JOURNAL OF FAMILY LAW
University of Louisville School of Law

Volume Twenty 1981-82 Number Two

REPRESENTING ABUSED AND NEGLECTED CHILDREN: WHEN PROTECTING CHILDREN MEANS SEEKING THE DISMISSAL OF COURT PROCEEDINGS

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I. INTRODUCTION

In the past six years, over forty states have changed their laws or court procedures to provide for the independent representation of children who are the subjects of child protective proceedings.[1]

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[1] *Oversight Hearings on Title I—Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Before the Subcommittee on Select Education*

Formal descriptions of the role of the child's representative in a child protective proceeding are unanimous in stating that the representative, whether an attorney or a lay guardian ad litem,[2] must make an independent appraisal of the facts and then "exert his efforts to secure an ultimate resolution of the case which, in his judgment, will best serve the interests of his client."[3]

Although such statements suggest that the child's representative may decide that continuing the court proceeding itself is not in the child's interest, there is an almost universal tendency to assume that he will support the need for court action. This is a natural assumption since the impetus to appoint independent representatives for children has come from cases in which the court's failure to protect obviously endangered children led to their further injury and even death.[4] Furthermore, there is a reasonable assumption that if a child protective agency has filed a petition the child's interests must require court action. All regular participants in court proceedings know that child protective agencies initiate court action "only as a last resort"—when other efforts to protect the children through

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of the House Committee on Education and Labor, 96th Cong., 2d Sess. 198 (1980) (statement of Cesar A. Perales). *But compare* Johnson, *Statutory Provisions Regarding the Guardian Ad Litem Mandate: Some Findings from a Regionwide Survey of Judges in the Southeast*, 3 JUV. & FAM. CT. J. 15 (1979), reporting on some deficiencies in implementation.

[2] A word on terminology: Statutes and court rules differ among the states on whether an attorney or a lay guardian ad litem should be appointed. Because this Article treats their roles as essentially equivalent when it comes to seeking the dismissal of the proceedings (*see* the text accompanying note 36, *infra*), it uses the neutral term: the "child's representative."

[3] Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501, 504 (1963); *see also* Fraser, *Independent Legal Representative For The Abused And Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 29 (1976-77), stating that the guardian ad litem is "to do everything in his power to insure a judgment that is in the child's best interests." *But see* FAMILY COURT BRANCH, NEW YORK LEGAL AID SOCIETY, MANUAL FOR NEW ATTORNEYS 218-19 (undated), discussed in the text accompanying note 45, *infra*.

[4] *See, e.g.*, Comment, *A Child's Right To Independent Counsel In Custody Proceedings: Providing Effective "Best Interests": Determination Through The Use of a Legal Advocate*, 6 SETON HALL L. REV. 303, 303-04 (1975).

voluntarily accepted services have failed.[5] (Nationally, less than twenty percent of all cases reported to the authorities reach the court.)[6] Even defense counsel acknowledge that most cases that do not belong in court are diverted by this extensive screening.

However, this diversionary process does not keep every inappropriate case out of court. The process may have malfunctioned or may have been bypassed, new facts may have been discovered, or the parents' improved ability to care for the child may have gone unnoticed during the pendency of the proceeding. Hence, in certain limited—but by no means uncommon—situations, court action may not be in the child's interest. In fact, because of the unavoidable emotional trauma of formal court proceedings and the often severe deficiencies of existing treatment programs, formal court action may be potentially harmful. In such circumstances, representing the child, and protecting his interests, may mean seeking the dismissal of the proceedings.

To adequately protect the children he represents, the child's representative must be able to recognize such situations and deal with them effectively. Unfortunately, this aspect of the role of the child's representative has received scant attention because the more common problem he faces is to ensure that prompt and effective court action is taken to protect an endangered child. As a result, the child's representative is frequently unprepared to mount the effort needed to get an inappropriate case dismissed. He may feel unqualified to disagree with the "experts" in the child protective agency, especially if he lacks wide experience in child protective proceedings. After all, if he is wrong, he could jeopardize the child's safety and future development. Institutional and collegial pressures to go along with the

[5] For a further discussion of this process, *see* text accompanying note 23, *infra*.

[6] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 38 (1980).

system make such decisions even more difficult to reach and sustain.

By identifying the five major types of cases in which the child's interests may require the dismissal of the proceeding, this Article seeks to assist and support the child's representative in making this fateful decision.

