equitable, realistic fee structure for appointed lawyers, rather than by abandoning or failing to initiate efforts to secure reasonably qualified attorneys to represent children. It seems reasonable to assume that paying an appointed attorney only \$35/hour for courtroom work and \$25/hour for non-courtroom work effectively guarantees that many, if not most, of the lawyers who will consistently accept appointments will be those without much experience or abilities, regardless of whether training is mandated. The unreasonably low fee structure must be changed, as is set forth in the following recommendation.²

Recommendation #8

Compensation for attorneys appointed by the court to represent children should be increased to \$60/hour plus reasonable out-of-pocket expenses, exclusive of travel, for work performed in or out of court, and judges should have the discretion to cap the total amount paid.

Comment

The Commission recognizes that state funding limitations preclude the possibility of reimbursing attorneys for their work on behalf of children at the same rate a private party would pay. The special dedication required on

behalf of children often necessitates that counsel make the financial sacrifice entailed in accepting reduced fees. Nevertheless, to encourage increased availability of high-quality representation for the Commonwealth's children, and to reduce the financial sacrifice attorneys must make, the Commission recommends that court-appointed attorneys for children be compensated at the rate of \$60/hour for work performed in or out of court.

As part of this recommendation, the Commission suggests that judges should be given discretion to order that an attorney be compensated at more than \$60/hour based on established criteria pertaining to the complexity of the case, the forum in which it is being heard, and the need for the attorney handling the matter to have a particularized expertise or level of experience. The Commission also recommends that judges be given discretion to cap the total amount paid to attorneys, based on the case's complexity, and other factors which may be relevant to a particular case.

Recommendation #9

In the initial stages of proceedings involving CHINS, care and protection or delinquency, the court should consider, on the record, whether the child should be referred to the local educational agency for a Chapter 766 Team evaluation, if the facts indicate possible impairment of the child's ability to progress effectively in a regular education program. Parents or legal guardians — or children themselves, if over 14 — should be parties to such consideration. In addition, the Office for Children should receive funds to support research and advocacy related to children's special education and other needs.

Comment

Many juveniles who become involved with the court system, whether through a care and protection petition, CHINS, or a delinquency matter have unmet needs for special education and human services. At times, these underlying needs cause problems leading to the child's court involvement. At other times, the familial or social issues that gave rise to the court proceeding, or the ultimate dispositional plan for the child, create a need for special education and human services. In both cases, a major cause of the lack of services may be the failure of the court or other systems with which the child is involved to identify the problem and refer the child for a Chapter 766 Team evaluation, or for services that a variety of other agencies might provide.

Children who are referred into the Chapter 766 system, but who dispute the adequacy of their educational or

other services, face an equally serious problem in securing legal representation in the Chapter 766 appeals process. This problem stems from the increasing complexity of special education law, lack of resources and special training for attorneys, as well as the uncertainty and low rate of reimbursement for attorneys who represent indigent children by virtue of representing their parents. For many of the Commonwealth's most needy children, the absence of an entitlement to legal representation may limit their ability to receive special education services, as well as their ability to secure other services state agencies are mandated to provide.

To implement its recommendation concerning special education, the Commission proposes that:

- A. Courts should, in every case, be mandated to consider, on the record, whether to refer a child involved in a CHINS, care and protection, delinquency, or termination of parental rights proceeding to the special education department of the local education agency ("LEA") for a Chapter 766 Team evaluation, if the facts indicate possible impairment of the child's ability to progress effectively in regular education. Under the current special education regulations, a judicial officer may refer a child for an evaluation at any time.³ Parents or legal guardians (whose consent is necessary for the evaluation to proceed), and children themselves, if over 14, should be parties to such consideration. The Commission has concluded that the congruence between a child being court-involved and having special needs is so great that mandatory consideration of referral of children who are involved in CHINS, care and protection, delinquency and termination of parental rights proceedings is required.
- B. The Office for Children (OFC) should receive funding to conduct a study to determine the need for an entitlement to representation for indigent parents and their children. The study should determine at what stages, if any, representation should be provided and whether representation at any or all levels could be provided by trained lay advocates. In addition, this study should consider the need, if any, for indigent parents and their children to have an entitlement to representation when seeking or challenging services or the level of services provided by state human services agencies.
- C. Funding for an attorney position at OFC. This attorney's primary responsibility shall be to direct, oversee and guide OFC's "Help for Children" advocacy activities. The attorney shall have expertise in Chapter 766 matters and shall provide training and supervision to OFC's lay advocates. The attorney also shall develop criteria to determine whether an OFC lay advocate should represent a student in any

due process hearing or whether the case should be referred to an attorney.

- D. The OFC "Help for Children" attorney should cooperate with private and state agencies in the training of lay advocates, CPCS attorneys, private attorneys, courts and DA's offices. The training should be provided to those who need it at their respective workplaces. In particular, the OFC attorney and other OFC staff, in conjunction with the Department of Education, should cooperate with the Chief Justices of the Trial Court and the Franklin Flaschner Institute to develop an appropriate training program for judges and other judicial officers.
- E. The OFC "Help for Children" attorney should compile a list of trained private attorneys and identify attorneys particularly skilled in different areas of special education appeals, or other fair hearings before state agencies who provide needed services to youngsters.
- F. The OFC "Help for Children" attorney should develop materials for outreach/referral, e.g., where to call for legal representation not only in special education, but in other areas of children's needs which should be met by particular state agencies.

The Office for Children is the state agency empowered to advocate for children. OFC currently has approximately 43 lay advocates statewide in its "Help for Children" program. Their job is to advocate for children in all civil contexts, not just special needs. It is apparent that more directed advocacy in special education as well as other needs of children is required, and more informed and thoughtful referrals of parents and children to the appropriate agencies that can help them must be instituted, if the Commonwealth is to serve the needs of its youngsters.

In January, 1987, OFC began a six-month pilot project focusing on special education advocacy issues in two regions of the Commonwealth. This project was made possible by the assignment to the Office for Children of a part-time *pro bono* attorney by the firm of Palmer & Dodge. While it is hoped that this project will document some of the needs for the services of advocates and attorneys, at least for the regions targeted, and will begin to outline essential training modules, it is clear that meeting the Commission's objectives will take more time than the pilot project affords, and must focus on the entire state — not just two regions, and on other needs of children for which OFC is mandated to advocate — not just special education. Consequently, the Commission recommends that at least one OFC "Help for Children" attorney position be created and funded immediately, as well as an administrative assistant.

Recommendation #10

Chief Administrative Judge of the Trial Court should establish a committee to develop and promulgate uniform, comprehensive written rules or standards for every Department of the Trial Court, including Probation, which govern Termination of Parental Rights Actions (G.L. c.210); Care and Protection Actions (G.L. c.119, §24 or §23C); Children in Need of Services (CHINS) (G.L. c.119, §39E *et seq.*); and Juvenile Delinquencies (G.L. c.119, §52 *et seq.*).⁴

One of the most serious concerns the Commission discussed is the mystery enshrouding court proceedings in which children are directly involved. Several factors have been identified as playing a part:

- (1) Several types of children's proceedings (care and protection actions, termination of parental rights actions, and CHINS proceedings) are permitted by statute to be conducted in as many as three different departments of the trial Court — District, Juvenile and Probate — leading to inconsistent practices among the departments.
- (2) The law governing children's proceedings is a mix of case law, rules or standards, and statutes which are difficult to access because they are scattered throughout the General Laws. As a result, it is difficult for attorneys to understand how to proceed, unless they have extensive prior experience in these matters. The District Court has done a commendable job in promulgating standards for certain types of cases (primarily, care and protection cases) within its jurisdiction. While these standards serve as an educational tool for all court personal and the bar, they actually apply only to the District Court. And even these standards are not well known.

Such factors create a deplorable lack of uniformity and clarity, which has a negative impact on children's proceedings. In particular, uniform standards are needed to aid, assist and guide the Probation Department in understanding their specific role in CHINS and care and protection cases, the Commission believes. The Commission recommends that the Chief Administrative Justice of the Trial Court — as the one who can most effectively promulgate standards uniformly governing all courts — convene a committee charged with the development of comprehensive standards.

Such rules or standards should clearly set forth the required procedures for each of the proceedings listed above, and should apply uniformly to all departments of

the Trial Court. In addition, these standards should be recommended to the Supreme Judicial Court for adoption as rules, thereby superceding any prior inconsistent rules. The draft standards for care and protection actions currently being developed for District Courts by a committee under Judge Zoll furnish an ideal model for this effort.

The Commission further recommends that the membership of this committee be multi-disciplinary, drawing

upon all professions concerned with children: lawyers, judges, educators, social workers, mental health and other clinical professionals. Judges and practitioners from each Trial Court department should be included, to facilitate the identification of inconsistent standards and rules. This multi-disciplinary approach has been used by Judge Zoll, in his recent efforts to draft care and protection standards, with considerable success.

¹ G.L. c.119, §51A.

² A similar recommendation concerning fees can be found in the chapter on Guardians Ad Litem, elsewhere in this report.

³ 603 Code Mass. Regs. §28.00, 316.0 (1986).

⁴ Recommendation #3 in the chapter on Due Process for Children, elsewhere in this report, focuses specifically on the need to adopt uniform rules and procedures for handling care and protection cases.

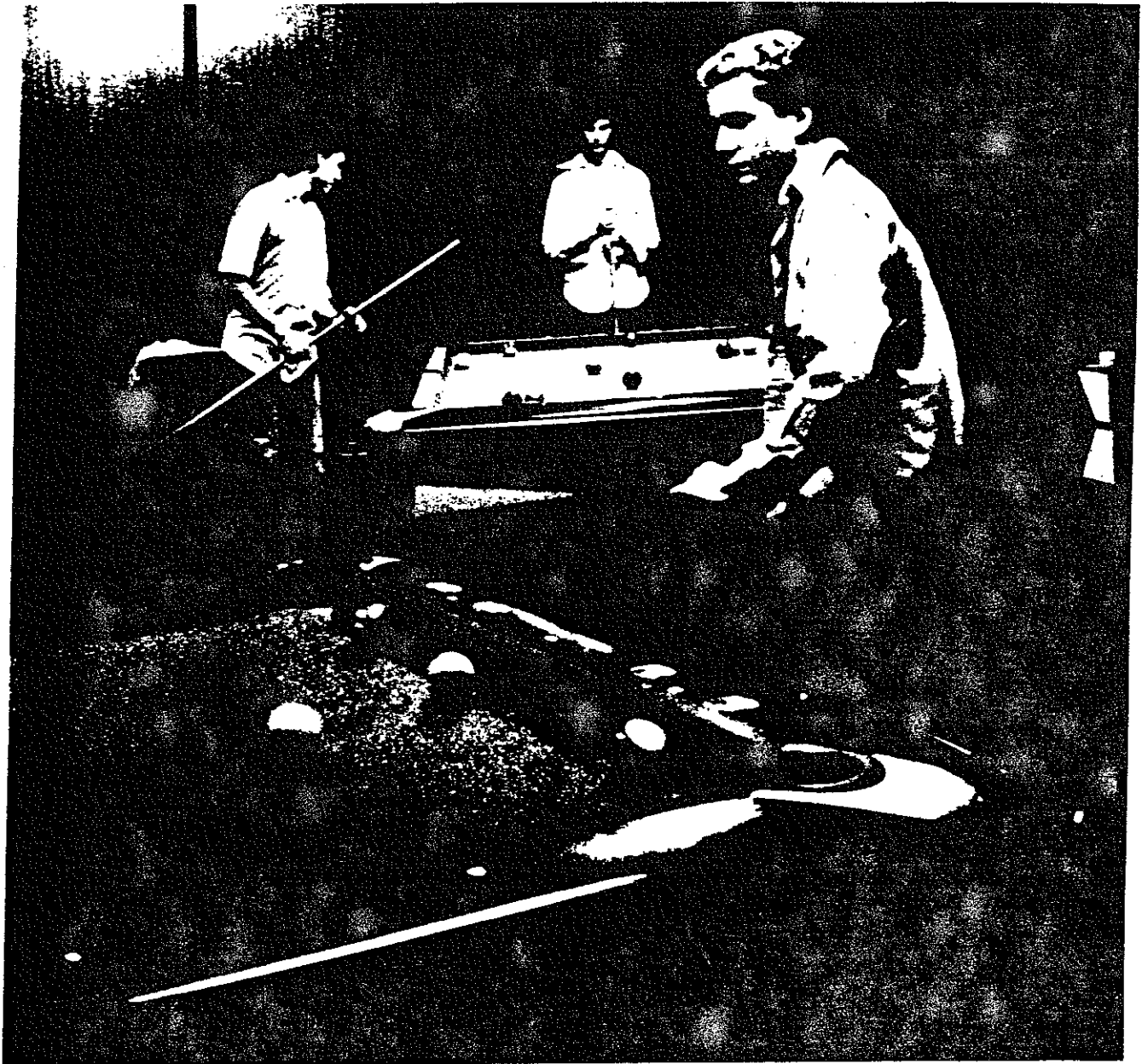


Photo by Andrew Doerfer

Chapter V

Guardians Ad Litem (G.A.L.)

