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Family Law 1971 Survey of New York Law: Part Five--Miscellaneous

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FAMILY LAW

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DIVORCE PROCEEDINGS

A bilateral Alabama divorce, obtained without either party residing in Alabama, was given full faith and credit recognition in *In re Joseph*[1] on the speculation that the Alabama courts, because nine years had elapsed since the divorce was obtained, would probably hold that laches barred an attack on the decree. This case arose out of the application of the surviving "spouse" for letters of administration, and the court indicated that even if full faith and credit did not require recognition, the decree could be recognized as a matter of comity.

In challenges to *ex parte* sister state divorces, the Appellate Division, First Department, in *Milbank v. Milbank*,[2] upheld a Nevada divorce decree, while the Court of Appeals, in *Pneuman v. Pneuman*,[3] without opinion, upheld the finding of the Appellate Division, Fourth Department,[4] that a bona fide domicile was never established in Idaho, and thus an Idaho decree was not entitled to recognition in New York. In neither of these cases was the effect of Section 250 of the Domestic Relations Law directly in issue.

The recognition given by the Court of Appeals in *Gleason v. Gleason*,[5] to the belief that no public purpose is served by perpetuating dead marriages appears to have significantly influenced the result in a number of cases during the past year. It was held in one case[6] that a default decree of divorce should be granted the plaintiff on the grounds of cruel and inhuman treatment even though the acts complained of arose twenty years prior to the commencement of the action. The court held that the five year limitation period contained in Section 210 of the Domestic Relations Law was a true statute of limitations that could be

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1. 27 N.Y.2d 299, 265 N.E.2d 756, 317 N.Y.S.2d 338 (1970).
2. 36 App. Div. 2d 292, 320 N.Y.S.2d 436 (1st Dep't 1971).
3. 27 N.Y.2d 982, 267 N.E.2d 478, 318 N.Y.S.2d 742 (1970).
4. Pneuman v. Pneuman, 33 App. Div. 2d 646, 305 N.Y.S.2d 272 (4th Dep't 1969).
5. 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).
6. Figueroa v. Figueroa, 66 Misc. 2d 257, 320 N.Y.S.2d 113 (Sup. Ct., Queens Co. 1971).

raised only as a defense to the action and was not part of the cause of action.

In *Martin v. Martin*,[7] it was held that an open court stipulation entered into between the parties, in a previous habeas corpus proceeding, wherein the parties agreed to live separate and apart and which was incorporated into a judgment, satisfied Section 170(6) of the Domestic Relations Law, which requires that the parties live separate and apart pursuant to a separation agreement, and thus a decree was granted. Reasoning that since the purpose of requiring a separation agreement was to authenticate the fact of separation, the court found no reason to deny recognition to the stipulation which accomplished the same result.

In another case, the Appellate Division, Fourth Department,[8] reversed a special term order and awarded a judgment of divorce pursuant to Section 170(5) of the Domestic Relations Law even though the evidence established that the husband had been delinquent in making alimony payments. Finding that while the delinquency had occurred for a number of years, the husband complied with the decree during the eight years immediately preceding the commencement of the action, and there was thus substantial compliance with the terms and conditions of the decree.

In the wake of *Boddie v. Connecticut*,[9] a lower court[10] held that due process of law and equal protection of law mandated that the City of New York pay the cost of publication of a summons in a divorce proceeding on behalf of an indigent person who could not otherwise gain access to the court to prosecute her divorce proceeding.

Legislation.—The cut-off date and the thirty day period for filing the separation agreement, or a memorandum thereof, was eliminated during the past session of the legislature.[11]

FAMILY SUPPORT

Child Support.—Recognizing that one parent should not be permitted to litigate away the rights of a non-party child,[12] a recent case[13] held

7. 63 Misc. 2d 530, 312 N.Y.S.2d 520 (Sup. Ct., Queens Co. 1970).

8. Rubin v. Rubin, 35 App. Div. 2d 460, 317 N.Y.S.2d 571 (4th Dep't 1971).

9. 401 U.S. 371 (1971).

10. Dorsey v. City of New York, 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct., N.Y. Co. 1971).

11. N.Y. SESS. LAWS 1971, ch. 801, *amending* N.Y. DOM. REL. LAW § 170(6) (McKinney Supp. 1971).

12. *Cf.* Valdimer v. Mount Vernon Hebrew Camps, Inc., 9 N.Y.2d 21, 172 N.E.2d 283, 210 N.Y.S.2d 520 (1961).

13. Adams v. Adams, 66 Misc. 2d 378, 320 N.Y.S.2d 636 (Sup. Ct., Nassau Co. 1971).

that an infant was a third-party beneficiary and had a cause of action against his father for breach of a separation agreement even though the monies sued for were to be paid to the mother of the infant for his benefit, and even though the clause in the separation agreement had been previously litigated by the mother. Because the infant was not a party to the earlier proceeding, the cause of action was not barred by the doctrine of collateral estoppel. The infant in this case was not suing to enforce periodic child support payments but rather was seeking to enforce a provision that obligated the father to pay educational expenses.[14]

If child support payments are to be reduced, pursuant to a separation agreement, when the child is attending college away from home, such a contingency should be clearly specified. In *Backstatter v. Backstatter*,[15] it was held that a child did not "cease to have his permanent residence with the Wife" when he was a full-time student at the Merchant Marine Academy nor did he become emancipated by the receipt of a government allowance while in attendance at the Academy.

In a much publicized case, *Roe v. Doe*,[16] the Court of Appeals held that a twenty-year-old college student could not refuse to change her lifestyle, deemed by her father to be harmful to her best interest, and still expect him to be obligated to provide for her support and college expenses.