II. Cases Where the Child's Interests May Require Dismissal

A. Case #1: When There Is No Persuasive Evidence That The Child Is Abused or Neglected

One purpose of the extensive pre-court screening of child protective cases is to ensure that only legally sufficient cases are brought to court. But, because the decision to file a petition is usually made by a protective worker or someone else not trained in the legal requirements of evidentiary proof, in many cases: (1) the allegations fall outside the jurisdictional statute, or (2) there is insufficient admissible evidence to prove the allegations. Even when legal counsel reviews cases before they are filed, institutional and community pressures in serious cases (as well as carelessness and plain mistakes) can lead to the filing of an unprovable case.

What should the child's representative do if, after his own assessment of the case, he concludes it is legally insufficient? Some authorities suggest that he do nothing. One New York court, for example, stated that:

> At the outset of the case, a Law Guardian [the title of the lawyer who serves as the child's representative], who in addition to his role as counsel, advocate and guardian serves also in a quasi-judicial capacity in that he has some responsibility, at least during the dispositional phase of the proceeding, to aid the court in arriving at the proper disposition, should, like the judge, be neutral. At some point in the hearing he has a right to formulate an opinion and then to attempt to persuade the Court to adopt that disposition which, in his judgment, will best promote his ward's interest. But certainly the Law Guardian's conclusions in these matters should not be reached in advance of a hearing and

without knowledge of the facts.[7]

The troubling aspect of this decision is that by holding the child's representative cannot form an opinion concerning the interests of the child in advance of an adjudicatory hearing, it seems to equate obtaining "knowledge of the facts" with the actual court hearing. However, unlike the judge, whose knowledge of the facts is limited to the evidence which is introduced during court proceedings, the child's representative can and should learn a great deal about the case prior to the trial—by informally reviewing the evidence with the petitioner, by interviewing the child, and by performing his own further investigation. It is naive to expect him to withhold judgment about the merits of the case, and it is unfair to the child to deny him the benefit of his representative's informed advocacy.

Therefore, the child's representative has an affirmative obligation to determine the legal sufficiency of the case, albeit a tentative one, and to take such action as is required. If the child's representative can correct the legal insufficiency, he should seek to do so. Many times, crucial evidence has been overlooked by the child protective agency (after all, their primary purpose is to provide social services, not to be legal investigators). Hospital records, school teachers, neighbors and relatives can often provide persuasive evidence in support of the petition.

If the legal insufficiency cannot be corrected, what should the child's representative do? Ordinarily, he can expect the parents' attorney to seek a dismissal. But if the parents are not represented, or if for some reason their attorney does not seek a dismissal, the child's representative must decide whether he should do so. A trial that results in a dismissal is not in the child's interests (nor in anyone else's) since it needlessly causes emotional stress and uncertainty. A trial can rupture already fragile family structures, especially if relatives are forced to testify against each

[7] *In re* Apel, 96 Misc. 2d 839, ___, 409 N.Y.S.2d 928, 930 (Fam. Ct. 1978).

other. Forcing a child to testify against his parents can be even more devastating. On the other hand, failure to pursue a case, even if it is technically insufficient, may leave an endangered child unprotected.

Hence, in deciding whether to seek the dismissal of a legally insufficient case, the child's representative must carefully assess the nature of its insufficiency. If the failure of proof is caused by the inadmissibility of otherwise persuasive evidence, and if the child's representative believes that the child is in danger, as the *child's* representative, he is under no obligation to seek the dismissal of the case, although a prosecutor might be.[8] In such cases, the child's representative should allow the case to continue, while pressing efforts to find supporting evidence. (Nevertheless, it may be advisable to attempt to convince the parents to accept a referral for voluntary treatment services,[9] especially since the case is probably in court only because they refused a prior offer of services.)

Cases on the borderline of legal sufficiency should also go to trial. At the trial, the child's representative "should seek to introduce all relevant evidence, pro and con, which has been overlooked by, or is unavailable to, other counsel or the court, and challenge by appropriate objection and cross examination the reliability of all evidence, pro and con, which is offered by other counsel or the court—to the

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[8] The response of the child's representative to a motion by the parents to dismiss such cases must be determined on a case by case basis, but certainly it must be governed by his obligation to fully and candidly present the facts, as he understands them, to the court. *Compare* AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1970): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *See also* Brady v. Maryland, 373 U.S. 83 (1963): "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly . . .. The [prosecution] wins its points whenever justice is done its citizens in the courts." *Id.* at 87.