Introduction

The role of the Guardian Ad Litem (G.A.L.) in court proceedings affecting children's legal rights has frequently been a source of great confusion for litigants and attorneys alike. A prime cause of this confusion has been the use of the term "Guardian Ad Litem" to encompass individuals appointed by the courts for diverse purposes. The concept of the G.A.L. derives from two distinct sources — statutory authority and case law — neither of which provides clear definition for the role and responsibilities of the G.A.L. As a result, G.A.L.s are often appointed to meet a perceived, but unarticulated need of the child for representation, and it may be left to individual G.A.L.s to shape or define their own roles in a given case.

Traditionally, G.A.L.s have fulfilled four separate roles, and a fifth has begun to evolve in recent years. One role has been as a "Next Friend," or legal stand-in, for minors in civil or probate litigation. G.A.L.s have also functioned as Investigators or Evaluators — in both cases, for purposes of presenting a report to the court. Investigators determine the factual background underlying pending litigation concerning children, and Evaluators assess the children's and parties' mental health. Finally, G.A.L.s have often functioned as attorneys or advocates for children, and there appears to be an evolving role in which G.A.L.s undertake to mediate issues concerning children and the parties.

The confusion surrounding the G.A.L.'s role has been compounded by the varied nature of the litigation in which they have been appointed to act on behalf of the child. Included are probate cases in which the minor child is a beneficiary or claimant on the estate (e.g., wills, accounts, compromise claims); civil litigation in which minors' rights in tort, contract, or other property rights are litigated; domestic relations cases in which custody and visitation are at issue; health and treatment-related issues such as actions by parents as legal guardians seeking authorization to admit a child to a mental health facility; minor children seeking permission to have an abortion; and representation of an unborn in cases involving issues of maternal or fetal health.

In a given case, the G.A.L. may alternately or simultaneously wear the hat of G.A.L. Investigator, Evaluator, or Attorney/Advocate. The tendency is simply to apply

the term "G.A.L." loosely and interchangeably when dealing with the concept of an attorney for the child. As a result, it is often unclear who is responsible for different aspects of the preparation and trial of a case, and such blurring of roles can create evidentiary problems at trial.

Through the recommendations summarized herein, the Commission has sought to clarify and define the varying roles fulfilled by G.A.L.s in court proceedings affecting children, to distinguish these roles from those of attorneys representing children before the court, and to specify the qualifications needed by G.A.L.s to fulfill their specified roles. The Commission has focused its analysis and recommendations primarily on domestic relations matters, since it is in this area that the greatest confusion regarding the G.A.L. is perceived.

Recommendation #11

Define G.A.L. Role By Statute

Legislation should be introduced to clarify and define the functions of G.A.L.s in cases where children are involved. G.A.L.s should function as Next Friend of the Minor, Investigator or Evaluator, but not as Attorneys/Advocates, as they have in the past.

Comment

The unmet legal need addressed by this recommendation is to provide high-quality representation of the child's interests in court proceedings by ensuring that an independent, skilled and objective G.A.L. is able to provide the court with all relevant factual data necessary for the court to determine where the child's "best interests" lie.

As outlined above, the four roles or functions that G.A.L.s have traditionally fulfilled have been as Next Friend, Evaluator, Investigator, and Attorney/Advocate for the child, though the particular role to be discharged by the G.A.L. in a given case has seldom been made clear. The Commission recommends that the role of Attorney/Advocate be removed from the umbrella of G.A.L. functions and be undertaken, instead, by an attorney for the child, designated as such, as set forth in Recommendation #12, below. The Commission's view is that the role of attorney for the child differs so funda-

mentally from other functions G.A.L.s have historically performed, that it is appropriate to segregate that role.

The Commission's model, in separating the roles of G.A.L.s and attorneys for the child, is consistent with the statutory requirements in care and protection cases. In such cases, the child is required to have independent counsel. In addition, the Court appoints an investigator to prepare a report detailing the relevant information about the child, parents and home life for use by the court.

The role of the investigator in care and protection proceedings is the model for the G.A.L. Investigator role the Commission recommends. The Commission recognizes that judges may also choose to appoint a G.A.L. Evaluator to evaluate competence or other mental health issues of the child, parents, or other party, in addition to or in lieu of the G.A.L. Investigator, in a particular case, and that this constitutes an appropriate use for G.A.L.s by the court.

Recommendation #12

G.L. c.215, §56A should be amended to give the court discretion to appoint counsel for children in cases of disputed custody and in cases where the court determines that visitation, support, or other substantial rights of children are at stake. Judges should also have authority to assess said counsel's fees and expenses to the parties, on the finding of ability to pay, or to the Commonwealth of Massachusetts, subject to a cap to be determined by the court.

If, in a given case, both a G.A.L. and an attorney are appointed by the court to protect the children's best interests, the G.A.L.'s services shall be to the court on the children's behalf. That means that G.A.L.s, if asked by the court to make recommendations, shall do so based on their own perception of what is in the children's "best interests," which may or may not coincide with the children's wishes. Attorneys, by contrast, shall represent the child's position, consistent with an attorney's representation of any other client.

Comment

In some legal proceedings — as in agency-sponsored guardianship cases involving minor wards, and in care and protection cases — the appointment of counsel for the child is already required by law. The Commission supports this policy, and also believes that there are circumstances where children's legal interests in domestic relations cases are sufficiently distinct from that of the divorcing parents that separate counsel should be ap-

pointed for the child.

- **Appointment:** At present, the court has not been required by statute to appoint counsel for the child in domestic relations cases where child custody and visitation are at issue, and there are varying views concerning whether the court even has authority to appoint such counsel, and the applicability of G.L. c.208, §16 to this end. For this reason, the Commission recommends that legislation be enacted that specifically permits the appointment of attorneys for children in domestic relations cases.

If the court determines that both an attorney and a G.A.L. should be appointed for the child in a given case, the attorney, not the G.A.L., should be responsible for actually preparing and developing the evidence in the case on the child's behalf, and should have the right to retain any necessary experts in preparation of the case. The attorney, not the G.A.L., should be responsible for advocating the child's individual interests, particularly if the child is old enough to communicate his or her own wishes.

- **Maintaining Records:** The Commission further recommends that procedures be developed and implemented for docketing appointments of G.A.L.s and attorneys for the child in an accurate, timely manner, and that the court ensure that statement of compensation received be reflected on the docket. Given the serious responsibilities G.A.L.s and attorneys for children are asked to undertake, the costs incurred in connection therewith, and to maintain confidence in the system and assure the availability of high-quality representation for children, the Commission recommends that precise docketing for these appointments be maintained.

Recommendation #13

Motions to appoint a G.A.L. may be made by children's attorneys, attorneys to other parties, or on the court's own initiative, but the decision to appoint a G.A.L. should be at the discretion of the court. The court should also specify whether the appointee will function as a G.A.L. Next Friend, a G.A.L. Investigator, or a G.A.L. Evaluator. A G.A.L. Next Friend should be an attorney; a G.A.L. Investigator should be an attorney, social worker or other appropriate professional; and a G.A.L. Evaluator should be a mental health professional, such as a psychiatrist, psychologist, or licensed independent clinical social worker. The G.A.L.'s duties, and timeframes for submission of reports, should be specified in the court forms.

Comment

- **Appointments:** At the time of appointing a G.A.L., the Court should clearly designate whether the G.A.L. is intended to be a G.A.L. Next Friend, G.A.L. Investigator, or G.A.L. Evaluator. The Commission believes that this consistency in nomenclature will help improve the quality of advocacy for children by eliminating confusion and making clear that the G.A.L. is advocating that which is objectively in the child's "best interests," and that the child's attorney is advocating the child's subjective legal position in the case.

There are specific instances in which appointment of a G.A.L. may be indispensable, to overcome practical problems in introducing information into evidence, even if the child is represented by separate counsel in the case. Such instances may include cases requiring information to be gathered from sources outside the Commonwealth, from school or medical records, or cases in which the child's statements are to be introduced into evidence without the child being a witness. Hearsay problems presented by such cases may be overcome through introduction of a G.A.L. report into evidence. (*Jones v. Jones*, 349 Mass. 259 [1965]. *Jenkins v. Jenkins*, 304 Mass. 248 [1939]).

- **Duties:** The Commission's views on duties of G.A.L.s, summarized here, are based on Massachusetts Probate and Family Court, *Duties and Responsibilities of a Guardian Ad Litem Appointed in a Domestic Relations or Child Welfare Case* (undated) and *Guidelines for Guardians Ad Litem in Cases Arising Under Rogers v. Commissioner of Mental Health* (1984):

A. **G.A.L. Next Friend:** The Commission does not recommend any specific changes in the manner in which the G.A.L. functions in this capacity as it appears that, historically, these appointments have worked reasonably well, as in cases involving allowance of wills, accounts, settlement or compromise of claims. In such cases, the G.A.L. has authority to assent or object on behalf of the child to any agreement in the case, subject to approval of the court.

B. **G.A.L. Investigator and G.A.L. Evaluator:** It is the duty of the G.A.L. Investigator and G.A.L. Evaluator to personally investigate the case assigned, and to file written recommendations with the court, unless the judge indicates no recommendations are to be made. Such recommendations must detail the pertinent circumstances surrounding the care, custody or competence of the child. Since the G.A.L. may be from a profession (e.g., psychiatrist, psychotherapist, social

worker) in which communications are ordinarily privileged, the G.A.L. should inform all persons at the outset that privileged communications do not exist between the G.A.L. and persons in the case, and that any information provided may be included in the G.A.L. report, and introduced into evidence.

The G.A.L. Investigator and G.A.L. Evaluator should, as appropriate to a given case, conduct a thorough investigation by:

1. interviewing, as appropriate, the child, parent(s), or all others with personal knowledge of the circumstances surrounding the case;
2. investigating the child's personal history, noting all relevant information;
3. recording family history as appropriate;
4. checking relevant agency records, as applicable, including Department of Social Services and other social agency records; medical, school, central registry, religious, probation and parole records;
5. assessing the child's or family's assets, as appropriate; and
6. in an evaluative report, consider issues of mental illness or competency; history of alcoholism, drug abuse, hospitalization, family stability, physical or sexual abuse, and any other relevant mental health issues.

The G.A.L. should file a report based on the information gathered, to include:

1. a recitation of such facts as names of children, dates of birth, addresses of all parties, description of parent/child relationships, description of problems, and specific incidents;
2. a summary of known agency interventions, if applicable, history of placements outside the home, if any, and efforts to reunify the family;
3. an evaluation of parental fitness, covering interaction and bonding with children, ability to nurture and discipline, incidents of abuse or neglect, and medical or psychological impediments to parenting skills;
4. present physical and emotional needs of children;
5. options for child placement and suitability of each; and
6. ultimate recommendations of the G.A.L.

In appointing a G.A.L. Evaluator, the court should specify who is to be evaluated, the scope of the evaluation, and the purpose thereof. The mechanics or method of evaluation should be left to

the judgment of the individual mental health professional appointed by the court.

The G.A.L. Investigator or G.A.L. Evaluator must be available to testify before the court concerning the contents of the report, and should be given notice of any motions brought by attorneys for the parties in the case.

It is the Commission's view that the tradition of having G.A.L.s file their reports with the court without sending copies to counsel of record is inefficient, and should be changed, and that the common practice of sending G.A.L. reports directly to judges is inappropriate. The Commission recommends that such reports be filed with the Clerk of Court, or Register of Probate — sufficiently in advance of trial to enable review by counsel — and that copies be provided to the attorney of record, the parties (if *pro se*), or the pro-

bation officer (if applicable). The Commission emphasizes that the report should be admissible into evidence in lieu of direct testimony by the G.A.L., but subject to any party's right to cross-examine the G.A.L. In preparation for a trial, any party should be entitled to depose the G.A.L., pursuant to the applicable rules of discovery.

- **Revision of the Court Forms:** Court forms appointing G.A.L.s should be revised to specify the purpose of each appointment (e.g., G.A.L. Next Friend, G.A.L. Investigator, G.A.L. Evaluator), and to include authorization for the G.A.L. to review and obtain any necessary records from schools, hospitals, state agencies, etc. Court forms should also set forth the G.A.L.'s specific duties and responsibilities, as outlined above, as well as time frames for submission of the written report.

Chapter VI

Divorce and Custody

Introduction

Divorce is often more devastating to children than to their parents, yet current law deals primarily with the parents' rights, largely ignoring the children's needs. Through its subcommittee on Divorce and Custody, the Commission examined the legal system as it affects children whose parents are divorcing, analyzed the system's shortcomings, and developed a series of recommendations designed to address the emotional and economic needs of children at this critical turning point in their lives.

In proposing these recommendations, the Commission's goal is to forge a new ethic in the law: one recognizing that parents' commitment to their children is *irrevocable*, and that the legal system must make children's needs the primary focus of the law in the context of divorce. The legal system's goal should be to minimize the impact of divorce upon children, and to preserve for such children as much as possible of the social, economic and emotional security that existed while their parents' marriage was intact.

When divorcing, parents are often unable to fulfill their obligations to their children as completely as they did when the marriage was intact. Conflict between the parents may interfere with their ability to perceive and meet their children's needs. The state must ensure that the void occasioned during this period of diminished parenting is filled, and must assure that the child's right to emotional and financial support — and access to both parents — is sustained. The right of each child of divorce is to be able to remain a child, and that right must be safeguarded by the action of the Courts.

These are the unmet legal needs of children the Commission sought to address, when it analyzed current law pertaining to custody and divorce.

Recommendation #14 **Economic Support**

G.L. c.208, §34 should be amended to add an additional mandatory criterion, namely, "the present and future needs of dependent children," in cases of divorce where children are involved. Children's needs shall be the court's primary concern in determining the distribution of marital assets, and in assessing alimony and child support.