> The father has the right, in the absence of caprice, misconduct or neglect, to require that the daughter conform to his reasonable demands. Should she disagree, and at her age that is surely her prerogative, she may elect not to comply; but in so doing, she subjects herself to her father's lawful wrath. Where, as here, she abandons her home, she forfeits her right to support.[17]

If the concurring opinion of Judge Jasen[18] is correct in stating that this decision means the conduct of a parent is now subject to judicial review to determine if such was unreasonable, arbitrary, or capricious, then it is indeed a far reaching decision. However, it appears that the decision is more restrictive and confines judicial intervention to those instances where there is a showing of misconduct, neglect, or abuse on the part of the parent and thus it does not depart significantly from

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14. *See* Forman v. Forman, 17 N.Y.2d 274, 217 N.E.2d 645, 270 N.Y.S.2d 586 (1966).
15. 66 Misc. 2d 331, 320 N.Y.S.2d 613 (Sup. Ct., Nassau Co. 1971).
16. 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971).
17. *Id.* at 194, 272 N.E.2d at 570, 324 N.Y.S.2d at 75-76.
18. *Id.* at 194, 272 N.E.2d at 571, 324 N.Y.S.2d at 76.

previous decisions of the Court.[19]

Jurisdiction.—A 3-2 First Department decision[20] refused to subject a non-domiciliary defendant who was personally served with process in Virginia, to in personam jurisdiction in a divorce action. The court indicated that the right of the wife to alimony was to be determined by the courts of Virginia, the domicile of the husband. The fact that the defendant may have had minimal contacts with the state of New York still did not subject him to in personam jurisdiction because, as the Court indicated, matrimonial actions are not one of the specific classes of actions under CPLR Section 302.[21] The dissenting opinion, however, argued that the defendant's minimal contacts with the state together with its strong interest in the financial support of its residents, gives the courts of this state the constitutional power to acquire jurisdiction over this non-domiciliary.[22] However, while the dissent might very well be correct in finding constitutional power to acquire in personam jurisdiction over the non-domiciliary, this finding goes to what the legislature might have done and not what was in fact enacted under CPLR Section 302.[23]

The omission of the divorced wife from coverage under the Uniform Support of Dependents Law,[24] coupled with this decision, places a harsh burden on a resident of this state who now must travel some distance to another forum to litigate her claim to economic support. Furthermore, when one recognizes that alimony is just one element in the total monies available for the support of the whole family, mother and children, then we must recognize that the present statutory scheme may cause significant financial hardship to the children of the dissolved marriage. This factor will hopefully result in legislation permitting a wife to litigate her claim for alimony in this jurisdiction. To avoid the possible hardship to a husband who may live a considerable distance away from the jurisdiction, the better way to accomplish the desired result would be an amendment to the Uniform Support of Dependents Law giving the ex-wife the same rights as the dependent wife.

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19. *See* People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936).

20. Renaudin v. Renaudin, 37 App. Div. 2d 183, 323 N.Y.S.2d 145 (1st Dep't 1971).

21. *Id.* at 185, 323 N.Y.S.2d at 147.

22. *Id.* at 186-87, 323 N.Y.S.2d at 148-49.

23. *See* Longines Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 459-60, 209 N.E.2d 68, 77, 261 N.Y.S.2d 8, 20-21 (1965).

24. N.Y. DOM. REL. LAW art. 3-a (McKinney 1964); *see* Martin v. Martin, 58 Misc. 2d 459, 296 N.Y.S.2d 453 (Fam. Ct., Ulster Co. 1968).

In another jurisdiction case,[25] it was held that the family court has jurisdiction under Article 4 of the Family Court Act to hear and decide a claim for support against a New York State resident even though the petitioner was a non-resident alien.

May a separation agreement executed in New York which was incorporated but not merged into a Mexican divorce decree, provide the family court with in personam jurisdiction over a non-domiciliary in an enforcement proceeding under Article 4 of the Family Court Act? An affirmative answer was given in *Lawrenz v. Lawrenz*,[26] wherein the court held that CPLR Section 302 is applicable to family court and that a separation agreement is a transaction of business within the meaning of CPLR Section 302(a)(1).

Right to Alimony.—A decree of divorce granted to a man based on the misconduct of his wife cannot be used as the basis for vacating retroactively support arrears based on a family court order for the support of the wife which had been entered by consent at a time when the man was represented by counsel.[27]

Is a wife, against whom a judgment of divorce has been granted, entitled to alimony pursuant to Section 236 of the Domestic Relations Law? In *Plancher v. Plancher*,[28] the plaintiff husband, suing for divorce on the grounds that the parties have lived separate and apart pursuant to a decree of separation, was held to be entitled to pre-trial disclosure of the finances of the defendant wife in order to prepare for trial on the issue of alimony. By indicating that the plaintiff would probably prevail and obtain a divorce and that alimony could be provided as an incident of the judgment, it seems as if the court is construing "misconduct" in Section 236 of the Domestic Relations Law as not to include the "no-fault" grounds under sections 170(5) and (6).[29]

In a more far-reaching but somewhat questionable opinion,[30] a husband was granted a divorce on the grounds of cruel and inhuman treatment. The defendant's counterclaim for separation was denied because of her recriminatory conduct. However, the court then went on to make

25. Swift v. Swift, 65 Misc. 2d 1014, 319 N.Y.S.2d 655 (Fam. Ct., Dutchess Co. 1971).

26. 65 Misc. 2d 627, 318 N.Y.S.2d 610 (Fam. Ct., Westchester Co. 1971).