[9] The reasons this is possible are discussed in connection with the case when the child can be adequately protected by parents' voluntary acceptance of services, beginning at text accompanying note 23, *infra*.

end that the court will have all (and only) reliable evidence upon which to make its decision . . .."[10] Once again though, the best resolution of such situations may well be a referral for voluntarily accepted services.

However, if the child's representative finds no evidence—whether legally admissible or not—to support the petition, then he has no reason for believing that the child is in danger. If there is no reason to believe that the child is in danger, then there is no justification for putting the child and the family through the emotional trauma of a court trial—and the child's representative should seek dismissal of the case.

B. Case #2: When The Child, Although Previously Abused or Neglected, Is In No Danger of Further Maltreatment

The reason society intervenes in situations of child abuse and neglect is obviously to protect children. That is why it is called "child protective intervention." But from what are children being protected? The aim can certainly not be to protect them from harm that has already occurred (although government intervention is sometimes needed so that the effects of past maltreatment can be remedied, and the severity of past maltreatment sometimes requires the criminal prosecution of the parents).[11] Rather, civil child protective proceedings seek to protect children from *further or future harm.* For example, Georgia law describes the purpose of its child protective procedures to be "the protection of children whose health and welfare are adversely affected *and further threatened* by the conduct of those responsible for their care and protection."[12]

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[10] MANUAL FOR NEW ATTORNEYS, *supra* note 3, at 218.

[11] Even criminal prosecutions have as their justification "prevention"—prevention before the maltreatment occurs through the deterrent effect penal sanctions are said to have on the population generally, and prevention of a reoccurence of the maltreatment through the incarceration of the offending parent or the provisions of rehabilitative services.

[12] GA. CODE ANN. § 74-111(e) (Supp. 1978) (emphasis added).

Civil statutory definitions of "child abuse" and "child neglect," however, do not focus solely on the question of whether the child is sufficiently "endangered" to justify state intervention. Although they all are careful to include children whose health or well-being is endangered or threatened with harm, statutes tend to concentrate on descriptions of past parental conduct which has already harmed the child. Indeed, simply calling the child an "abused child" or a "neglected child" suggests that the abuse or neglect has already happened.

Since the purpose of child protective intervention is to protect endangered children, such definitions are frequently criticized as examples of fuzzy thinking. The Institute of Judicial Administration - American Bar Association Juvenile Justice Standards Project, for example, proposed that this entire area of court jurisdiction be relabeled "child endangerment."[13] But the focus on past maltreatment has a valid purpose. To decide that a child is endangered, that is, in danger of future maltreatment, one must make a *prediction of future parental* conduct. Such predictions are no more than probabilistic assessments based on our admittedly shaky ability to understand the forces that shape future human behavior, and they make most child protective professionals and courts uncomfortable. Hence, to minimize the ethical and practical pitfalls of such blatant predictions of human behavior, definitions focus on the past maltreatment. This adds one concrete element to an otherwise amorphous decisionmaking process because past parental conduct is a valid indicator of future parental conduct.

This focus on the past maltreatment tends to obscure the reason for child protective intervention—the need to protect the child from future harm. Consequently, agencies and courts sometimes intervene when there is no danger of

[13] JUVENILE JUSTICE STANDARDS PROJECT, INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO ABUSE AND NEGLECT 48 (Tent. draft 1977). *See also* N.Y. PENAL LAW § 260.10 (1980), entitled "Endangering the welfare of a child."

future of further maltreatment. The IJA/ABA Juvenile Justice Standards Project described two such situations:

> First, there may be some cases where the child was injured by a parent, but the evidence indicates there is little danger of future harm. For example, a child may be physically injured by a parent in a moment of anger, but all evidence indicates that this was a one-time event and supervision is unnecessary to protect the child.
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> Second, coercive intervention may be inappropriate in cases where the parents' and child's situation has changed from the time the court petition was initially filed. For example, a very young child may not have been adequately protected because his/her parent worked and left the child without a caretaker. However, since the filing of the petition, the child has been placed in a day care center and now is adequately protected.[14]

Some observers have responded to such situations by saying that it does not hurt to take jurisdiction over them. They reason that, if the danger to the child is small, it is unlikely that the child will be removed from the home, and court supervision is a painless way of ensuring that the child will be safe in the future. But it is not painless. In addition to the unavoidable stress of court proceedings, the stigma of a formal adjudication can have a devastating effect on the family and, therefore, on the child.[15] Moreover, the process of court supervision, though not as traumatic as removal, can place an added strain on an already tenuous family situation.