Comment

Statistics on our society show that there is an entirely new class of people living in poverty — children of divorced parents. It is not uncommon for the non-custodial parent (usually, the father) to experience a dramatic improvement in lifestyle, while the children and the custodial parent (usually, the mother) find their means are severely reduced. More often than not, this situation arises from short-sighted decision-making by the court, as well as from shortcomings concerning custody, child support and divorce in the legal code itself.

In Massachusetts, the *present* needs of children are theoretically provided for at the time of the Judgment of Divorce. Projected needs require an action for modification. The child's evolving needs — such as increased expenses for clothing, food, education and general increases in the cost of living as time goes by — are left to future litigation.

But the financial and emotional toll of battling the legal system often make it impossible to obtain needed relief. Once children reach majority, under G.L. c.208, §28, provision for their needs can only be made upon petition of the parent with whom the child lives, and only if the child is principally dependent upon this parent for maintenance. Children cannot petition the court for assistance themselves.

Nor are children's needs, capacities, and reasonable expectations protected by G.L. c.208, §34, which deals only with the equitable division of property between divorcing parties, and the support of one party for the other. This omission, more often than not, results in an *expedient* rather than an *equitable* distribution.

There are no mandatory requirements regarding child support in Massachusetts law, and no specific criteria in G.L. c.208, §28, which only *authorizes* the court to provide for child support. Moreover, the court lacks even the authority to set aside property for the benefit of children, or to consider the child's needs in dividing marital property.

As it seeks to revise its divorce laws to address children's needs, and explores ways to make property division equitable for both parents and children, the Commonwealth can benefit from an examination of measures taken in other parts of the country and abroad. England, for example, amended its Matrimonial Causes Act (M.C.A.), in 1984. The M.C.A., which was nearly iden-

tical to G.L. c.208, §34, has been rewritten to state that the needs of children are primary, and paramount to the parents' needs. M.C.A. §25 obligates the court to give first consideration to the welfare of any minor child of the family. The court is also required — under M.C.A. §25(2) — to consider the parties' properties and present earning capacities, and is empowered to consider a parent's future earning capacities in determining child support.

M.C.A. §24 (1) (b) provides that, upon divorce, the court may transfer assets either to a child or to a third person on a child's behalf. Even in second marriages, English courts have imposed child support obligations upon step-parents, regardless of whether the child was adopted or not. To secure this support, English courts may order property held in the name of either or both spouses transferred to the child.

In the United States, the Uniform Marriage and Divorce Act (1970, as amended 1971, 1973) includes two sections that may be adopted by the states to control property division. Section 307, alternate A, states that "the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties. . .".

By securing children's needs at the time of divorce, conflicts that might arise through the competing needs of a second family can be forestalled. Such conflicts are more likely to be averted if the mechanism the Commission has proposed is adopted by the legislature and the courts.

For the Commission's recommendation to be fulfilled, the following policies will need to be implemented by the courts:

- A. The court should be required to make findings of fact concerning children's financial needs, in connection with property division and child support (G.L. c.208, §28). Recommended considerations include:
 1. at minimum, the housing, food, clothing, social, medical and educational needs and capacity of the child, including higher education;
 2. the income, earning capacity (if any), property and other financial resources of the child and each parent (including their standard of living; age; health; station in life; occupation; amount and sources of income, including unearned income; value of service, including those as a homemaker contributed by the custodial parent; vocational skills; employability; estate; liabilities and opportunity of each for future acquisition of capital assets and income);
 3. any physical or mental disability of the child;
 4. any capacity or talent of the child;
 5. the manner and station in which the child was being raised, and in which the parents expected

the child to be developed, educated or trained.

- B. Presumption in the law that the marital home not be sold or disposed of until after a child reaches majority, or completes a reasonable formal education, unless the court determines that the child's welfare, emotional well-being, financial and educational needs during minority have been suitably provided for without regard to this asset, or if the facts show that it is not economically feasible.
- C. The court should have authority, at the time of divorce, to establish trust funds for the support and education of the child, in the form of a bank accounts or other suitable fiduciary types of investments, paid either in a lump sum at divorce or periodically thereafter. When the child goes to college or other needs arise, the income from the trust could be used for general support, and if necessary, the principal could be invaded as well.
- D. Consideration should be given to child support awards that reflect a percentage of income and/or earnings after the base is established at the time of divorce.

The Massachusetts Legislature has responded to the needs of children born out of wedlock by passing laws creating mandatory criteria for determining parents' obligation to such children's support. The Commission welcomes the advent of this legislation, and of federally-mandated child support guidelines as well.

The Commission also commends the pioneering work done by the Chief Administrative Justice of the Trial Court and his Child Support Guidelines Commission. These guidelines, currently in effect, will be reviewed in December of 1987. They do not apply, however, if the combined income of the parties exceeds a certain amount of money, and they relate only to income (including gain and prizes), not to assets or property division. Our Commission sees its recommendation as building upon the foundation laid down by the Guidelines Commission, and anticipates that the Guidelines Commission's work will be strengthened if, as recommended here, assets as well as income are considered in the effort to protect children's long-term economic well-being, after divorce.

Recommendation #15 Fiduciary Obligations of Parties to Divorce

To assure full and realistic financial disclosure, Rule 401 of the Domestic Relations Special Rules should be revised to recognize marriage as a "partnership," to impose fiduciary responsibilities of full disclosure upon the parties to divorce, and to authorize sanctions for failure to do so.

Comment

Although present case law requires parties to divorce or separate support actions to provide Financial Statements disclosing assets (but not their value) under pains and penalties of perjury, violators are seldom prosecuted. If each family member's economic well-being is to be protected, a fiduciary obligation of full, fair financial disclosure must be imposed. In particular, children — as dependents of the marital partnership — have a right to rely on their parents' fulfillment of their fiduciary obligations.

Mere disclosure of assets, as required under current divorce law, is not enough, as this standard does not comport with every other legal position of trust. The parties must also be obligated to make a good faith effort to place realistic values upon all assets and liabilities, with special onus — as in partnership or trust law — on the more knowledgeable or controlling party, respecting a given asset or liability.

The Courts should pursue such violations as come before it on their own, and persons wronged by improper or false financial statements should have the right to seek damages, penalties, attorney's fees and costs from a "partner" for breach of fiduciary duty to make proper disclosure.

Recommendation #16 ***Emotional Support***

G.L. c.208, §31 should be amended to require divorcing parents who request shared legal custody to demonstrate their ability to cooperate in protecting the child's interests by developing a mutually acceptable parenting plan, prior to the date the court renders its final decree. At minimum, this plan should provide for decision-making concerning the child's education, regular and emergency health care, religious training and observance (if any), and procedures for resolving parental disputes concerning child-raising decisions and duties after divorce.

A proposed amendment of G.L. c.208, §31 is attached hereto, as Appendix III.

Comment

Present law presumes temporary shared legal custody from the beginning of the divorce process until hearing on the merits, and requires an implementation plan within 30 days of entry of this temporary order. The law was developed to encourage both parents, from the beginning of the divorce process, to remain involved with their children. It assumed that parents would continue to share the rights and responsibilities of child rearing, while the

child would have frequent and uninterrupted contact with both parents. It was hoped that the father's role in parenting, after divorce, would be greatly increased, and that the child would be able to "keep both parents," despite the divorce.

In practice, however, implementation of this law has been inconsistent and fragmented. G.L. c.208, §31 stipulates that "...the rights of the parents shall, in the absence of misconduct, be held to be equal..." and that "...the parents shall have shared legal custody of any minor child...". These provisions have led to confusion and unrealistic demands for immediate joint legal and physical custody upon separation of the parents, by parents and lawyers who failed to understand what shared custody involves, and how to implement an effective shared custody plan.

Despite our Supreme Judicial Court's definite statements in *Yannas v. Frondistou-Yannis*, 395 Mass. 704, 708-709 (1985) that there is no presumption in favor of joint custody of minor children (especially joint physical custody), the confusion and arguments have not diminished. Parents who lack the goodwill, capacity and ability to cooperate are enabled, through a joint custody order, to further exacerbate and prolong the damaging impact of divorce upon the child. In addition, joint physical or legal custody may be awarded with complete disregard for the age and developmental stage of the child, thus causing severe hardship and trauma to the minor in order to serve the parents' needs.

Furthermore, when the statute is erroneously interpreted as presuming joint custody, a bargaining advantage accrues to a parent who would be an unlikely candidate for custody in the final decree. The more appropriate parent, aware of the deficiencies of the other adult, will often bargain away needed financial assets or income in order to win agreement for sole custody of the child. Some parents, conversely, manipulate the system by seeking joint custody in the hopes of reducing the amount of child support they will be obligated to pay.

While the statute concerning shared/joint custody is technically not a presumption, it becomes a *de facto* presumption because the court must make written findings if it fails to enter such an initial temporary order as a starting point, and because most temporary orders are not altered significantly. Yet custody is of such great importance that the court should routinely explain the basis for its custody decisions, the Commission believes.

While current law requires parents to submit a plan in writing to the court within thirty days after the temporary custody order is entered, this requirement is rarely carried out. Either the courts do not request the plans, and create their own, or the plans are simply not being submitted or prepared. There appears to be no process for follow-up, nor any sanctions if plans are not submit-

ted. Courts often award joint custody without careful attention to specific requirements to implement the order.

The current statute's objective was to encourage parents to work out their children's custody arrangement over the period of the divorce process, with assistance from court-affiliated mediators and counselors, should the need arise. It was hoped that parents would accept the invitation and inherent challenge of self-determination in this important area of family life. However, by virtue of the way in which the law has been implemented, the courts have effectively bypassed this step.

The Commission strongly believes that the potential advantages of a statute encouraging joint custody outweigh any problems that may have developed as a result. If properly modified and implemented, the statute will provide a vehicle for parents to define and share their rights and responsibilities in child rearing. It will increase the likelihood of continued, meaningful parental involvement, minimizing loss to the child. In addition, requiring a final plan before the permanent custody award is made reinforces the idea of cooperation, and establishes that the central focus is not on parents' rights, but on children's needs.

The Commission believes that a necessary test of parents' ability to share custody, and to place the child's best interests above their own, lies in their ability to develop a mutually acceptable plan. Assistance in developing this plan should be provided to divorcing spouses through Court Intake Centers, described in Recommendation #17, below.

Recommendation #17

Creation of Court Intake Centers

Intake Centers staffed with clinical social workers should be created within each probate court to provide education and evaluation, as well as direction and access to necessary services, for couples involved in divorce proceedings and custody disputes.

Comment

The primary benefit of creating Court Intake Centers

is that their input during the initial stages of divorce proceedings would enable divorcing spouses to develop support and custody plans with a minimum of personal anguish, while protecting each party's and their children's needs and rights. Under present law, there is no requirement that parents involved in custody disputes have these disputes evaluated, nor do the courts provide staffing by clinical social workers through which such services can be obtained.

The following is a suggested three-stage procedure through which the Intake Centers could work with parties to divorce:

Stage One: Groups of parents involved in custody disputes should be educated by social workers and court personnel. Educational materials, including films, should be developed and made available in the court to deal with such issues as

- understanding the divorce process;
- telling children about separation and divorce;
- the meaning of loss to children of divorced parents;
- developmental stages of children, and how they are affected by separation;
- qualifications of candidates for joint custody; and
- what comprises good versus bad visitation.

Stage Two: Intake Center professionals should evaluate each couple to assess its custody dispute or visitation problems. The Intake Center will then recommend a track along which the case should progress, i.e., mediation, evaluation, short term therapy, supervised visitation, or referral to other needed services to bring about resolution. Or — if the Intake Center determined that a couple would not be helped by the services it could provide — it would recommend the case proceed to trial. With court order and approval, some of these services could be provided on a short-term basis by the Intake Centers themselves.

Stage Three: Special Sessions should be created to accommodate evidentiary hearings of difficult and highly contested issues at the proceedings' temporary order stage, because detailed analysis at this stage is critical to the orderly progression of cases to closure.

Chapter VII

Structure and Jurisdiction

Introduction

The state's power to intervene in family life derives from its police power and its *parens patriae* power, the power directed to protecting the welfare of children and other individuals who are not capable of protecting themselves. Government policy towards the family has traditionally been left to state and local governments, rather than established by national policy, resulting in enormous variations in how children and family issues are dealt with from state to state. Even within a single state, structure and jurisdictional decisions concerning the family have developed on an *ad hoc* basis, in response to emerging needs, rather than as the result of a carefully-reasoned plan. This is certainly true in Massachusetts where, under current law, jurisdiction over children's issues is spread throughout the Commonwealth's court system.

For example, care and protection petitions which might result in permanent custody of a child being granted to the Department of Social Services (DSS) are within the jurisdiction of the district and juvenile courts, while petitions for adoption without parental consent (which often follow permanent custody orders in a care and protection case) are within the jurisdiction of the probate court. Abuse prevention orders (G.L. c.209A) are within the jurisdiction of the superior, probate, and district courts, but only the probate court can make orders with regard to visitation with children. The district and superior courts can make orders relative to vacating the premises, temporary custody of a child and support, but are not empowered to establish visitation rights. District courts, in particular, handle many 209A's involving "common law" families, i.e., families functioning as such without benefit of marriage, but are unable to establish visitation rights. Probate and district courts have jurisdiction over granting permission for minors to marry, but only the superior court has jurisdiction over granting permission for minors to have abortions performed.