27. Fine v. Fine, 65 Misc. 2d 87, 316 N.Y.S.2d 725 (Fam. Ct., N.Y. Co. 1970).

28. 35 App. Div. 2d 417, 317 N.Y.S.2d 140 (2d Dep't 1970); *cf.* Lewis v. Lewis, 37 App. Div. 2d 725, 323 N.Y.S.2d 864 (2d Dep't 1971).

29. N.Y. DOM. REL. LAW § 170(5), (6) (McKinney Supp. 1971). *See* Foster, *Family Law, 1970 Survey of N.Y. Law*, 22 SYRACUSE L. REV. 207, 211 n. 28 (1971).

30. Woicik v. Woicik, 66 Misc. 2d 357, 321 N.Y.S.2d 5 (Sup. Ct., N.Y. Co. 1971).

an award of alimony based on the economic needs of the wife, citing the decision of Judge Traynor in *De Burgh v. De Burgh*[31] as authority for justifying the award. Awarding alimony based on the economic needs of the wife and the financial ability of the husband, regardless of fault, while desirable and important, especially where the defendant wife also obtains custody of children and the monies will be utilized for the support of the entire family, is unfortunately not within the discretion of the court when the misconduct of the wife results in the husband obtaining a decree of divorce.[32]

Again recognizing the desirability of a fixed sum alimony award, the First Department[33] reversed a lower court decision which had granted an open-ended temporary alimony award.

The obligation of a husband to make payments under a separation agreement was held to have terminated upon the remarriage of the wife, even though the separation agreement contained no termination clause.[34]

Counsel Fees.—Finding no contrary authority in the First Department or Court of Appeals, Judge Midonick held that Section 438 of the Family Court Act gave the family court discretion to award counsel fees even after a final order of support and visitation.[35] Because of the present uncertainty regarding the phrase "at any stage in the proceedings", contained in section 438, the legislature should give consideration to this problem and resolve the conflict.

Property Settlement.—Where a judgment of divorce awarded the wife exclusive possession of the marital residence, the fact that the judgment also terminated the tenancy by the entirety and created a tenancy in common in the residence does not give the husband the right to seek partition in a separate partition proceeding. Rather it was held that the remedy of the husband is to seek a modification of the prior judgment of divorce.[36]

The rights of a tenant by the entirety was also considered by the Second Department in *Plancher v. Plancher*,[37] wherein the court held

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31. 39 Cal.2d 858, 250 P.2d 598 (1952).

32. *See* Schine v. Schine, 36 App. Div. 2d 300, 303, 319 N.Y.S.2d 967, 970 (1st Dep't 1971).

33. Weltz v. Weltz, 35 App. Div. 2d 208, 315 N.Y.S.2d 150 (1st Dep't 1970).

34. Griffin v. Faubel, 64 Misc. 2d 653, 315 N.Y.S.2d 243, (Sup. Ct., Monroe Co. 1970).

35. Reed v. Reed, 63 Misc. 2d 459, 311 N.Y.S.2d 657 (Fam. Ct., N.Y. Co. 1970); *contra*, Cassieri v. Cassieri, 31 App. Div. 2d 927, 298 N.Y.S.2d 844 (2d Dep't 1969) (mem.).

36. Ripp v. Ripp, 64 Misc. 2d 323, 314 N.Y.S.2d 461 (Sup. Ct., Nassau Co. 1970); *accord*, Davies v. Davies, 65 Misc. 2d 480, 318 N.Y.S.2d 97 (Sup. Ct., Monroe Co. 1971); *contra*, Pechstein v. Pechstein, 64 Misc. 2d 969, 316 N.Y.S.2d 4 (Sup. Ct., Nassau Co. 1970).

37. 35 App. Div. 2d 417, 317 N.Y.S.2d 140 (2d Dep't 1970).

that Section 170(5) of the Domestic Relations Law, permitting a divorce where the parties have been separated pursuant to a decree of separation, was not unconstitutional even though the effect of the decree would be the termination of the tenancy.

PATERNITY PROCEEDINGS

Pre-Trial Examinations.—The apparent wide latitude enjoyed by the family court in deciding whether a pre-trial examination is appropriate in any given case resulted in decisions during the past survey period that give little or no guidance to the practitioner.[38]

In a case involving the availability of a bill of particulars, a family court[39] vacated a notice for a bill directed to the respondent where his answer only contained a general denial. The bill was being sought to learn if the respondent was going to claim at trial that the petitioner was promiscuous, and if so, the names of the persons with whom the petitioner allegedly had intercourse. While not in issue before the court, it would seem that the vacating of the bill should now be considered as "special circumstances" sufficient to justify a restricted pre-trial examination, if one is sought, in order for petitioner to adequately prepare to rebut the issue of promiscuity, if such is to be raised.[40]

Because of the restrictive attitude toward pre-trial examinations in filiation cases, the Fourth Department[41] held that where the respondent was called as a witness by the petitioner, she had the right to treat him as a hostile witness and thus to lead and cross-examine him. The court further stated that the restrictions on examinations before trial in filiation cases should be relaxed.[42]

Inasmuch as the CPLR is applicable to family court proceedings[43] and inasmuch as the bill of particular is not a disclosure device, there seems to be no reason why a respondent in a filitation proceeding should not be able to freely utilize one or more disclosure devices.[44] The showing

38. *See* Green v. Smith, 65 Misc. 2d 588, 318 N.Y.S.2d 27 (Fam. Ct., Dutchess Co. 1970) (denied examination); Green v. Brown, 65 Misc. 2d 226, 317 N.Y.S.2d 104 (Fam. Ct., Westchester Co. 1970) (examination before trial granted); Linnie D.B. v. Lonnie J.H., 65 Misc. 2d 754, 317 N.Y.S.2d 832 (Fam. Ct., Westchester Co. 1970) (examination before trial granted).