> The presence of a caseworker supervising parental behavior can interfere with the psychological system of the family. For example, caseworkers may pressure parents into substituting the caseworker's views regarding childrearing for their own. Yet, the caseworker may not allow for cultural differences in childrearing, or take into account the way in which a child has adapted to "bad" parental behavior. As a result of external pressure, a parent may become uncertain in dealing with the child and move from one pole to another in behavior management techniques—from permissiveness to authoritarianism—or begin to

[14] IJA/ABA ABUSE AND NEGLECT STANDARDS, *supra* note 13, at 63-64.

[15] *See generally* E. M. SCHUR, LABELLING DEVIANT BEHAVIOR: ITS IMPLICATIONS (1971).

"scapegoat" the child, who is seen as the source of trouble.[16]

Lastly, there is still the possibility that the child will be removed—as child protective and court officials overreact to the severity of the past maltreatment.

Because these are the unavoidable costs of court intervention, the IJA/ABA Juvenile Justice Standards require that: "In order to assume jurisdiction, a court should . . . have to find that intervention is necessary to protect the child from being endangered in the future."[17] Similarly, since 1962 the New York Family Court Act has authorized the court to dismiss a petition even if "facts sufficient to sustain the petition" are established, if "the court concludes that its aid is not required on the record before it."[18] *In re G.*[19] dramatically illustrates the degree of discretion this section vests in the family court—no matter how serious the maltreatment. The case came to the attention of child protective authorities after the respondent mother placed her newborn child in a waste receptacle on Wall Street and left the infant there. The infant was taken to a hospital where it was found to be in good health. Two weeks later, after the child protective agency had made a home visit, and with the court's permission, the infant was returned to the mother's custody. Two months later, the respondent, *joined by the attorney for the child,* moved to dismiss the petition on the ground that "it failed to state that the court's aid or assistance was in any way required under Section 1051(c) . . .."[20] Even though this issue is usually addressed at the conclusion of the factfinding hearing, the court held a hearing to consider the respondent's motion.

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[16] Wald, *State Intervention on Behalf of "Neglected" Children: A Search For Realistic Standards,* 27 STAN. L. REV. 985, 999 (1975) (footnotes omitted).

[17] Standard 2.2, IJA/ABA ABUSE AND NEGLECT STANDARDS, *supra* note 13, at 63.

[18] N.Y.FAM. CT. ACT § 1051(c) (McKinney 1975). It should be noted that this authority is limited to cases of child neglect; it does not apply to cases of child abuse.

[19] *In re* G., 91 Misc. 2d 911, 398 N.Y.S.2d 975 (Fam. Ct. 1977).

[20] *Id.* at 912-13, 398 N.Y.S.2d at 976.

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The court heard extensive evidence from a variety of law enforcement, child protective, and social services agencies as well as the respondent's babysitter. (The child protective agency had made eight home visits during the two-month period; the Visiting Nurse Service had made five visits.) All agreed that there was "no present neglect but, on the contrary, a normal, healthy and affectionate parent-child relationship."[21] Holding that there was "no evidence in this record to persuade [the] court that respondent or her children are presently or will in the future be in need of [the] court's aid or assistance," the court dismissed the petition.[22]

Admittedly, situations in which a previously abused or neglected child is not in danger of further maltreatment are rare—and rightfully difficult to prove. But when they arise, the child's representative must be prepared to protect the child's interest in being free from unnecessary state intervention. Even in the absence of a statute which gives the court the explicit authority to disregard instances of past maltreatment, the child's representative should not hesitate to seek the dismissal of the proceeding, *if* it can be established that the child is not in danger of further maltreatment. Most courts are willing to consider this common sense approach, for they too are aware of the serious harm that even well meaning state intervention can cause.

C. Case #3: When The Child Can Be Adequately Protected By The Parents' Voluntary Acceptance Of

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[21] *Id.* at 914, 398 N.Y.S.2d at 977.

[22] *Id.* While there is no reason to question the soundness of the court's determination, given the extreme level of emotional disturbance (and disregard for her child's safety) reflected in the mother's original behavior in abandoning her newborn on a city street, it is unfortunate that the court's opinion does not explain why the court did not expect the mother to engage in similarly dangerous behavior in the future. The disturbance may well have been a transitory one, but the evidence supporting such a conclusion is neither described nor alluded to in the opinion. *Compare In re* Forman, 75 Misc. 2d 345, 349, 347 N.Y.S.2d 319, 320 (Fam. Ct. 1973), in which the court described how the respondent had "fully rehabilitated herself."