Rules, procedures, scheduling, services, resources, and staff training vary sharply from one court to another, all of which can cause additional stresses on a family in crisis which might be involved in several courts at one time. These problems are exacerbated by the lack of information available to judges and court personnel in one

court about the existence, nature or status of matters involving the same family unit which might be pending in other courts.

During its deliberations, the Commission on the Unmet Legal Needs of Children received numerous complaints concerning the structural inadequacy of existing court services for children and their families. Some of the specific issues raised by this testimony gave rise to the recommendations outlined below. But there were two issues that received considerable attention, for which formal recommendations were not devised:

1. **Children in Need of Services (CHINS):** The Commission originally intended to examine the Commonwealth's CHINS statutes, in order to propose revisions designed to mitigate the immense frustration felt by all those who must contend with the statutes as they now exist. A new legislative CHINS Commission was established, however, after our Commission began its work. In deference to the CHINS Commission, we are not making detailed recommendations concerning CHINS. But this Commission would like to add its voice to what it perceives as widespread support for making major revisions in the CHINS law, in order to effectively meet the needs of runaways, stubborn children, and other children in need of services. To this end, we offer some general comments, and then direct the CHINS Commission's attention to several problems relative to the CHINS statute and the jurisdiction of the courts for which the Subcommittee on Structure and Jurisdiction has devised responses, to stimulate further thought.

In 1973, when Massachusetts decriminalized status offenses (actions such as truancy, or running away from home, which would not be punishable by law if committed by an adult), it continued to deal with cases involving Children in Need of Services (CHINS) within the court system, but placed such children under the jurisdiction of the Department of Social Services (DSS) rather than the Department of Youth Services (DYS). To meet the increased demands created by this change, some additional funds and resources were committed to DSS. But the bulk of available resources were channeled to DYS, due to the need for an infusion

of energy and resources created by the closing of the state's juvenile training schools ("deinstitutionalization") in 1972.

Enlightened idealism — a desire to protect troubled children from being harmed by those who sought to come to their aid — gave rise to these changes in the law, but problems arose during implementation, which have yet to be resolved. A recent research study showed that perhaps 70 different issues within families are lumped together under the heading of CHINS — issues which often frustrate the best efforts of those who must deal with such cases in court and in the social service system.

In the most difficult and troublesome CHINS cases, where the child (and/or family) is in acute need of professional services, the current system based on voluntary compliance with a plan of supportive services often breaks down. DSS and perhaps even the child's attorney often turn to the courts as an entity to enforce the provision or implementation of services. However, short of committing the child to DSS and walking away, the court lacks power to enforce orders that it makes, and sometimes resorts to empty threats or bluffs which in turn undermine respect on the part of the child or the family for the court and for the social service system.

Although neither time nor space allow for a full debate here, this Commission acknowledges, and in fact itself represents, widely divergent views as to how extensively the courts should be involved in CHINS-type cases, if at all. Most people would, nevertheless, probably agree that any system developed for these complex cases is subject to bureaucratic and human imperfections. These cases run from the extremes of severely disturbed children at risk to intolerant parents looking for an easy way out of parental responsibilities. Any system must be based on some faith in the ability of service professionals and judges to distinguish between the extremes and to act accordingly in developing and implementing appropriate service plans in the best interest of the child and the family.

Legitimate strategies and techniques may vary from case to case, but they should include the use of the court for the protection of the substantial rights of the parties, for insuring that services are made available by the bureaucracy and for exerting pressure, where appropriate, for the parties to comply with service plans developed by social service professionals. Obviously, the court cannot force one to "successfully" engage in therapy, but in particular

cases, the coercive or persuasive presence of the court can place people in circumstances where they might decide to avail themselves of services that they would not take advantage of without the nudge from the court.

The Commission perceives the following problems and offers responses several Commission members have devised:

A. **Problem:** Focusing exclusively on the child minimizes the need for the entire family unit to be involved in resolution of its problems.

Response: Expand the Court's jurisdiction to embrace "Families in Need of Services."

B. **Problem:** The Court lacks the statutory authority needed to enforce its orders.

Response: The Court should be given specific authority to enforce its orders. Safeguards should be developed, such as the establishment of standards, requirements for written judicial findings, limitations on sanctions or other limitations to insure against arbitrary judicial orders or sanctions which in effect provide punishment as if the status offense were a criminal offense. As an example, in the extreme case of parents who just want to "dump" their children on the Commonwealth and refuse to participate in any reasonable services to reunite the family, perhaps the Court should at least have the power to order the parents to pay for all or part of the services provided to their child by the Commonwealth, or to pay the costs of the child's legal counsel.

C. **Problem:** The Court lacks the statutory authority to make specific placement orders where a child is at serious risk.

Response: Empower the Court to make specified placement orders, particularly for seriously disturbed, impaired, extremely stubborn children or chronic runaways whose physical and emotional well-being are at serious risk without such placement. Again, safeguards should be developed as in the response to Problem "B," above, to perhaps limit placement options and to insure that specific placement orders are consistent with a therapeutic or clinical treatment plan, not arbitrary or otherwise inappropriate.

In addition to these ideas — developed by the Subcommittee on Structure and Jurisdiction, and included here for consideration by the CHINS Commission and others reading this report — this Commission has specifically developed Recom-

mentation #22, below, concerning the use of family mediation as an alternative in many CHINS cases.

2. **Creation of a Family Court**

Those involved in the system are aware that troubled families often simultaneously participate in litigation in several of the Commonwealth's courts. Yet experienced court and agency personnel are far from unanimous in support of the idea that a unified family court would alleviate the difficulties such families face. Given the restrictions of time and resources that we faced, and the magnitude of the questions involved, the Commission is not currently prepared to make recommendations concerning creation by the Commonwealth of a unified family court.

The Commission did explore mechanisms for consolidating cases involving children and family issues into a single court structure, and gratefully acknowledges the comprehensive study of the nation's family courts prepared by Attorney Jackie Bowman on the Commission's behalf. This study — which forms a portion of the Draft Proposal for a Family Court (Appendix V) — illustrates how the jurisdiction and effectiveness of these courts varies from state to state. A list of potential problems associated with creation of a unified family court accompanies the Draft Proposal, as Attachment B to Appendix V.

The Commission recommends that this issue receive additional attention from the Massachusetts Bar Association's newly-established Standing Committee on Children — and, perhaps, that a special governmental commission on the issue be formed — so that the merits of creating such a court can be more fully explored.

Recommendation #18

Mechanisms should be established to identify all cases pertaining to a single family unit.

Comment

In Massachusetts, at the present time, there is no single repository for data related to cases whether pending or closed concerning a single family unit's involvement with the Commonwealth's courts. As a result, a court may be deprived of valuable information necessary to make appropriate decisions regarding a case. The lack of a centralized information bureau may also result in inconsistent court orders, unnecessary court appearances by witnesses, and duplication of efforts and resources by various state agencies and the courts. To fill this void, the Commission recommends:

(A) Expanding Trial Court Rule IV.

Trial Court Rule IV mandates disclosure of pending and concluded care or custody matters under G.L. c.119 (except for delinquency matters), G.L. c.201, G.L. c.208, G.L. c.209, G.L. c.209A, G.L. c.210, or any other provision of law concerning care or custody of children by parties to the litigation.

The Commission recommends that this rule be expanded to embrace criminal cases involving spousal or child abuse. Parties to civil proceedings under Trial Court Rule IV should be required to disclose, in their sworn statements, any criminal cases, closed or pending, known to them in which a parent or other custodian of the children (or the children themselves) have been named as defendants or victims in spousal or child abuse cases. Similarly, in any criminal proceedings involving physical or sexual abuse in which the victim is a minor, and the defendant a parent, step-parent, relative, member of the same household, or custodial caretaker of the child, the prosecutor filing the complaint or indictment should be required to file a statement disclosing any cases affecting the child that are known to the prosecutor and encompassed by Trial Court Rule IV. Upon motion of the Court or any interested party, these statements could be impounded under the Rules of the Court, and would be available only to certain designated personnel.

(B) Installation of an integrated computer system in the various Departments of the Trial Court for identifying, collating, tracking and storing the data described above.

Computer equipment is currently in use in various segments of the Trial Court. The Case Flow Management/Automated System Subcommittee of the Probate and Family Court has made provisions for an automated system, capable of expansion, in which data can be stored. Expansion of this system would allow case data from Trial Court Rule IV statements to be tracked and stored. The Commission recommends that computers be installed for this purpose in all Departments of the Trial Court. A central depository for this information is a necessity, of course, but the true value of a central index case file can only be realized if the information can be communicated easily and efficiently to qualified court personnel in the Trial Court. Each division should be equipped with a computer terminal for this purpose.

- (C) **The establishment within the Trial Court of an office to supervise the collection, coordination, and consolidation of data pertaining to cases affecting a single family unit.**

This office would not only serve as the central depository for the identification, collection and storage of the information described above, but would also be responsible for identifying cases that should be consolidated, for making appropriate interdepartmental assignments, and for monitoring case flow.

Recommendation #19

Procedures to coordinate and consolidate cases affecting a single family unit should be implemented by the Courts.

Comment

Mechanisms do exist in G.L. c.211B, §9 for coordination and consolidation of various court proceedings in which a single family unit is involved. To achieve the goal of coordinating and consolidating these court proceedings, the Commission recommends:

- (A) **Identification of the multiple proceedings, as described in Recommendation #18, above.**
- (B) **Assignment of priority status to cases involving issues of child care, custody, protection and support.**

Priority status must be afforded cases dealing with children's issues. The Supreme Judicial Court has promulgated time standards for such cases, but these standards are not effective unless cases are tracked and monitored by the courts. Tracking and monitoring procedures should be established for each Department of the Trial Court.

- (C) **Allocation of adequate, continuous court time to complete cases involving children and family issues.**

Due to the lack of judicial manpower and the press of other court business, these cases often are heard in bits and pieces over a long period of time. To eliminate the need for long, protracted hearings and continuances, court calendars should allocate sufficient, continuous court time for cases to be heard, when children are involved.

- (D) **Creativity and continuity in judicial assignments.**

Judges must be familiar with community resources and services and with individuals provid-

ing such services so that litigants' needs can be met. In addition, in CHINS cases, care and protection cases, and other child custody matters, it is essential that a judge familiar with the history and background of the case should continue to preside over future legal proceedings when such issues are involved.

For these reasons, continuity of judicial manpower is of vital concern in cases where children are involved. The Commission recommends that each division implement procedures for assigning such cases to a judge who regularly presides in the court of their origin, rather than to a circuit judge, as is often done today. In view of current constraints on judicial resources, however, creativity in scheduling is essential (i.e., a modified circuit system, special assignments, a team approach, interdepartmental cooperation, etc.).

- (E) **Annual review of child issue case management by each Department of the Trial Court.**

Administrative mechanisms to review management of cases involving children should be established by each Department of the Trial Court. Reviews should be conducted on a regional basis, since problems vary in different parts of the state, and should include (but not be limited to) such issues as continuity of judicial assignments; completion of cases within time standards; communication among court personnel, the Department of Social Services and the Department of Mental Health; allocation of sufficient court time for these cases; and personnel problems such as suitability of assigned court personnel to handle these cases.

- (F) **Consolidation of cases.**

The Commission recommends substantially more frequent use of the power provided by G.L. c.211B, §9 to consolidate civil cases involving children and families for hearing before a single judge. Care and protection cases and petitions for adoption without parental consent are examples of cases that are often appropriate for consolidation. The identification/tracking mechanisms (Recommendation #18) are essential to this effort to consolidate cases. The Chief Administrative Justice's office and the organized bar should be encouraging the judiciary, attorneys and litigants to seek consolidation of appropriate family-related cases. The Commission does not feel that criminal and delinquency proceedings that require a jury trial, a different burden of proof, and present evidentiary problems unique to those cases should be consolidated. The scheduling of

such cases, however, can be appropriately coordinated through court and agency personnel to achieve optimum order.

Recommendation #20

Mental health clinics should be established, under the aegis of the Department of Mental Health, for all courts in which child and family issues are heard.

Comment

Access to mental health services by courts varies widely throughout the Commonwealth. Currently, two out of the 14 Probate Courts have court clinics, and 26 out of the 69 District Courts have either a clinic or full-time mental health staff. Judges, probation officers, families and attorneys cite the need for easy access to mental health services and professionals, if diagnostic and therapeutic needs are to be met.

No court should be without ready access to such resources. The Commission recommends that clinics be placed under the Department of Mental Health, which has the expertise needed to administer clinics of this type, but that the clinics be appropriately housed within the court, or have easy access to the court house.

Recommendation #21

Legislation should be introduced authorizing court-appointed counsel for minor children alleged to be victims of child abuse in cases where statutory authority for such appointments does not currently exist, and funds should be appropriated by the legislature to underwrite the cost of such representation.

Comment

The Commission recommends that the legislature authorize the Court, at its discretion, to appoint counsel for children alleged to be victims of child abuse, physical or sexual, in proceedings under G.L. c.207, 208, 209, 209A, 209B and 265. In these cases, the alleged victims' interests may differ from those of any other party to the case. Protection of the children's interests may require separate legal representation on their behalf, and funds should be provided by the legislature to underwrite the costs such representation will entail.

Recommendation #22

Increased funding should be made available to encourage expanded use of mediation by the courts — particularly in CHINS cases — as an informal alternative for families willing to try mediation before resorting to litigation.