39. Jesmer v. Beyma, 66 Misc. 2d 323, 321 N.Y.S.2d 173 (Fam. Ct., Monroe Co. 1971).

40. *See* Arlene W. v. Robert D., 36 App. Div. 2d 455, 460, ___ N.Y.S.2d ___, ___, (4th Dep't 1971) ("Evidence of promiscuity, if present, would weigh heavily against petitioner.").

41. *Id.* at 456, ___ N.Y.S.2d at ___.

42. *Id.* at 457, ___ N.Y.S.2d at ___.

43. N.Y. FAM. CT. ACT § 165 (McKinney Supp. 1971).

44. N.Y. CPLR § 3102(a) (McKinney 1963).

of special circumstances seems unnecessary in light of the power of the family court to protect a party against abusive disclosure practices.[45]

Statute of Limitations.—The decision in *Wales v. Gallan*,[46] wherein the court held that the dual limitation periods contained in Section 517 of the Family Court Act was unconstitutional, was held to be neither binding nor acceptable in a recent decision.[47]

In another case,[48] the family court rejected a somewhat novel defense that the paternity statute of limitations is available to a husband in a non-support proceeding brought by his wife on behalf of a child born during the marriage, where the husband denies paternity.

Right to Counsel.—Is a person summoned to defend himself in a paternity proceeding entitled to be advised that he has a right to counsel and that if he cannot afford one, the court will assign an attorney to represent him? In two recent decisions during the survey period, the Second Department held that inasmuch as the filiation proceeding is civil in nature, the respondent had no such right where he was apparently over twenty-one years of age.[49] However, where the respondent was sixteen years of age, the court,[50] citing, *inter alia, In re Gault*,[51] indicated that admissions made in the absence of counsel may have impinged the respondent's right to due process of law.

Are these opinions consistent on the issue of the right to legal representation in a filiation proceeding? If the *Leanna M.*[52] case is limited to holding that due process only requires that before a juvenile may waive legal representation, he must fully comprehend all the ramifications of such a waiver, then perhaps the cases are consistent on the assumption that an adult is intelligent enough to understand all the ramifications of such a waiver. However, if such is the holding, does it mean that if the infant requests counsel, after understanding the ramifications of waiving representation, and cannot afford to retain private counsel, the court need not assign counsel to represent him? Perhaps, but if such is the result then the juvenile in essence receives no more protection than the adult except that the indigent juvenile is made aware that if he had money an attorney could be of real help to him.

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45. N.Y. CPLR § 3103 (McKinney 1963).
46. 61 Misc. 2d 681, 306 N.Y.S.2d 614 (Fam. Ct., Richmond Co. 1969).
47. Green v. Smith, *supra* note 38.
48. Swift v. Swift, *supra* note 25.
49. Bido v. Albizu, 36 App. Div. 2d 537, 318 N.Y.S.2d 547 (2d Dep't 1971) (mem.).
50. Leanna M. v. Douglas J., 35 App. Div. 2d 551, 315 N.Y.S.2d 271 (2d Dep't 1970).
51. 387 U.S. 1 (1967).
52. *Supra* note 50.

But if *Leanna M.*[53] indicates that due process of law requires that the infant be afforded counsel, which the author hopes is the implication of the holding, then the cases still are inconsistent unless the tables have been completely turned to the extent of affording constitutional protections to a juvenile while denying the same protections to an adult.[54]

Perhaps, however, the recent decision in *Boddie v. Connecticut*,[55] will provide some uniform direction in this area. While *Boddie* limited itself to a divorce proceeding, it would seem that a logical extension would cover, at least, a situation where an indigent person was a defendant in a civil case and was being denied the opportunity to defend himself solely because of his poverty. If access to the courts is to be a meaningful constitutional right, the principle of the *Boddie* case must also mandate that an indigent respondent in a filiation case, *inter alia*, be assigned counsel.

Legislation.—Article 5 of the Family Court Act was amended to give the family court jurisdiction[56] to make an order of visitation[57] in addition to its prior authority to determine custody, if there has been an order of filiation or a court approved paternity agreement or compromise.

While these statutory provisions regarding custody and visitation are phrased in neutral terms there is a strong judicial reluctance to award custody to the biological father.[58]

CHILD CUSTODY

While the "best interest" test[59] is the articulated standard in determining custody between parents who were, at least at one time husband and wife, and is at least a factor in determining custody between a parent and a third-party, it is sometimes unclear whether the courts are award-

53. *Id.*

54. *See* N.Y. FAM. CT. ACT § 249 (McKinney Supp. 1971) which gives the family court the authority to appoint a law guardian for a minor in any proceeding under the Family Court Act. Whether this section is intended to be applicable to a minor who is a respondent in a proceeding is unclear. If the statute is applicable, arguably the indigent adult respondent, in addition to any due process claims he may have, is being denied equal protection of the laws.

55. Boddie v. Connecticut, *supra* note 9.

56. N.Y. SESS. LAWS 1971, ch. 952, *amending* N.Y. FAM. CT. ACT § 511 (McKinney Supp. 1971).

57. N.Y. SESS. LAWS 1971, ch. 952, *adding* N.Y. FAM. CT. ACT § 549 (McKinney Supp. 1971) (effective June 25, 1971).

58. *See* Loretta "Z" v. Clinton "A", 36 App. Div. 2d 995, 320 N.Y.S.2d 997 (3d Dep't 1971) (mem.).

59. *See* N.Y. DOM. REL. LAW § 70 (McKinney 1964).

ing custody according to the "best interest" of the child or the "best interest" of the parent.