Services[23]

Many abusive or neglectful parents can be helped to adequately care for their children without resort to court action. In fact, treatment services are most effective when they are voluntarily accepted. When parents understand their need for help and willingly accept it, they are more motivated to make the personal commitment required for treatment to work.

Recognizing this, child protective agencies seek the voluntary participation of parents in treatment by offering a range of services designed to help them meet their child-rearing responsibilities. Many of these services, such as day-care, are a concrete effort to relieve the pressures and frustrations of parenthood. Individual and family counseling services are also used to relieve personal or psychological problems and marital tension. Referrals are also made to family service agencies, mental health clinics, hospitals, and other social and child welfare agencies. Recently, a large number of Parents Anonymous groups have been established, and often a referral is made to one of them. If the parent is an alcoholic or drug addict, he may be referred for detoxification and rehabilitation. Although foster care for children is also considered a "service" that is "offered" to parents for their voluntary acceptance, it is deemed necessary in only about fifteen percent of all cases.[24]

Therefore, even in cases of serious maltreatment where there is ample evidence to establish court jurisdiction, unless the parents are deemed to need a structured treatment atmosphere that only the court's authority can provide (which is rarely the case), most child protective agencies in-

[23] This section describes the process through which a case is dismissed as the result of the parents' agreement to accept voluntary, non-court treatment services. It does not discuss plea negotiations in which the charges are reduced (or the allegations softened) in return for a parental guilty plea or admission of responsibility.

[24] NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, *supra* note 6, at 36.

itiate court action only when parents refuse treatment services.[25] Hence, in almost all cases, court action is commenced only because: (1) the parents have refused to accept treatment services (including foster care), and, (2) the child protective agency decides that, to protect the child, it needs the court's authority either to remove a child from the home or to impose treatment services. (Court action to obtain services that are otherwise not available to the child protective agency seem utterly inappropriate. While this is necessary in some states, the preferable procedure, if not the constitutionally mandated procedure, is to offer these services without the harmful impact of a court adjudication.)

Given this commitment to prior offers of treatment services, many practitioners assume that by the time a case reaches court it is no longer possible to divert a case for voluntarily accepted services. But this is far from true. Diversion is always possible, even after an adjudication. First, despite the system's general commitment to pretrial diversion, in a particular case no real effort may have been made to offer the services that would have prevented court action. For example, the case may have been especially serious or notorious, or the person who made the report may have insisted that a petition be filed, and no one in the child protective agency may have been willing to accept responsibility for an informal referral. However, by the time the case reaches court, cooler heads may be willing to treat the situation normally.

Second, as the prospect of a trial approaches, the parents may be much more amenable to accepting a service they previously rejected. It is not just a question of their agreeing to the placement of their children in foster care, although that frequently happens. A surprising number of

[25] Sometimes, initial parental cooperation is not enough to keep a family out of court; the parents' care of the child may not improve or may even worsen during the period of contact with the child protective agency, but they may refuse to "voluntarily" place their child in foster care, thereby necessitating court action.

parents are brought to court because they rejected relatively innocuous services such as day care and homemakers. While parents have a right to reject even these beneficent governmental intrusions, most will change their minds when the nature of the service and the consequences of their refusal are explained to them. (Explaining these realities is an important function of the parents' counsel.) If it appears that a voluntary referral is possible, the child's representative therefore may explore it with the parents' attorney as well as the petitioner. If the parents are not represented, approaching the parents may be practically and ethically more difficult, but, if a voluntary referral is in the child's interest, the effort should be made.

Third, the child protective agency can sometimes be convinced to accept an informal resolution of the case different from the one it originally offered the parents. The "service" most often rejected by parents is, of course, foster care. But even in such cases, where the child protective agency has presumably concluded that removal of the child is essential to his protection, the agency may be willing to modify its position if it is persuaded that the initial decision was wrong or that the family situation has changed since the initial decision was made. If the legal sufficiency of the case is in doubt, the agency has an additional incentive to seek an informal resolution that at least provides some treatment services to the family.

Such opportunities to divert a case, when coupled with the emotional trauma that unavoidably accompanies formal court action, place an affirmative obligation on the child's representative to assess the viability of an informal resolution of the proceeding. In doing so, he must keep in mind that such referrals for voluntary services remove the family from the child protection system's formal monitoring, poor as it might be. If the parents do not do well in treatment—or drop out of treatment altogether—it is unlikely that corrective action will be taken, unless the family happens to be reported again. Hence, in deciding where the child's interests lie, the child's representative must assume

that, unless some kind of child protective agency followup can be arranged,[26] the child and his family will be on their own. Despite this troubling reality, he may decide that the child's interests can be adequately protected by the parents' voluntary acceptance of treatment services.