Comment

In its efforts to determine how CHINS issues can best be addressed, the Governor's/MBA Commission agreed to strongly encourage the expanded use of court-sponsored mediation programs as an informal alternative to court proceedings for families who are willing to try mediation first. The Commission views mediation as a promising model, which has already achieved impressive results in dealing with cases which do not always lend themselves to resolution by more traditional proceedings in court. Mediation is particularly appealing for CHINS because it allows a child's voice, as well as others, to be heard.

In the early 1970's, mediation began to attract attention partly because it changed the traditional win/lose equation into a win/win proposition for the parties involved. In Massachusetts, the Dorchester Court had an experimental mediation project, but this pilot project was not used for CHINS. Many people in the alternative dispute resolution field at that time felt it would be impossible to get children involved, but others believed that the concept was worth a try.

The Children's Hearings Project, in Cambridge, Mass., pioneered in this effort because its founders had observed that court proceedings are often very frightening and damaging to children. Moreover, families are often reluctant to file a CHINS petition, because there is a risk that children will be placed away from the home, and that the family's integrity will be lost.

The success of the Children's Hearings Project lent impetus to the use of mediation in other courts. Massachusetts currently has ten mediation programs funded by DSS, statewide, at a total FY 1987 cost of \$520,000. Each program is different, tailored to the specific needs and resources of the local court.

In launching a mediation program, a number of major issues must be addressed. Such programs may be mandatory or voluntary, may provide formal or informal diversion from the courts, and there are wide variations in how programs gain access to families, and how they conduct community outreach and education, and mediation itself. Some are run primarily by professionals, and some make extensive use of community volunteers.

Mediation can not address every problem covered by CHINS. It doesn't work well in truancy cases, and is still less effective in aiding runaways. Its greatest potential for CHINS may be in the area of family dispute resolution. Through mediation, family members learn to sit down and talk, and to listen to each other. They learn to manage conflict, and often to avoid it. They learn to strike a balance by establishing mechanisms that permit parents some degree of control, while giving children a measure of freedom. And it is a flexible option, which can be court-centered or primarily a free-standing program.

Either model enhances the court's role as a broker of services to help CHINS cases receive the help they so desperately need, and only rarely obtain.

There are dangers to which planners must be alert if mediation programs are to be effectively used with CHINS:

- Mediation can become a second-class form of justice, unless programs are operated by agencies with high standards and proven track records of success, and are carefully monitored and reviewed.
- Court-based mediation programs are more effective than community-based mediation programs in dealing with truancy cases, because a court order is a more powerful inducement for school officials' participation than a request issued by a community group. But preservation of neutrality is particularly important when a court-based model is used. For example, probation staff in probate courts sometimes conduct mediation. But they also make recommendations to judges, questions of divided loyalties may be raised.

- Follow-up services have a substantial impact upon a mediation program's success.
- If mediation fails, cases can be returned to the jurisdiction of the court, but great care must be taken to assure that children who fail to comply with a mediation contract would not be held in criminal contempt, thus receiving harsher treatment than they would have if mediation had never been tried.

In conclusion, the Commission agreed that mediation holds great potential for resolving some of the problems created by current law concerning CHINS. As the foregoing discussion shows, there are many questions which would have to be addressed before deciding on the specific approach such mediation programs should take. In addition, CHINS encompasses such a wide array of cases that no single solution is appropriate for all. Nevertheless, the Commission views mediation as an exceptionally promising model for family dispute resolution, and recommends increased public funding to expand its use in courts throughout the state.

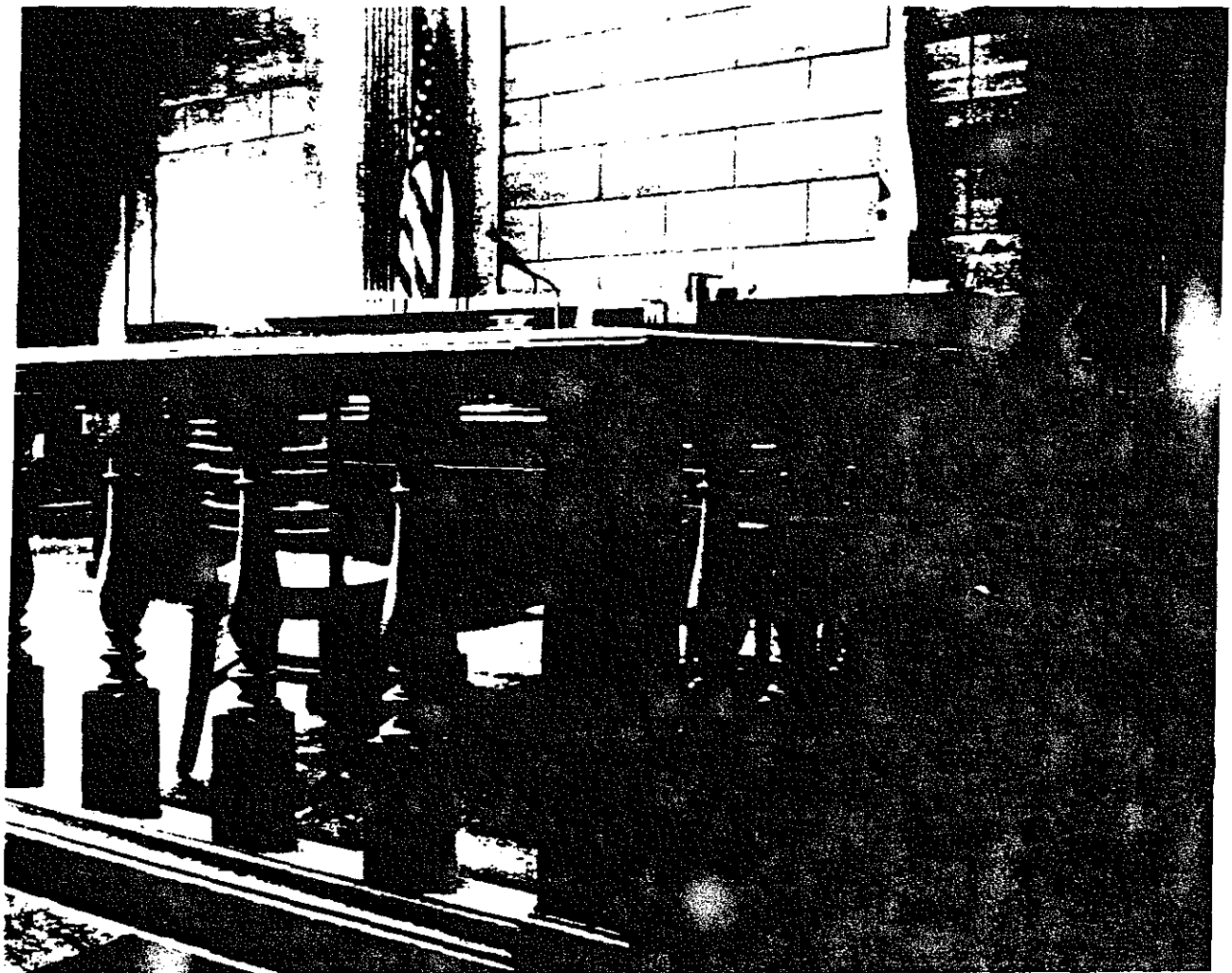


Photo by Andrew Doerfer

Appendices

Explanatory Note

As noted in Chapter I, the *Introduction* to the Commission's report, the subcommittees were charged with limiting the number of issues they addressed to a chosen few. This was an exceedingly difficult task, and often required the subcommittees to winnow out issues which were of vital importance to children, but which, in the end, were deemed either of lesser importance than the ones the Commission chose to address, or less amenable to adequate treatment by the Commission during its short lifetime. It was agreed that materials developed by the subcommittees, but not included in the Recommendations the full Commission prepared, would be collected and appended to the final report.

It must be emphasized that these *Appendices* were prepared by individual subcommittees, or members thereof, and were not subject to the consensus-building process that was the hallmark of the Commission's work. They are included here not only because of the important background they provide for the general reader, but because it is hoped that they will serve as critical building blocks for the enormous task remaining to be carried out by the MBA's Standing Committee on Children, as it seeks to implement the recommendations contained in the Commission's report.

Appendix I

Children in Need of Services (CHINS):

The Contempt of Court Issue

Prepared by Commissioner Edward J. Loughran

Department of Youth Services

In 1986, a number of the Commonwealth's District Court judges elected to invoke their Contempt of Court power in cases involving youths brought before them for failing to comply with court-ordered treatment plans administered by the Department of Social Services (DSS). As a result, the youths in question were ordered detained by the Department of Youth Services (DYS) pending further court action. In one case, the court opted to *commit* the involved youth to DHS based on the contempt finding.

Although not a new phenomenon (a total of four such actions occurred during 1984 and 1985), during 1986 the contempt option was exercised in 27 instances, by a dozen different judges, in cases involving 23 youngsters. This dramatic growth in the volume of such cases provides a telling index of the judiciary's increasing level of concern with its ability to ensure the appropriate treatment of CHINS.

Unfortunately, while the placement of CHINS in the custody of DHS has demonstrated short-term effectiveness in curtailing certain undesired behaviors (i.e., truancy, running away) of these youths, this practice presents a variety of important and perplexing questions for those involved in serving the Commonwealth's troubled youngsters.

First, in remanding CHINS to the custody of DHS (with the intention of either ensuring a youth's subsequent appearance in court, or punishing the youth for violating the terms of his or her treatment plan, or attempting to promote improved behavior) the courts have essentially mandated the commingling of delinquent and status offender populations in DHS-operated secure detention facilities. The merging of these distinct populations directly conflicts with a fundamental objective of both the Commonwealth's CHINS legislation of 1973 and the Federal Juvenile Justice and Delinquency Prevention Act of the following year, which is to protect the youthful status offender from potentially harmful interactions with youths who are frequently older and more

experienced in truly delinquent activities.

Second, the use of the contempt vehicle poses a series of related difficulties for the Department of Youth Services, the agency which has been forced to accept these youths into an already burgeoning pre-trial detention system. (Between 1984 and 1986, DHS experienced an unprecedented 30% increase in the number of youths remanded to its custody for detention purposes, resulting in both persistent overcrowding problems at the facility level and a significant strain on Departmental resources.) Indeed, at one point during 1986, a full 15 of DHS' 37 secure detention slots for girls — or 40% of capacity — were occupied by DSS clients.

Having been legislatively relieved of responsibility for treating status offenders in 1973, the Department does not maintain the capacity to house these youths apart from its own detainee population. Consequently, DHS is, as noted above, forced to commingle populations, a practice which may have significant repercussions for both the youths involved and for the stability of individual detention programs.

A third area of concern involves the correct procedures which are to be applied to contempt proceedings against CHINS. The procedural problems are two-fold: first, there are no established procedures by which the courts may be guided, because there are no statutory provisions concerning contempt in the CHINS legislation. Second, the procedures the courts have employed have been inconsistent and irregular.

With regard to the proper procedure to be employed, the initial question is whether contempt in such cases should be civil or criminal. In simplified terms, the distinction between civil and criminal contempt is primarily derived from differences in function. Civil contempt is designed to be coercive — to encourage or discourage behavior the court wants to effectuate or prohibit. Criminal contempt is primarily punitive — designed to punish the offender for some transgression against the court.

Ideally, contempt under these circumstances should be

civil, since the purpose of the contempt citation is to coerce the juvenile to comply with the order of the court. In practice, the contempt citation tends to be criminal, and for good reason: the only effective sanction the court can normally impose when juveniles violate an order is short-term commitment to a secure facility. Because the juveniles cannot, through improved behavior, win their release, this is a criminal — not a civil — sanction. Its effect is not to coerce certain behaviors, but to punish past transgressions.

There is another technical problem with permitting the use of criminal contempt against CHINS. In 1973, the General Court carefully separated status offenders from delinquents through enactment of the CHINS legislation for the particular purpose of removing from status offenders the "taint" of having committed a criminal offense. Punishing such juveniles through the criminal contempt process for behaviors which constitute status offenses would seem to conflict with the specific intent of that legislation.

Finally, there are no particular rules governing contempt proceedings in the juvenile courts. The only avail-

able rules are those governing adult proceedings, and these, in turn, are less substantive in that they simply affirm the common law. (See Rule 65.3 of the *Rules of Civil Procedure* and Rule 44 of the *Rules of Criminal Procedure*.) Neither of these rules takes into account the special nature of juvenile proceedings or the particular objectives that the CHINS legislation is trying to achieve.

The actual practice employed by Massachusetts courts reflects the current confusion regarding proper procedures. In some cases, it is unclear what (if any) procedures the court has employed. Certainly, a good number of courts have not abided by the specific requirements of Rule 65.3 and 44 of the respective rules of civil and criminal procedure. In addition, many of the courts imposing contempt have also imposed bail on a finding that there is just cause to hold the juveniles because they are unable or unwilling to provide reasonable assurance for their next court appearance. Such juveniles are remanded to the custody of the Department of Youth Services not as part of an imposed sanction of civil or criminal contempt, but rather because they cannot satisfy the court that they will appear on the scheduled date.