In *People ex rel. Moffett v. Cooper*,[60] two sixteen-year-old children had been residing with their mother, as custodial parent, since birth, and residing with their step-father for the past eleven years. While the mother had been awarded custody pursuant to a divorce decree, the children had physically resided with both parents until they were almost three years of age. The father had been making monthly child support payments and during the four years immediately preceding the commencement of the proceeding, the children, for a period of three weeks during the summers, had visited with the father. When the custodial parent died, the father commenced a habeas corpus proceeding to obtain custody.

A court-appointed psychiatrist and psychologist both recommended that the children continue to reside with their step-father. The two children opposed the writ and indicated their preference to stay in their present surroundings and not move to Louisiana, the home of the father.

In spite of the recommendations of the two experts,[61] the desires of sixteen-year-old children, and the fact that the step-father stood in a parental relationship with the children for so long a period of time, the court, finding that the father did not abandon the children and that he was not unfit, held that there was no legal basis for denying the natural father custody of his children.

While this "blood is thicker than water" approach taken by the court may be appropriate where the third-party has not stood in a parental relationship with a child for any significant period of time, in a case where there has been a protracted substitute parent-child relationship, as in the *Moffett* case,[62] the focus should be on the best interest of the child[63] and not on whether the biological parent has lost his "natural right" to the custody of the children because of his unfitness. While this approach may at times result in questionable decisions, at least the focus of the proceeding will be on what is in fact best for the child involved.[64]

60. 63 Misc. 2d 1005, 314 N.Y.S.2d 248 (Fam. Ct., Dutchess Co. 1970).

61. *But see* Anonymous v. Anonymous, 34 App. Div. 2d 942, 312 N.Y.S.2d 348 (1st Dep't 1970) (mem.).

62. People *ex rel.* Moffett v. Cooper, *supra* note 60.

63. *See* Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 82 (1969).

64. *See* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966), where in a custody dispute between the natural father and maternal grandparents, the court awarded custody to the grandparents on the grounds that it was in the best interests of the child even though there was no showing that the natural parent was unfit.

Children must be considered as persons rather than parental property that can be retained or given away at the whim of a parent. It is interesting that while these sixteen-year-old children could not compel their father to assume custody against his wishes, he can obtain their custody over their strong objections.[65]

To restore some balance to the parent-child custodial relationship, there should be legislation recognizing that a child over a certain age has at least the right to determine with whom he does not wish to live.

Again relying on automatic presumptions, the Third Department[66] reversed a family court order, and awarded custody of an illegitimate three-year-old child to its mother even though the family court found both parents fit and that the child had lived most of his life with his father.

> Under established law, the mother of an illegitimate child is prima facie entitled to its custody if she is a proper and suitable person, even as opposed to the child's father.[67]

Whether the removal of the child from the father's custody would be harmful to the child was never discussed by the court.

In another Third Department case,[68] the court refused to grant the petition of the father and ex-husband to modify a former custody award even though there was evidence that the mother had entertained male companions in her apartment overnight with the knowledge of the child, because there was no showing that such conduct was affecting the upbringing of the child.

While full faith and credit may not be applicable to custody decrees,[69] an appellate division decision[70] implicitly recognized that the New York courts should not freely re-examine anew custody decrees of sister states unless there is a showing that the parties have some significant contact with New York, over and above mere physical presence.

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65. *But see* Hughes v. Hughes, 37 App. Div. 2d 606, 323 N.Y.S.2d 621 (2d Dep't 1971) where in a custody dispute between natural parents, the court indicated that the desires of 16 and 17-year-old children must be given significant consideration.

66. Loretta "Z" v. Clinton "A", 36 App. Div. 2d 995, 320 N.Y.S.2d 997 (3d Dep't 1971) (mem.).

67. *Id.* at 996, 320 N.Y.S.2d at 999.

68. Rodolfo "CC" v. Susan "CC", 37 App. Div. 2d 657, 322 N.Y.S.2d 388 (3d Dep't 1971).

69. Bachman v. Mejias, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868, 154 N.Y.S.2d 903, 907 (1956).

70. Duke v. Duke, 37 App. Div. 2d 83, 85, 322 N.Y.S.2d 261, 264 (1st Dep't 1971); *see* proposed UNIFORM CHILD CUSTODY JURISDICTION ACT § 3.

ADOPTIONS

The religious preference statutes[71] regulating adoptions were held not violative of the Establishment Clause of the first amendment in two recent decisions.

While upholding the statutes in question, the Appellate Division, Furthermore, in a situation where the natural parents are unknown, the matching was not mandatory and that:

> [t]hese portions of the amended statutes plainly place the primary emphasis on the temporal best interests of the child, subordinating the religious preference ot the natural parents.[73]

Furthermore, in a situation where the natural parents are unknown, the court stated that:

> [C]hildren with unknown religious affiliation should be placed in the first good home so far as consistent with the best interest of the child without regard to the religion or non-religion of the prospective adoptive parents.[74]

In *In re Efrain C.*,[75] Judge Dembitz, faced with a situation where a five week attempt to find Catholic adoptive parents for a two-year-old Catholic child was unsuccessful, directed that the child be placed with a non-sectarian agency for adoption and in addition stated that subdivision (e) of Section 116 of the Family Court Act is constitutional only if it is construed, where a child is placed with a sectarian agency, as not preventing or substantially delaying the adoption of the child.

Consistent with its decision in *Dickens v. Ernesto*,[76] the Fourth Department[77] reversed a family court order which had denied an adoption because, *inter alia*, the religion of the adopting parents differed from that of the child. In so holding the court indicated that religious differences, without more, is not sufficient reason to block an adoption.