D. Case #4: When The Harmful Effects Of Intervention Outweigh The Danger The Child Faces From His Parents

Child protective proceedings are initiated, as their name implies, to "protect" the victims of child abuse and neglect. The early identification of cases resulting from the recent dramatic increases in reporting has prevented many thousands of children from suffering serious injury and death. As Ruth and Henry Kempe note: "Not only are more cases being reported—they are of a milder nature, suggesting that families are being helped sooner. In Denver, the number of hospitalized abused children who die from their injuries has dropped from 20 a year (between 1960 and 1975) to less than one a year."[27] This improvement is not limited to Denver, which has long been the center of much innovation in the field. In New York State, for example, under a comprehensive reporting law that also mandated the creation of specialized child protective units, there has been a fifty percent reduction in fatalities, from about 200 a year to under 100.[28]

Unfortunately, while courts and child protective agencies are increasingly able to protect children from immediate or life threatening harm, they usually can do so only by removing the child from the home. Existing programs often are unable to provide the treatment services needed to break patterns of intergenerational abuse and neglect by helping parents provide the physical, emotional, and cogni-

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[26] *Compare* N.Y.FAM. CT. ACT § 1039 (McKinney 1975), which provides for a judicially monitored "adjournment in contemplation of dismissal."

[27] R. S. KEMPE & C. H. KEMPE, CHILD ABUSE 8 (1978).

[28] N.Y.S. DEPT. OF SOCIAL SERVICES, CHILD PROTECTIVE SERVICES IN NEW YORK STATE, 1979 ANNUAL REPORT, Table 8 (1980).

tive care that children need. More disquieting than the inability of existing programs to improve family situations is the undisputed evidence that they often harm the children they are meant to protect. Too many families suffer the trauma of home investigation, are forced to agree to treatment, and then are forgotten. Although only about fifteen percent of the children in the system are placed in foster care, for these children, it may be years before they are returned home. (More than half of the children placed in foster homes remain in this "temporary" status for over two years; more than twenty percent are in foster care for more than six years.) During this time, many of them are placed in a sequence of ill suited foster homes, denying them the consistent support and nurturing they so desperately need. The resulting emotional scars that many of these children carry into adult life make them a continuing burden on the full range of community welfare, mental health, and social service systems. With good cause, Goldstein, Freud, and Solnit, in their book, *Before the Best Interests of the Child*, concluded: "By its intervention the state may make a bad situation worse; indeed, it may even turn a tolerable or even a good situation into a bad one."[29]

Therefore, in deciding whether court action is in the child's interest, his representative must weigh the danger the child faces from his parents against the possible harmful effects of intervention. The notion that child protective intervention should be authorized only when it will "do more good than harm"[30] is not a new one; neither is the notion that the child's representative must balance the relative benefits and harms involved. For example, North Carolina law specifies that one of the "duties" of a guardian ad litem is "to serve the child and the court by protecting and promoting the best interests of and the least detrimental

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[29] J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1980).

[30] IJA/ABA ABUSE AND NEGLECT STANDARDS, *supra* note 13, at 40.

alternative for the child . . .."[31]

Discussions of the need to avoid a harmful intervention usually operate on the implicit assumption that some "lesser" intervention will be in the child's interest, assuming that the child is indeed in danger. However, there are times when *any* conceivable intervention will cause more harm than the child otherwise faces. For example, an older adolescent who has weathered the storms of parental abuse and neglect may be ready or about ready to leave home. For him, even casework supervision may complicate a tense family situation that is best left alone. Similarly, when the cause of the abuse or neglect is the parent's inability to cope with the child's developmental disabilities, the child may be better served by enrollment in a special education program.

There are times when the child's interest in being free of court intervention is clear. But, in most cases, the balance of harms and benefits is far more ambiguous. First, predicting the quality of the parents' future care for the child, and the harm that it may cause, is a subjective and uncertain process.[32] Second, it is often equally difficult to predict the effects of the intervention; many parents and children are helped by court-imposed treatment services. Further complicating matters is the fact that there may be two, three, four, or more children in the same family, each of whose interests may conflict. Although an adjudication may not be in the interests of an older child ready to enter adult society, the safety of younger children in the same family may well depend on an adjudication and a proper order of disposition.