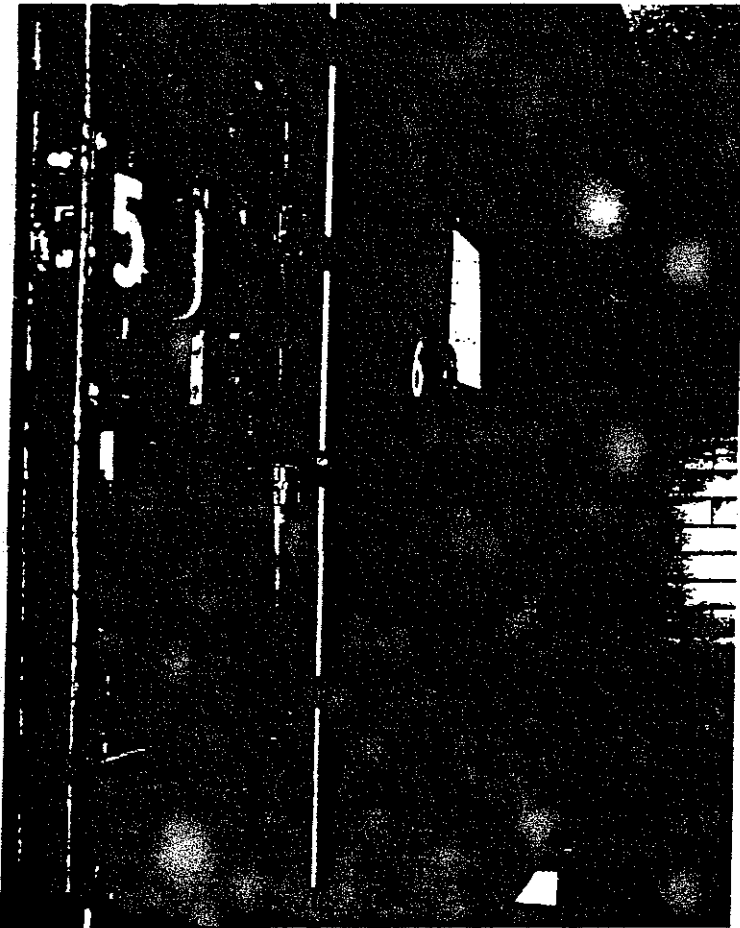


Photo by Andrew Doerfer

Appendix II

Other Due Process Issues

The Subcommittee on Due Process hopes that the MBA's Standing Committee on Children will consider the following due process issues, when it convenes. These issues were discussed in depth over the past two years, and were only reluctantly deleted from our recommendations to the full Commission, due to the limitation on the number of formal recommendations each subcommittee could contribute to the final report:

I. "51A's" — Abuse and Neglect

"51A" refers to G.L. c.119, §51A, which requires various medical, educational, therapeutic and other professional personnel to report to the Department of Social Services any circumstances in which they have "reasonable cause" to believe that a minor is "suffering serious physical or emotional injury" resulting from abuse or neglect. §51A also provides a non-mandatory mechanism for such reports by "any other person" who has reasonable cause to believe a child is abused or neglected. Upon receiving such a report, the Department of Social Services (DSS) is required by §51B to conduct an investigation to determine if the allegation of abuse or neglect is "substantiated."

If it is substantiated, DSS forwards the original §51A report, and its own report, to the District Attorney for the county where the child resides. Concurrently, DSS must offer the family appropriate social services to protect the child and to "preserve and stabilize family life." If the family does not participate in the offered services, DSS or any other person may institute a care and protection proceeding in court, pursuant to G.L. c.119, §51B. Thus, because the early investigations under §51A can lead to deprivation of a child's fundamental right to live in the family, or to live in a better environment, due process is a concern.

A. Questions were raised concerning whether G.L. c.119, §51E — which appears to permit the DSS commissioner at his or her discretion to deny the child's parents or counsel access to the reports filed pursuant to §§51A and 51B — is inconsistent with parents' entitlement to inspect records under the Fair Information Practices Act, whether due process requires access to these reports, and what use is made of these

"confidential" reports.

- B. It was questioned whether, upon initiating an investigation, DSS provides adequate notice to parents. Some people have suggested that parents should be informed that they have a right not to allow the inspector into their home; a right to remain silent (with the warning that anything they say can be used against them in court); and a right to refuse services. Also, it was questioned whether parents are — or should — be told the practical consequences of exercising these rights (e.g., that a care and protection petition may be brought on the basis of their refusal of services).
- C. Questions were raised concerning whether DSS's standards for substantiating abuse and neglect are too vague to protect the due process rights of children. The subcommittee has compared the ABA Standards with the relevant Massachusetts statutes and DSS regulations. Careful study is recommended to determine whether discrepancies or incongruities exist between standards in the statute and DSS's regulations.

II. Care and Protection

- A. Concurrent jurisdiction in the district, juvenile and probate courts should be examined, to determine whether DSS gains an unfair advantage in being able to choose the forum and, by extension, the judge who will hear a given case, as well as the particular procedures that will be observed. (See allegations of differences among courts, below.)
- B. Although the statute calls for a clear separation between adjudicatory and dispositional hearings, the Due Process subcommittee was told that this often does not happen in practice.
- C. People have reported to the subcommittee that existing statutory provisions for appointment of counsel are not always carried out in letter or spirit. For example, we have been told that there is a substantial difference in the process followed in different courts. In the Boston Juvenile Court, it is said, parents and children

are informed of their right to counsel, but not in probate court. Generally, judges don't automatically appoint counsel for parents, especially in probate court, where parents must fill out an affidavit of indigency for court-appointed counsel. Many parents don't know how to apply.

- D. It has also been suggested that counsel should be appointed earlier in the process, or that a lay advocate or mediator should be present to make clear to parents and children the possible outcomes of any intervention by DSS, and the consequences of any disclosures made to DSS workers and to therapists or other professionals (whether sent by DSS as part of a service package or appointed by the court and reporting to the court).
- E. Many attorneys reported that despite case law to the contrary (see *Duro v. Duro*), there are still frequent *ex parte* communications between the judge and the attorney for one of the parties and/or the witnesses, such as psychologists and probation officers.
- F. Because the care and protection (c&p) process is so difficult, time-consuming and poorly-paid for the attorney, and because there are very few attorneys specifically trained in this area, c&p's are almost never appealed by attorneys for kids. The requirement of obtaining a draft report of the trial court proceedings in order to make an appeal is too cumbersome and further discourages appeals.
- G. On the question of burden of proof, there should be a consideration of whether the ABA standards, which differ from Massachusetts law, should be adopted here.

III. Delinquency Proceedings

- A. Once bail is imposed, counsel almost never appeals to have bail reduced in Superior Court. As a result, youths may be held in secure detention simply because excessive bail was imposed, and counsel failed to appeal. Quality of counsel becomes a due process issue here.
- B. The pretrial detention of juveniles, given the lack of standards for imposing it, may present due process issues. Additional questions are raised in this regard by the fact that two-thirds of children held in secure facilities in lieu of bail are not held in such facilities as part of disposition.

IV. Children in Need of Services (CHINS)

- A. The due process rights accorded by the CHINS

statute to children and their parents attach chiefly at the hearing stage. It has been reported that only about 1,000 children in the system have been adjudicated as CHINS, but thousands who never get adjudicated CHINS are in the process for a couple of years. These are handled "informally" by the probation officer without representation and other due process rights. This is especially true of truancy cases.

- B. Questions have been raised about the role of the probation officer. When a petition is applied for — before any court proceedings and before appointment of counsel — the child is referred directly to a probation officer. The probation officer is a "god-like figure," who can impose many restrictions, take the child to court, even get temporary transfer of custody away from parent to the court — all before counsel enters the picture. Mediation is seen by some as needed, because the situation today sets up an adversarial relationship between the child and the court which can be extremely hard to reverse.
- C. The CHINS statute calls for bifurcated hearings:
 - 1. hearing to see if a petition should be issued at all;
 - 2. hearing for adjudication.In practice, however, most cases never go beyond the first hearing. The process is too informal and discretionary now (like delinquency proceedings before *Gault*). No genuine process exists. When two hearings actually are held, child advocates feel they should be handled by two separate judges, as is required by the statute.
- D. The parameters of a judge's discretion to have a child arrested or detained before any hearing deserve further study.
- E. Children being held during the CHINS process, and after adjudication as CHINS, are being placed in facilities of the Department of Youth Services, along with children who have been adjudicated delinquent.
- F. Legal representation is often lacking, despite the statutory requirement that it be provided. Because of the absence of counsel — or inadequacy of counsel — children sometimes get improperly placed into the correctional system (DYS).
- G. Parents and children are not advised that what they say in conferences with probation officers

or therapeutic professionals can be used against them in dispositional hearings.

- H. Judges have unlimited discretion to assign children in the CHINS process to secure placement. DSS has little to say in the decision. DYS, by contrast, makes the placement decision in delinquency cases, and has "due process oriented" standards and guidelines. Nothing like that exists in the courts. Again, there is too much discretion and informality.

V. Miscellaneous

1. **Civil Commitment.** Parents can commit their children to mental health facilities without court approval, but the law is unclear on whether children in DSS custody can be committed to mental hospitals without hearings at which they are represented by counsel, as is required for adults who have been determined incompetent. DSS regulations permit social workers to commit children in agency custody to mental health facilities without giving the child an opportunity for a hearing or access to representation by counsel.

A serious question exists as to whether this practice violates children's due process rights.

2. **Minor Mothers.** Minors who give birth while in DSS custody may present a conflict of interest for DSS. DSS can decide to take the child away, on the grounds that the minor mother is unfit. Fears were expressed that a shortage of foster care facilities where mother and child could remain together might affect the decision-making process. If this were to occur, DSS would be acting against the interest of its own original ward, for the sake of expedience.

DSS may advise minor mothers with respect to the signing of voluntary waivers of custody, in which case they are acting as both the caretaker and the advising agent. Some observers argue there should be an independent representative for the minor mother and baby, and that DSS should step aside in such cases, comparing this to judges who recuse themselves in cases where a conflict of interest exists.

Appendix III

Divorce and Custody

The following is a proposed statutory amendment, prepared by the Commission's Subcommittee on Divorce and Custody, for study by the MBA's Standing Committee on Children, when it convenes:

G.L. c.208, §31. Custody of Children.

For purposes of this section, the following definitions shall apply:

- (1) **Sole legal custody** means that one parent shall have the right and responsibility to make major decisions regarding the child's welfare in matters of education, medical care, emotional, moral and religious development. Decisions regarding the child's day-to-day activities shall be made by the parent who is granted physical custody.
- (2) **Shared legal custody** shall mean continued mutual responsibility and involvement by both parents in decisions regarding the child's welfare in matters of education, medical care, emotional, moral and religious development.
- (3) **Sole physical custody** means that a child shall reside with and under the supervision of one parent, subject to the power of the court to order visitation.
- (4) **Shared physical custody** shall mean that each of the parents shall have significant periods of physical custody. Physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

In making an order or judgment relative to the legal custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody or possession.

Upon filing of an action in accordance with the provisions of this section, section 28 of this chapter or section 32 of chapter 209, and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child.

In determining whether shared legal custody would not be in the best interest of the child, the court may consider all relevant facts, including but not limited to whether any member of the family has been the victim of domestic violence, abuses alcohol or other drugs, has deserted the child, and whether the parties have a history of being able and willing to cooperate in matters concerning the child. There shall be no presumption either in favor of or against shared legal custody at the time of the trial on the merits.

Notwithstanding the foregoing, if either or both parties seek shared legal custody at the hearing on the merits, both parties must submit to the court at the hearing a shared legal custody implementation plan setting forth the details of shared legal custody, including but not limited to:

- (1) the child's education;
- (2) the child's religious observance and training, if any;
- (3) the child's health care; and
- (4) procedures for resolving disputes between the parties with respect to child-raising decisions and duties.

At the hearing on the merits, the judge shall consider the shared custody plan of the parties. The judge may enter an order modifying such plan or awarding sole legal custody to one of the parties if written findings are made that such shared legal custody would not be in the best interests of the child.

An award of joint legal custody shall not eliminate the responsibility for further agreement or court orders with regard to child support, the physical/residential needs of the child, or visitation. Each parent shall be responsible for child support based on the child's needs and each parent's actual resources. If a parent would otherwise be unable to maintain adequate housing for the child, and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support. An order of joint legal custody, in and of itself, shall not constitute grounds for modifying a support order.

Nothing herein shall be construed to limit the power of the court at such time or any time thereafter to make any order relative to the custody of the child, including an order for shared legal custody, if it determines it to be in

the child's best interest. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his or her physical, mental, moral or emotional health when making an order or judgment relative to the custody of said child.

The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the parent not granted custody to have such access to the academic, medical, hospital, or other health

records of the child, as he or she would have had if the custody order or judgment had not been entered.

Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, but shall make specific findings if it determines that such an order would not be in the best interests of the children, indicating its reasons for rejecting such agreement.

Nothing herein shall be construed to create any presumption of shared physical custody.



Photo by Andrew Doerfer

Appendix IV

Parental Kidnapping: Recommendations of the Subcommittee on Divorce and Custody

Introduction

Parental kidnapping is a matter of grave national and international concern. In an effort to discourage parents from leaving one state and moving to another to defeat custody orders, all fifty states have now enacted some form of Uniform Child Custody Jurisdiction Act (1968). Massachusetts enacted its version in 1983 as G.L. c.209B, "Massachusetts Child Custody Jurisdiction Act."