To the extent that a fair reading of the above cases permits one to conclude that they are in agreement—the best interests of the child is paramount in attempting to find a suitable family and that such interest

71. N.Y. Soc. Serv. Law § 373 (McKinney Supp. 1971); N.Y. Fam. Ct. Act § 116(e) (McKinney 1963); N.Y. Dom. Rel. Law § 113 (McKinney Supp. 1971).

72. Dickens v. Ernesto, 37 App. Div. 2d 102, 322 N.Y.S.2d 581 (4th Dep't 1971).

73. *Id.* at 106, 322 N.Y.S.2d at 584.

74. *Id.* at 104, 322 N.Y.S.2d at 583.

75. 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (Fam. Ct., N.Y. Co. 1970).

76. Dickens v. Ernesto, *supra* note 72.

77. *In re* Michael D., 37 App. Div. 2d 78, 322 N.Y.S.2d 532 (4th Dep't 1971).

is not served when a child who has been given a religious designation is denied the opportunity to be adopted merely because the potential family is not of the same religion—they represent a positive step forward insofar as the rights of unwanted children and potential adopting families are concerned.

What is left unclear is how the agencies, both sectarian and nonsectarian, are to implement the above decisions. Will the agency place the child with the first suitable family regardless of religious matching? Or, will there be a cutoff time before which the agency will attempt to make a religious match and after which time, any family will be considered? Further, will an atheist or agnostic be considered as a suitable person to adopt a child of a designated religion? Will parents of one religion ever be able to adopt a child of another religion if suitable persons of that religion are available? While expensive, protracted litigation could possibly bring clarity to this area and resolve some of these questions, the wisest course would be a legislative reconsideration of the above-noted statutory provisions[78] in light of the decisions noted and the questions posed.

Surrender and Consent.—The statutory provision[79] authorizing the judiciary to permit the revocation of a surrender was the subject, at least in one instance,[80] of the much publicized litigation during the past year.

The "Baby Scarpetta" case, while causing substantial emotional strain to all the parties concerned, merely reaffirmed previous decisions of the New York courts that a mother may revoke a surrender before an order of adoption, if such revocation is in the best interest of the child.[81]

In this case, five days after the agency placed "Baby Scarpetta" with the adoptive parents, and within three weeks after the surrender was executed, the natural mother sought to revoke her surrender. There is no indication that the adopting parents were ever informed by the agency of the mother's attempted revocation nor is there any indication that the adopting parents were ever informed generally that a natural parent has such a right. Clearly, if adoption placements are still going to be made

78. *Supra* note 71.

79. N.Y. SOC. SERV. LAW § 383(1) (McKinney 1966).

80. People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

81. *See* Roe v. N.Y. Foundling Hosp., 36 App. Div. 2d 100, 318 N.Y.S.2d 508 (1st Dep't 1971), where the court found that the best interest of the child would not be served by permitting a surrender revocation.

prior to the time the surrender is final and binding on the natural parent, there should be some legislative enactment requiring the adopting parents to be so informed in order for them to have an opportunity, at the earliest moment, and before emotional ties with the child are further strengthened, to decide whether they want to assume the risk of protracted litigation.

Furthermore, Section 384(4)[82] of the Social Services Law does authorize an agency to petition the family or surrogate court for an order approving the surrender, which is then binding on anyone who has been given notice of such proceeding and an opportunity to be heard. Such a proceeding can be commenced prior to the child being placed with adoptive parents. Unfortunately, the Spence-Chapin Adoption Agency did not utilize this procedure.

To avoid the grief which is visited upon all the parties to these contested proceedings and to give a greater degree of stability to the child when there is a placement with adopting parents, it is recommended that section 384(4)[83] be amended so as to impose a mandatory obligation upon an adoption agency to seek court approval of the surrender *prior* to placement.

In *In re Adoption of Brousal*,[84] Surrogate Sobel held that the adoption of a child born out of wedlock requires only the consent of the natural mother[85] and that the natural father does not have any standing to object to the adoption.

The statute[86] involved creates two classifications of fathers based on the status of a child's birth. The first class is composed of fathers whose children were born in wedlock; these fathers have the right to grant or withhold consent to the adoption of their children. The second class is composed of fathers whose children were born out of wedlock; these fathers do not have any rights insofar as the adoption of their children is concerned. While the constitutionality of the statutory exclusion was apparently not in issue in *Brousal*,[87] it is the opinion of this author that the statute creates an invidious classification that denies to the fathers in the second class equal protection of the laws under the fourteenth

82. N.Y. Soc. Serv. Law § 384(4) (McKinney Supp. 1971).
83. *Id.*
84. 66 Misc. 2d 711, 322 N.Y.S.2d 28 (Sur. Ct., Kings Co. 1971).
85. N.Y. Dom. Rel. Law § 111(3) (McKinney Supp. 1971).
86. *Id.*
87. *Supra* note 81.

amendment.[88]

Furthermore such a classification does not take into consideration the father who has supported the child, the father who wishes to take the child into his own home, and the father whom the natural mother did not want to marry. Additionally, the interests of the child are perhaps being overlooked. What governmental interest is so strong as to deny to the child the right to have his father present at such a proceeding?

Abrogation.—Section 118-b of the Domestic Relations Law[89] authorizing adoptive parents to petition the court which originally granted the adoption to abrogate the adoption because of the misbehavior of the child, clearly sets up an obstacle to the complete integration of the adopted child into the family. Even though courts are reluctant to grant such petitions,[90] the fact that they can be brought and the fact that adopted children are treated differently than natural children seems sufficient reason to eliminate this provision.