Because of these ambiguities—and the hesitancy everyone feels about saying a child is better off if society does nothing—many cases in which intervention may do more

[31] N.C. GEN. STAT. § 7A-283 (Supp. 1977) (repealed). Similar provisions are now contained in N.C. GEN. STAT. § 7A-586 (Cum. Supp. 1979).

[32] *See* text accompanying note 13, *supra*.

harm than good are resolved through the parents' referral to voluntary services. Unlike the situations discussed in the previous section, such referrals give the illusion of doing "something" to protect the child when they are really only a practical escape from a no-win situation. Many patently improbable referrals are made because the charade of a referral allows the system to ignore its inability to help the child. But such referrals tend to obscure the true consideration at stake, namely, that given the deficiencies of existing treatment programs, the child is likely to be harmed by societal intervention. When a meaningful referral is not possible, this obfuscation makes it doubly difficult for the child's representative to convince the "system" that the child's interests require an outright dismissal of the case.

E. Case #5: When A Child Of Sufficient Maturity Requests That The Petition Be Dismissed

Up to now, in discussing the circumstances that may require the dismissal of court proceedings, this Article has ignored the wishes of the child. If the child is an infant or of tender years, his representative necessarily must make a decision in the absence of any guidance from the child,[33] although children as young as four or five can often shed significant light on the quality of the home situation and the consequent need for court intervention.

At some point, the child reaches sufficient maturity so that his wishes—whether or not in agreement with those of his legal representative—must be taken into account, even if he wants the proceeding dismissed. For example, if a sixteen year old who has been beaten by his father concludes that he would rather not have his family put through the strain of a full-blown trial, if he thinks he would be better off if the incident is simply forgotten, perhaps he is right.[34]

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[33] For a discussion of whether the child's representative should make such decisions on his own, *see* text accompanying note 44, *infra*.

[34] Actually, older children often wish to be placed out of their homes, so that they can escape what they consider to be an impossible family situation. However,

In any event, he has a right to have his point of view forcefully expressed to the court. As Vincent DeFrancis, long a strong advocate for more effective intervention in child abuse and neglect cases, points out:

> Children have very real and legitimate feelings and are entitled to have those feelings respected. At minimum, this requires procedures which ensure that the child has meaningful input into the process which determines his future. Since it is the judicial process which ultimately makes such a determination, the child needs someone to serve effectively as an advocate for his wishes and feelings in the judicial forum.[35]

The need to respect the wishes of a sufficiently mature child is usually discussed in relation to his representation by an attorney. For example, the IJA/ABA Juvenile Justice Standards provide that: "Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel."[36] However, even if the child's representative is a lay guardian ad litem, it seems difficult to deny that at some age the child has a right to have his views considered. Would that not be the role of a wise parent or guardian? In child custody litigation, consideration of a sufficiently mature child's wishes is sometimes expressly guaranteed. California has a typical statute; it provides: "If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof."[37]

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such cases are beyond the scope of this Article.

[35] V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S, 186 (rev. ed. 1974).

[36] INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, 79 (1980) (Standard 3.1(b)(ii)[b]); *compare* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1974).

[37] CAL. CIV. CODE § 4600 (West Supp. 1974); *see also* GA. CODE ANN. § 30-127

This does not mean that the court should be bound by the desires of even a mature child. It still must make its decision on the basis of the law and the child's interests as it determines them. Rather, the child's wishes should bind *his representative* and should shape the position he takes before the court. If a child of sufficient maturity wishes the proceedings to be dismissed, the child's representative, whether a lawyer or lay guardian ad litem, is under a moral and practical obligation to pursue that end. "Although [he] may strongly feel that the client's choice . . . is unwise, and perhaps be right in that opinion, [his] view may not be substituted for that of a client who is capable of considered judgment . . .."[38]

The child's ability or inability to reach a "considered judgment" is often quite clear. Unfortunately, many children before the court are on the borderline of maturity. There are no easily applied rules of thumb such as those contained in child custody statutes which sometimes specify the age at which a child is deemed to be of sufficient maturity.[39] In the absence of such rules, the child's representative often feels ambivalent about the degree to which he should be bound by the child's wishes. Consequently, he temporizes, at one moment supporting the child's express desire and at the next moment arguing against it. The result is a troubled attorney or guardian, a dissatisfied court, and a confused and hostile child-client.