However, increasing numbers of parental kidnapping, and inconsistent and conflicting state responses, caused the Congress to enact the "Parental Kidnapping Prevention Act of 1980." This Act requires that each state give full faith and credit to child custody determinations in other states. It also provides for the use of the Federal Parent Locator Service in connection with the enforcement or determination of child custody and in cases of parental kidnapping of a child.

The Act also declares that it is the intent of Congress that section 1073 of Title 18, United States Code, the Fugitive Felon Act, apply to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable state felony statutes.

This provision allows the F.B.I. to assist in the location and apprehension of parents who flee one state to another in violation of a state custody order.

In Massachusetts, the applicable state felony statute involving parental kidnapping is G.L. c.265, §26A, which

makes such kidnapping a felony if the child is taken or held outside of Massachusetts.

International recognition was given to parental kidnapping at the Hague Conference on Private International Law: Convention on the Civil Aspects of International Child Abduction (1980). The Hague Convention provides a process between "contracting states" for obtaining the return of a child who has been taken to a foreign country.

Recommendations

The Subcommittee on Divorce and Custody recommends:

- (1) Endorsement of amendments that have been proposed to G.L. c.265, §26A, and that are intended to clarify how the law should be applied in the following situations:
 - (a) when a custodial parent takes a child, thus depriving the other parent of court-ordered visitation rights;
 - (b) when a parent having joint physical custody takes a child;
 - (c) when neither parent, married or unmarried, has custody and one parent takes the child.
- (2) Assistance be sought from district attorneys in educating local police as to the use of G.L. c.265, §26A, and the Parental Kidnapping Prevention Act.

Appendix V

Draft Proposal on the Creation of a Family Court

Proposed by S. Stephen Rosenfeld, Esq., Co-Chair¹
Governor's/MBA Commission on the
Unmet Legal Needs of Children

Introduction

This Commission's recommendations, particularly those of the Legal Resources and Judicial Education and the Structure and Jurisdiction subcommittees, focus on the *existing* court structure. They seek to improve the efficiency and effectiveness of court proceedings in which children are involved, and to strengthen and expand the legal resources and training available to lawyers and judges. The Structure and Jurisdiction subcommittee also explored the possibility of consolidating all family-type cases into a single court structure, but neither the subcommittee nor the Commission as a whole were able to come to any firm conclusions on what the form and scope of such a court should be.

While recognizing the importance and practicality of the recommendations contained in this report, the Commission believes it should be acknowledged that some of the problems identified — such as those involving state intervention into family life, court proceedings and legal education — may be rooted in the structure of the court system itself. This *Appendix* is an attempt to provide a preliminary exploration of alternative court structures, as a basis for further deliberations to be conducted by the Massachusetts Bar Association's Standing Committee on Children, when it convenes. As Justice Blackmun noted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971), the court system must "further experiment and . . . seek in new and different ways the elusive answer to the young."

History of the Juvenile Court System

Government policy towards the family has traditionally been left to the state and local government, rather than established by national policy. Beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923), under the doctrine of substantive due process, the Supreme Court has recognized as "fundamental" the right to individual autonomy in such family-related areas as marriage [See, e.g., *Zablocki v. Redhall*, 434 U.S. 374 (1978)]; procreation [See, e.g., *Carey v. Population Servs., Int'l.*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479

(1965)]; abortion [See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973)]; and family relationships [See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977)].²

The state's power to intervene in the family derives from its police power and its *parens patriae* power — that is, power directed toward protecting the welfare of certain individuals, particularly children and mental incompetents, who are not capable of acting to protect themselves. The state's *parens patriae* power originated as an equitable concept by the English chancery court between private parties.

Unlike the English court, the 19th century American courts used these powers in both public and private custody cases. While the American court applied the common law presumption that protected the natural rights of parents in private custody cases, in the public custody area the courts expanded and distorted the *parens patriae* power by applying it to a broad array of child neglect and delinquency statutes that allowed for state-initiated intervention into the family.³

In 1899, Illinois enacted the first juvenile court system in the nation to assure "that the care, custody and discipline of a child [found to be delinquent, dependent or neglected] should approximate as nearly as possible that which should be given by its parents."⁴ By 1927, all but two states (Maine and Wyoming) had a juvenile court system.

In general, 19th century American courts upheld the constitutionality of child neglect and delinquency laws as appropriate measures for the state to act to rehabilitate, rather than to punish children⁵

By the 1960s, challenges arose to the constitutional status of state intervention under the *parens patriae* power. In *Kent v. United States*, 383 U.S. 541 (1966), Justice Fortas stated that "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. at 566. In a landmark case, *In re Gault*, 387 U.S. 1 (1967), the Supreme Court held that children were entitled to due process protection in juvenile delinquency proceedings. *Gault* precipitated a series of constitutional attacks on juvenile court procedures: *In re Winship*, 397 U.S. 358 (1970), held that the "state must prove delinquency beyond a reasonable doubt" in the adjudicatory state of delinquency proceedings.

However, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the court held that due process does not require a jury trial in juvenile court proceedings.

As a result of these decisions, there has been a widespread re-examination of the broad jurisdictional and dispositional standards used in delinquency and neglect cases.⁶ For example, in *Parham v. J.R.*, 442 U.S. 584 (1979), the court concluded that the statutory presumption that the state acts in the child's best interest justifies denying minors who are wards of the state a formal hearing prior to commitment to a mental institution.

As Chief Justice Edward F. Hennessey noted, there are certain contradictions in the present treatment of children: children have constitutional rights, but these rights may nonetheless be limited in certain instances by the state.⁷

According to a Development Note in the *Harvard Law Review*,⁸ "*Parens patriae* laws may be constitutionally infirm in procedural due process, void for vagueness and substantial due process or First Amendment grounds." If additional constitutional restraints are introduced into family law cases, then, as Chief Justice Hennessey noted, there is an even greater urgency to explore methods of improving the effectiveness of the juvenile court process.⁹

Family Courts as Alternatives to Juvenile Courts

The first family court was set up in 1914 in a county in Ohio. In the 1970's, as critics began to challenge the assumptions underlying the juvenile court process,¹⁰ the idea attracted more than rhetorical support.

The Supreme Court, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), supported the juvenile court system, commenting:

"The juvenile concept held high promise. We are reluctant to say that despite disappointment of grave dimensions, it still does not hold promise, and we are particularly reluctant to say...that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on the willingness to learn, and on the understanding as to cause and effect and cure."¹¹

Family courts are viewed as incorporating the unique characteristics of the juvenile court system — its emphasis on rehabilitation, broad jurisdiction over status offenders and neglected children, intake methods, flexible procedures and diverse dispositional alternatives.¹²

In fact, some proponents compare the family court to an extended juvenile court with jurisdiction over the entire family.¹³

"Today's reality in the overwhelming majority of states is that families beset with legal problems are dealt with by a different court or court divisions, judges and probation personnel. . . . Characteristically, the child's delinquency is heard in one court, his or her parents' divorce in a second court, a family member's mental illness commitment in still another, and an assault between two members of his family in yet another court. Typically, there is no systematic provision for different judges to learn of the related cases that have involved this family. . . . Further, there may be organizationally separate . . . social service personnel, all involved with this family in an uncoordinated fashion. . . . The well-coordinated family court division, conscious of its purpose, objectives and procedures, can do much to concentrate legal and social resources to improve family welfare and enhance individual treatment." (National Advisory Committee, 1976.)¹⁴

By consolidating a number of legal functions into one comprehensive jurisdiction, rather than creating a new court system, it is hoped that the effectiveness of this coordinated court as part of a rehabilitative juvenile justice system will be enhanced.¹⁵

As the National Advisory Committee on Criminal Justice Standards stated in its recommendations for a family court:

"The family court will consolidate resources for dealing with family problems and provide a central organization for the administration of these resources by combining a variety of matters that require similar handling. This will reduce duplication of resources and increase the efficiency with which family services can be rendered. Creation of a family court also will promote the development of a judicial and support staff, experienced in handling family and related problems. In many localities, juvenile court jurisdiction does not justify assignment of one judge exclusively to such work. . . . For a family court to function effectively, specialized training for those who participate in its process will be essential."

The U.S. Department of Health, Education and Welfare (1975), the Institute of Judicial Administration/American Bar Association (1980), and the National Advisory Committee on Criminal Justice Standards and Goals (1976) all recommended that juvenile courts be replaced by family courts.

Although numerous counties and cities have instituted local family court experiments on a limited basis, only five states — Rhode Island, New York, Hawaii, Delaware and South Carolina — have established family courts on a uniform statewide basis.

How Family-Related Cases are Currently Handled in Massachusetts

As the accompanying chart (Attachment "A") illustrates, jurisdiction for domestic relations cases is spread throughout the Massachusetts court system.¹⁶ For example, an abuse/neglect proceeding can be heard in any of three different forums: the probate, district or juvenile courts. Court permission for abortion to be performed on a minor can only be obtained in the superior court, while minors seeking permission to marry must go to probate court.

The Massachusetts juvenile court is geographically based in larger population areas, with juvenile sessions scheduled in the district court one or two days a week, in other parts of the state. Taken together, the separate juvenile courts plus the juvenile sessions of the district court can be said to form a statewide juvenile court, since these courts also provide counseling and investigatory services and juvenile justice division programs. All probate courts also offer mediator/counseling/investigating services through the family services officer.

Problems with the Massachusetts Court System's Handling of Family-Related Cases

During 1985, the joint Governor's/MBA Commission on the Unmet Legal Needs of Children received numerous complaints on the structural inadequacy of existing court services for children and their families.

According to a Department of Social Services study presented to the Commission at its public hearing, the district court timeline is approximately 19 months for a custody case. Frequently, families have several cases being heard in different courts at different levels with different judges. And, when a case is continued, it is often heard by a different judge or visiting judge without family law experience. This inconsistency from court to court, and the delay in rendering decisions, raises the question whether a family court is needed in Massachusetts.

In his "Tenth Annual Report to the Bar on the State of the Massachusetts Judiciary," Chief Justice Edward Hennessey addressed the problem of delays:

"There is one general category of cases in which delay has caused considerable discomfort to the Justices of the Supreme Judicial Court upon review of appellate records. That category encompasses cases involving the care and custody of minor children whether presented as custody and visitation rights attendant to separation or divorce proceedings, or proceedings for children in need of services. These cases often present classic confrontation between the natural rights of parents, the best interest of children, and the role of the state as '*parens patriae*'."

The Department of Social Services study also found that the Massachusetts Trial Court does not have a single centralized location where information about pending cases is stored. As a result, there are a great many examples of criminal prosecutions existing simultaneously with a care or custody action. According to the "Child Sex Abuse Task Force Report" of the Middlesex County District Attorney's office:

"Often the alleged victim of a criminal case of child sex-abuse is the subject of at least one other proceeding in another court, such as a care and protection petition, custody action or a CHINS petition. Consolidation of these separate, but substantially related, proceedings is in the interests of the victim, the family and, in most cases, the alleged perpetrator."

There is a mechanism available under U.G.L.C. 21¹ which gives parties the ability to request consolidation cases in different divisions of the trial court, which is helpful in cases involving child custody and issues of abuse and neglect. However, the effectiveness of this mechanism is limited by the rules, remedies and services available in the court hearing the case, and these rules and services are not uniform throughout the court system.

The reasons for the Chief Justice's call for priority attention to the caseload management of the district court are reflected in the following statistics: In the district court, total juvenile complaints were up 12.9%. Fiscal 1985 was the fourth consecutive year in which CHINS applications received and petitions issued increased. The Department of Social Services had approximately 8,000 children with legal status in every quarter of 1985. Between 1983 and 1985, the Department of Youth Services had provided custody and appropriate services to 8,100 youths who are either committed to, referred to, or detained by the Department under orders of the court.

A Look at Some Other States' Family Court Systems

Delaware Family Court

Establishment and Jurisdiction: The Family Court of the State of Delaware was established in 1971. It has 12 associate judges and one chief judge appointed by the governor for a 12 year term.

The family court has original civil and criminal jurisdiction. Its civil jurisdiction extends over divorce and annulment proceedings, custody and visitation of children, non-support of dependents, separate maintenance of spouses, dependent and neglected children, adoptions and termination of parental rights, and delinquent children except those charged with first-degree murder, kidnapping and rape. The court's criminal jurisdiction includes cases involving child abuse, neglect and contributing to the delinquency of a child.

Proceedings: The family court has operated efficiently. In 1985-86, it disposed of almost as many cases as were filed during that year. It employs several types of counselors trained to handle family matters that may arise in the court. Investigatory counselors make custody and pre-sentence investigations and report their findings to the judge.

Mediation counselors attempt to reach voluntary settlements among parties in custody, visitation, support and guardianship relief, rather than formal court proceedings. During 1985, 9,564 petitions were processed, and only 20.3% of the cases passing through mediation were forwarded.

The Guardian Ad Litem Program (CASA) uses screened and trained volunteers to serve as representatives of abused, neglected and dependent children. In 1985, 80 cases involving 136 children were handled by CASA.

Arbitration proceedings are conducted by specially trained counselors for first-time offenders charged with less serious offenses. If arbitration succeeds, the charge is dismissed without a formal hearing.

Rhode Island Family Court

Establishment and Jurisdiction: The Rhode Island Family Court was established in 1961. It is a separate statewide court on the superior court level, and has 11 associate judges and one chief judge. In 1985, there were 6,701 juvenile filings, 4,773 divorce filings, and 981 domestic abuse filings in the Rhode Island Family Court.