Legislation.—In response to the "Baby Scarpetta"[91] case which held, *inter alia*, that prospective adoptive parents have no right to intervene in such proceedings, legislation was enacted[92] giving the prospective adoptive parents the right to intervene in a proceeding to set aside a surrender. The amended statute permits the intervention to be made anonymously or in the true name of the adopting parents. The statute is silent as to whether the name option will be that of the court or the proposed intervenors.

In other legislation,[93] a state-wide adoption exchange was created within the Department of Social Services. Regulatory implementation of the exchange was left to the Department of Social Services or the Board of Social Welfare.

JUVENILE DELINQUENCY—PINS

Jury Trial.—The United States Supreme Court has decided that children charged with juvenile delinquency are not entitled to a jury trial. In *McKeiver v. Pennsylvania*,[94] the Court held, in a plurality opinion

88. *See* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); *see generally* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 95-97 (1971).

89. N.Y. DOM. REL. LAW § 118-b (McKinney Supp. 1971).

90. *See In re* Anonymous, 63 Misc. 2d 661, 313 N.Y.S.2d 148 (Sur. Ct., Erie Co. 1970).

91. *Supra* note 80.

92. N.Y. SESS. LAWS 1971, ch. 1142, *amending* N.Y. SOC. SERV. LAW § 384(3) (McKinney Supp. 1971).

93. N.Y. SESS. LAWS, ch. 47, *adding* N.Y. SOC. SERV. LAW § 372-b (McKinney Supp. 1971).

94. 403 U.S. 528 (1971).

written by Justice Blackmun,[95] that trial by jury in the adjudicatory stage of a juvenile court proceeding is not required by the Due Process Clause of the fourteenth amendment. Rejecting the "wooden approach" of justifying its decision by placing the "civil" label on the proceeding,[96] the Court emphasized three factors which it found to be determinative of the issue: (1) in prior opinions expanding the procedural rights of juveniles, the Court had focused on rights which improved the fact-finding procedures of the juvenile court process, while "one cannot say that in our legal system the jury is a necessary component of accurate fact-finding";[97] (2) the injection of the jury trial into the juvenile court system might remake the juvenile proceeding into a full adversary process with the attendant delay, formality and publicity that the present process ideally intended to eliminate; (3) the great weight of authoritative studies of the juvenile court process,[98] present state legislative schemes,[99] and recent judicial opinions[100] have held that the jury trial is not an essential component of the juvenile justice system.

The Court reiterated the idealistic goals of the juvenile court process, made an express finding that these goals "have not been realized"[101] but felt that the failures relate "to the lack of resources and of dedication rather than to inherent unfairness."[102] In what can only be taken as an ominous warning to those charged with the obligation of translating the beneficial goals of the juvenile court process into reality, the plurality opinion concluded with a statement designed to hasten the pace of needed reform:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[103]

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95. Justice Blackmun was joined by Chief Justice Burger and Justices Stewart and White. Justices White and Harlan wrote separate concurring opinions. Justice Douglas filed a dissenting opinion in which Justices Black and Marshall joined. Justice Brennan wrote a separate opinion concurring in part and dissenting in part.

96. McKeiver v. Pennsylvania, *supra* note 94.

97. *Id.* at 543.

78. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967); *cf.* UNIFORM JUVENILE COURT ACT § 24(a); STANDARD JUVENILE COURT ACT art. V, § 19.

99. McKeiver v. Pennsylvania, *supra* note 94, at 548, n. 7.

100. *Id.* at 549.

101. *Id.* at 544.

102. *Id.* at 548.

103. *Id.* at 551.

Section 758(b) of the New York Family Court Act provides that a male who is found to be a juvenile delinquent because at the age of fifteen he committed an act which if committed by an adult would constitute a class A or class B felony may be committed to the Elmira Reception Center, a prison for persons from age sixteen to twenty-one, in lieu of placement in an institution for adjudicated juvenile delinquents. In a decision rendered before *McKeiver* but in no way affected by its holding, Judge Millard Midonick held, in *In re Reginald S.*,[104] that a juvenile facing possible sentencing under section 758(b) was entitled either to a trial by jury or to a pre-trial ruling by the court that any commitment to Elmira under that section would be limited to a period not to exceed six months. Judge Midonick reasoned that while the New York Court of Appeals had held that jury trials were not required in most juvenile cases,[105] and correctly anticipated that the United States Supreme Court would also so conclude, an exception must be made where the possible result of the juvenile proceeding was commitment to an *adult* prison for a period of three years. Since *Baldwin v. New York*[106] had held that a jury trial must be afforded one who is subject to a sentence of more than six months in an adult penal institution, the court correctly concluded that the same requirement attached to juveniles who faced such a sentence under section 758(b).

In deciding which of the alternative remedies to afford the respondent, the court in *Reginald S.* was influenced by the recommendation of the attorneys, particularly the prosecuting attorney, that a pre-trial determination that the respondent could not be incarcerated in Elmira for more than six months was acceptable. In choosing this alternative, the court noted that had it chosen to afford the juvenile a jury trial, the proper procedure would have been to grant leave to counsel to petition the supreme court for an order of transfer to that court.[107]

Burden of Proof.—In 1970 the Court of Appeals decided[108] not to give retroactive effect to the United States Supreme Court's decision in *In re Winship*[109] which held that in juvenile delinquency proceedings the county must establish the elements of juvenile delinquency beyond a reasonable doubt. The Court of Appeals reasoned that to permit the

104. 64 Misc. 2d 1002, 317 N.Y.S.2d 180 (Fam. Ct., N.Y. Co. 1970).
105. *In re* Daniel Richard D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970).
106. 399 U.S. 66 (1970).
107. This procedure is authorized by the State Constitution. N.Y. CONST. art. 6, § 19(a).
108. *In re* Daniel Richard D., *supra* note 105.
109. 397 U.S. 358 (1970).

decision to have retroactive effect "would substantially affect countless juvenile delinquency adjudications made on the prior standard."[110] The Appellate Divisions for the First[111] and Second[112] Departments have ignored that ruling in two cases decided last year. Both decisions held that the *Winship* standard should be applied to cases commenced before *Winship* was decided if the juvenile delinquency adjudication was not final and was in the course of appellate review when *Winship* was decided.