The only way to lessen the difficulties inherent in borderline cases is for the child's representative to adopt a policy that respects the child's fundamental right to be heard by the court before a decision is made concerning his future. The framework enunciated by the United States Supreme Court in *Bellotti v. Baird* serves as an apt model. In *Bellotti,* the Court held that a minor has a right to decide

(1969).

[38] IJA/ABA STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, *supra* note 36, at 81. *Accord* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1974).

[39] *See, e.g.,* GA. CODE ANN. § 30-127 (1969) (specifying age 14).

whether to have an abortion if she can show: "(1) that she is mature enough and well enough informed to make her abortion decision, . . . independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."[40] Therefore, even if the child's representative is not sure that the child is sufficiently mature to make a decision about the course of the proceeding, he should nevertheless "help him express his wishes to the court . . .."[41] While doing so, he should also seek the fullest presentation of the facts concerning the allegations of the petition and the family's present situation. Then, as in the case of a minor's decision about an abortion, it would be up to the court to decide whether the outcome desired by the child is in his interests.

III. Conclusion

Many child protective cases reach court that do not belong there. Usually, this happens because the system's diversionary procedures did not operate as they should have. The legal sufficiency of the case may not have been carefully assessed; the relative safety of the child's present situation may not have been recognized; the parents' willingness to voluntarily accept treatment may not have been adequately pursued; the likely benefits of intervention may not have been weighed against its possible harmfulness; or the child's own wishes, if he is of sufficient maturity, may not have been taken into account. For any of these reasons, formal court action may be contrary to the child's interests, and actually harmful to the child.

The person representing the child, whether an attorney or lay guardian ad litem, has an affirmative obligation to determine whether court action is in the child's interest and, if it is not, to seek its dismissal. As the American Bar

[40] Bellotti v. Baird, 443 U.S. 622, 643-44 (1979).

[41] N.J. Stat. Ann. § 9:6-8.23(a) (West 1976); *accord* N.Y. Fam. Ct. Act § 241 (McKinney 1975).

Association Code of Professional Responsibility states: "If the disability of a client [and the absence of a legal guardian] compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interest of his client . . .."[42]

In a surprising number of cases, the child's representative will be able to convince the petitioner of the need to dismiss the case. However, there are times when he will have to adopt a straightforwardly adversarial posture vis-a-vis the petitioner. He may be forced to make a formal motion to dismiss, accompanied by appropriate supporting briefs and documents and perhaps amplified by an evidentiary hearing. (Such motions should be made as soon as their need becomes apparent.)[43]

Some authorities have disagreed with the kind of active representation of children this Article advocates. Unless the child is mature enough to decide what position his representative should take, they assert that the representative should remain "neutral concerning the proceeding."[44] They argue that for the child's representative to decide what is in the child's interests, "and then tailor his representation in the light of that decision, is a self-serving exercise in which the lawyer has in reality judged the ultimate issues in the case and then set out to implement his own judgment."[45]

No one can disagree that determining where a child's interest lies is a subjective and dangerous task (although, of course, judges do so every day). And no one can deny that opposing the pressure to go along with the system requires professional and personal courage. Nevertheless, adopting a "neutral" posture about the need to dismiss a case leaves unprotected the child for whom court intervention may be

[42] ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-12 (1974).

[43] *See, e.g., In re* G., 91 Misc. 2d 911, 398 N.Y.S.2d 975 (Fam. Ct. 1977).

[44] IJA/ABA STANDARDS RELATING TO PRIVATE PARTIES, *supra* note 36, at 80 (Standard 3.1(b)(ii)[c][3]).

[45] MANUAL FOR NEW ATTORNEYS, *supra* note 3, at 218-19.

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harmful. (While the parents can be expected to resist court intervention, unless they are represented, it is unlikely that they can effectively raise the issues discussed here. Even if they are represented, their interests too often diverge from those of their children for them to be adequate spokesmen for their children's interests). Especially in serious or notorious cases, everyone in the system, from the child protective worker to the judge, is hesitant to consider a dismissal, even if it appears to be in the child's interests. For, while there is always the danger of negative media publicity if the child is subsequently injured or killed, no one of any consequence will later complain if the child is permanently scarred as a result of unnecessary intervention. That is why, at the time this crucial decision is made: "The child is entitled to a spokesman and an advocate who totally, unequivocally, and actively pursue his rights and interests."[46]

[46] U.S. Dep't of Health and Human Services, National Center on Child Abuse and Neglect, Representation for the Abused and Neglected Child, 1 (1980).