The family court has jurisdiction over divorce, support and custody of children, neglected children, adoption, civil commitments, concurrent jurisdiction over intra-family crimes, domestic abuse, and criminal non-support.

Proceedings: The Rhode Island Family Court has a juvenile information system and record access (JISRA) designed to enable every judge to have a monitor on the bench. The merging of functions under one court has resolved the problems of overlapping jurisdiction and lack of personnel. There is a family counseling service within the family court, as well as medical and psychological experts provided by the Department of Social Services.

New York Family Court

Establishment and Jurisdiction: The New York Family Court was established in 1962 as a statewide court, part of a revision of the state's court system. Its jurisdiction encompasses delinquent or dependent minors, custody of minors not incidental to divorce or separation, paternity, conciliation, guardianship, intra-family crime and offenses.

There are several noteworthy aspects of the family court's jurisdiction. First, the state supreme court has constitutionally guaranteed concurrent jurisdiction over any matter within the jurisdiction of the family court.

Although the supreme court often declines to hear family-related cases because of caseload considerations and lack of support services, the problems resulting from duplication of effort and forum-shopping caused one family court judge to complain of the "folly and hardship attendant upon the fragmentation of the court system."

Second, there is a division of jurisdiction between children's issues and divorce in New York. The family court has jurisdiction over applications for support, maintenance, distribution of marital property and custody in matrimonial actions when they are referred to the family court by the supreme court. The supreme court has exclusive jurisdiction over divorce actions. The family court also has broad power over foster care cases, jurisdiction over compulsory education law and jurisdiction over delinquent and non-delinquent runaways from other states.

While the New York Family Court was widely hailed at the time of its creation, over the years it has been strongly criticized as failing to fulfill its early promise. A New York Senate task force report noted that the system is out-of-balance because the family court is burdened with overcrowded courtrooms, overworked judges and overbooked caseloads. Other critics claim that the court is too strongly integrated with social service agencies.

Connecticut Family Court System

In 1959, Connecticut enacted legislation creating a division within its superior court that has jurisdiction over family relations cases. Under this legislation, there was a separate juvenile court to handle delinquency, status offenses and dependent or neglected children. The legislature enacted a series of court reform acts by which juvenile proceedings are now handled by one of the four divisions of the superior court.

Connecticut is currently in the process of unifying the family and juvenile courts into one division of the superior court. At present, issues raised in juvenile cases which may affect the family as a whole are referred to the family relations office shared by the family court. Another recent court reorganization act took paternity cases and non-support cases from the geographical area court-houses (similar to the Massachusetts district courts) and placed them in the family court division of the superior courts. Family court judges rotate through both the juvenile and family sessions of the superior court for six-month terms.

South Carolina Family Court System

In 1976, South Carolina abolished its single-county and multi-county family courts and replaced them with a statewide family court in 16 judicial circuits. The judges rotate through the family court circuit on a six-month basis. The frequency of the sessions depends on the circuit's needs.

The South Carolina Family Court has exclusive original jurisdiction over cases of abused, neglected and delinquent children, cases under the Uniform Reciprocal Child Custody Jurisdiction Act, child support, paternity determinations, and Uniform Reciprocal Enforcement of Support Act proceedings. The court also has exclusive jurisdiction of divorce and support matters, adoption, termination of parental rights, validity/annulment of marriages, and paternity suits.

In 1981, the South Carolina legislature enacted a Children's Code which establishes a children's policy as a standard of care and treatment of children who need help from the legislative, executive and judicial branches of state government. The Children's Code also attempts to coordinate all relevant laws and regulations applying to children who need legal services from the state. (See *Code of Laws of South Carolina 1976*, Volume 8A, Sec. 20-7-10 *et seq.*)

Hawaii Family Court System

Hawaii's family court was established in 1965 as a division of the circuit court rather than as a separate court of special or limited jurisdiction. The goal was to coordinate all children's and family matters into one court and to use social science knowledge and techniques.

Hawaii's family court has jurisdiction over all matrimonial actions, adoptions, juvenile proceedings (detention, dependency and neglect), support, paternity, termination of parental consent, and commitment proceedings for mentally retarded and mentally incompetent children and adults. The family court has concurrent jurisdiction with the criminal division, with discretion left to the judge of the family court whether to maintain jurisdiction over criminal matters.

Components of a Family Court

As the preceding review of family court systems in other states shows, there is no standard formula for a family court. Most model family court proposals (i.e., the United States Department of Health, Education and Welfare, the ABA/IJA Juvenile Justice Standards Project and the National Advisory Commission on Criminal Justice Standards and Goals) all recommend several basic components of a family court system.

Many of these recommendations have been incorporated into this proposal. However, the model family courts have exclusive original jurisdiction over juvenile law violations, neglected and abused children, adoption, termination of parental rights, offenses against children, divorce, and related custody proceedings. Some states (Hawaii, for example) closely follow this model — other jurisdictions (such as New York) do not.

This proposal for a Massachusetts Family Court suggests that the court be modeled on the housing court. The

Commission considered other proposals — such as transferring the probate function of the Probate and Family Court to the land court, while leaving child and family-related matters to the remaining Family Court. Suggestions were also made concerning creation of a statewide juvenile court system, with exclusive and original jurisdiction over all family-related cases. We hope and expect these proposals will attract further interest and study.

What Features Should a Massachusetts Family Court Have?

- A. A family court should be part of the Massachusetts Trial Court Department, modeled in its structure after the Massachusetts Housing Court. It should be, in essence, a traditional court structure, but with sufficient social resources to address a family's problems with minimal intervention and emphasis on mediation where possible.
- B. Family court jurisdiction should be concurrent with the present jurisdiction of all existing courts with broad substantive and geographic jurisdiction over family matters.
It should have original and concurrent jurisdiction over:
 - divorce and custody proceedings;
 - care and protection cases;
 - proceedings for voluntary and involuntary termination of parental rights;
 - adoption proceedings; and
 - CHINS proceedings.
- C. Any civil action within the jurisdiction of the Family Court, and which is pending in another court, should be transferred to the Family Court upon motion of any party to the case.
- D. Cases should be calendared so that the same judge considers different legal issues relating to the same family.
- E. Adjudicatory and dispositional hearings on the same cases should be conducted by the same judge, to facilitate efficient, timely decision-making by the court.
- F. Judges assigned or appointed to the Family Court should demonstrate particular interest and expertise in family-related issues. There should be mandatory training for judges in juvenile and family law.
- G. Adequate staff — including well-supervised and well-trained social workers and medical personnel — should be available to the Family Court.
- H. The court should provide a mandatory mediation program for custody, visitation and support matters, and perhaps other matters as well.

- I. A "Juvenile Information System and Record Access," with central files accessible to all qualified personnel, should be installed. The Case Flow Management/Automatic System Subcommittee of the Probate and Family Court has provided for an automated system (capable of expansion) for storing data.
- J. The Family Court should have a clear-cut, straight-line chain of command, closely managed by a chief judge with statutory powers to promulgate uniform rules of practice.
- K. The Family Court should be initiated on an experimental basis (i.e., for a two-year trial) in a single jurisdiction within the Commonwealth.

¹ Principal drafting of this proposal was performed by Rosalind Levine, Legal Intern to the Commission.

² See generally, *Developments in the Law — the Constitution and the Family*, 93 Harv. L. Rev. 1156 (1980) [hereinafter *Developments*].

³ *Developments*, *supra* note 1, at 1222.

⁴ Ketcham, O., "The Unfulfilled Promise of the American Juvenile Court," *Justice for the Child*, M. Rosenheim, editor (1962), p. 22-41.

⁵ *Developments*, *supra* note 1 at 1227.

⁶ Hennessey, Hon. Edward F., "Explosion in Family Law Litigation: Challenges and Opportunities for the Bar," 14 *Family Law Quarterly* (3) Fall 1980, 187 [hereinafter *Hennessey*].

⁷ *Id.* at 190.

⁸ *Developments*, *supra* note 1, at 1221.

⁹ *Hennessey*, *supra* note 5, at 196.

¹⁰ Besharov, D., "A Proposal to Re-orient the Juvenile Court Process," 73 *Family Law Quarterly*, 243-251 (1973), and Mulvey, E., "Family Courts: Issue of Reasonable Goals," 6 *Law and Human Behavior* (1) Winter, 49-64 (1982).

¹¹ National Advisory Commission on Criminal Justice Standards and Goals, "Courts," Washington, D.C., 1976, at p. 291 [hereinafter *Courts*].

¹² *Id.*, at 289-291.

¹³ Dyson, E., and Dyson, R., "Family Court in the United States," 8 *Journal of Family Law* 505 (1968).

¹⁴ Mulvey, E., "Family Courts: Issue of Reasonable Goals," 6 *Law and Human Behavior* (1) Winter, 49 (1982).

¹⁵ Arthur, L.G., "A Family Court — Why Not?" 51 *Minnesota Law Review* 223 (1966), *Courts*, *supra* note 10.

¹⁶ Additional research on the Massachusetts court system and other states' family courts prepared for the Commission by Attorney Jacqueline Bowman, Staff to the Subcommittee on Structure and Jurisdiction.

Attachment A

Current Massachusetts Law

| Principal Types of Justiciable Family Problems | District Court | Probate Court | Juvenile Court | Superior Court |
|---|-------------------|------------------|-------------------|-------------------|
| Criminal non-support | x | | | |
| Support of indigent parents | x | x | | x |
| Child abuse | x | x | x | |
| Child abandonment | x | x | x | |
| Child labor violation | x | | | x |
| Selling liquor to child | x | | x | x |
| Harboring runaway | x | | x | |
| Contributing to dependency | x | | x | |
| Contributing to delinquency | x | | x | |
| Desertion of spouse | | x | | |
| Spouse abuse | x | x | | |
| Paternity | x | x | | |
| Custody | x-limited | x | x | |
| Adoption | | x | | |
| Illegal placement for adoption | x | | | x |
| Support orders | x | x | x | |
| Visitation | x-limited | x | x | |
| Vacate orders | x | x | | |
| Divorce | | x | | |
| Annulment | | x | | |
| Consent to child marriage | | x | | |
| Consent to abortion | | | | x |
| Consent to join military | | | x | |
| Juvenile delinquency | x | | x | |
| CHINS | x | | x | |
| Regulating/enforcing international custody decrees | | x-limited | | x |
| Writs of habeas | | x-limited | | x |

Attachment B

Does Massachusetts Really Need a Unified Family Court?

Prepared by Judge Philip A. Contant
Member of the Subcommittee on Structure
and Jurisdiction

Although, in general terms, the concept of establishing a unified Family Court may seem appealing, such an idea perhaps should not be rushed into without careful analysis to determine whether another bureaucracy is needed to alleviate shortcomings in the present system, or whether it would be more productive to modify the present system, correcting its flaws.

The following are a few of the key questions that should be answered, regarding the need for a unified Family Court, and modifications that might improve the current structure of the Massachusetts Trial Court:

- (1) Has any statistical data been developed to determine the extent of the problem faced by families involved in simultaneous legal proceedings in different courts?
- (2) Is the problem concentrated in certain regions or counties, and practically non-existent in other parts of the state?
- (3) What adjustments can be made to the existing court system, short of establishing an entirely new bureaucracy, to avoid or minimize the problems of simultaneous family actions in different courts?

Possibilities include:

- a computerized tracking system to identify such cases (Rule IV);
- greater use of special judicial assignments and

consolidation of cases per G.L. c.211B, §9;

- creative and careful judicial scheduling to help insure continuity, including modified circuit systems, special assignments, judicial teams and interdepartmental cooperation;
 - a system for an annual, region-by-region review of the management of these cases, to include case flow management analysis together with recommendations for improvements that can be made, continuity, judicial assignments, communication with service agencies, and suitability of the personnel assigned to such cases.
- (4) Will creation of a unified Family Court resolve the difficulties existing courts face in gaining access to vitally-needed support services, such as Court Clinics or the Departments of Social Services and Mental Health?
 - (5) Can the present court system's ability to handle these cases be improved through greater flexibility provided by statutory modifications in the jurisdiction of various Departments of the Trial Court?

Finally, no analysis would be complete without careful consideration of the merits of the existing system, which would be lost through creation of a unified Family Court. The strengths of the community court network of district and juvenile courts include:

- (1) smaller, more manageable caseloads;
- (2) familiarity with the parties, community resources, schools, neighbors, etc.;
- (3) convenient access by parties to the local court;
- (4) the variety of cases presented in District Court reduces the risk of judicial burnout, which might occur in a unified Family Court.

Appendix VI

Proposed Statutory Amendments Relative to Court Jurisdiction

The Subcommittee on Structure and Jurisdiction of the Courts recommends amendments to the Massachusetts General Laws, as summarized below:

- G.L. c.119, §39D be amended to grant visitation to grandparents by district and juvenile court in care and custody cases.
- G.L. c.119, §39E be amended to allow a judge holding and initial hearing on the issuance of a CHINS petition to also be allowed to hear the case on the merits.
- G.L. c.119, §39E and H be amended to allow a warrant in lieu of a summons to be issued for runaways, and to allow police to return a child on a warrant to a shelter or DSS facility.
- G.L. c.209A and 209C be amended to allow the district and superior court to establish custody and visitation in the cases of children born out of wedlock, and visitation in the case of legitimate children.
- G.L. c.209A and 209C be amended to allow the courts discretion to appoint an attorney for the child in 209A or 209C cases.