In a brief memorandum opinion, the Court of Appeals extended the *Winship* decision into the PINS category this past year. Despite the fact that the majority opinion in *Winship* explicitly limited its holding to cases where the juvenile is charged with committing an act which would constitute a crime if committed by an adult,[113] the Court of Appeals in *In re Richard S.*[114] held that "proof beyond a reasonable doubt is constitutionally required for an adjudication that a minor is a person in need of supervision."[115] While many critics of the PINS category will be satisfied with nothing less than its complete repeal,[116] others may take some measure of satisfaction from the fact that the county will now have the burden of establishing beyond a reasonable doubt that a child "is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of the parent."[117]

The allocation of the burden of proof that the juvenile proceeded against is within the age limitation established by statute was decided in *In re Don R. B.*[118] In that case the prosecuting attorney failed to establish that at the time the act was committed[119] the respondent was under the age of sixteen years.[120] Despite the fact that the Family Court Act places upon the prosecution the burden of alleging in the petition that the respondent is below the required age,[121] the court held that the respon-

110. *Supra* note 105 at 96, 261 N.E.2d at 631, 313 N.Y.S.2d at 709.

111. *In re* Ivan V., 35 App. Div. 2d 806, 316 N.Y.S.2d 568 (1st Dep't 1970).

112. *In re* Ronald H., 35 App. Div. 2d 845, 317 N.Y.S.2d 95 (2d Dep't 1970).

113. *In re* Winship, *supra* note 109, at 359, n. 1.

114. *In re* Richard S., 27 N.Y.2d 802, 264 N.E.2d 861, 315 N.Y.S.2d 861 (1970).

115. *Id.*

116. *Cf.* Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966).

117. N.Y. FAM. CT. ACT § 712(b) (McKinney 1970).

118. 66 Misc. 2d 279, 320 N.Y.S.2d 813 (Fam. Ct., Kings Co. 1971).

119. N.Y. FAM. CT. ACT § 71(a) (McKinney 1963) provides:

> In determining the jurisdiction of the court . . . the age of the respondent at the time the delinquent act allegedly was done . . . is controlling.

120. N.Y. FAM. CT. ACT § 712(a) (McKinney 1963).

121. N.Y. FAM. CT. ACT § 731(b) (McKinney 1963).

dent is obligated to prove that he was not sixteen years of age at the time the act was committed, and that "[t]he failure of the respondent to raise any objection was a tacit admission as to the fact that he was under the age of sixteen at the time of the occurrence of the act."[122] While it is not unusual to see, in civil law, the allocation of the burden of pleading placed on one party and the allocation of the burden of proof placed on the other,[123] it is certainly most unusual to find such a dichotomy in regard to an issue going to the jurisdiction of the court to hear a case.[124]

Definitional Problems.—The PINS category has been further limited by cases reaffirming the established proposition[125] that acts which constitute only "offenses" and not felonies or misdemeanors cannot serve as a basis for a PINS finding, absent proof that the offense has been committed a sufficient number of times to constitute proof that the juvenile is incorrigible or ungovernable. In *In re David W.*,[126] the Court of Appeals held in a per curiam opinion that a single act of harassment was not sufficient to sustain a finding of juvenile delinquency nor to sustain a finding that the respondent was a person in need of supervision.

In *In re John "M"*,[127] respondents were charged with a single act of "glue sniffing". The petition charging juvenile delinquency originally alleged that respondents had violated Section 3396 of the Public Health Law, which would constitute merely an offense and thus could not support a finding of delinquency. The court permitted the police counsel to amend the petition to allege possession of noxious material in violation of Section 270.05 of the Penal Law, a misdemeanor, but was later obligated to dismiss the petition when it decided that section 3396, a more specific statute, controlled over the more broadly worded section of the Penal Law. The court went on to point out that the respondents could not be charged under the PINS category unless they were proven to have engaged in glue-sniffing as a matter of habit, in which case they might be deemed to be incorrigible and beyond the lawful control of their parents. Judge Moskoff, in his opinion, stated that it was mandatory that the juvenile court be able to assume jurisdiction over juveniles who commit single acts which constitute offenses or violations and appealed to the legislature to grant the juvenile court jurisdiction. He

122. *In re* Don R.B., *supra* note 118, at 283, 320 N.Y.S.2d at 818.
123. *E.g.*, Fowler v. Donnelly, 225 Ore. 287, 358 P.2d 485 (1960).
124. *See* N.Y. FAM. CT. ACT § 713 (McKinney 1963).
125. *See, e.g.*, Bordone v. Allen F., 33 App. Div. 2d 890, 307 N.Y.S.2d 527 (4th Dep't 1969).
126. 28 N.Y.2d 589, 268 N.E.2d 642, 319 N.Y.S.2d 845 (1971).
127. 65 Misc. 2d. 609, 318 N.Y.S.2d 904 (Fam. Ct., Queens Co. 1971).

suggested that the PINS category be expanded to cover single acts within those two categories.

Judge Dembitz contributed another of her incisive and well documented opinions this year. In *In re Mario*,[128] she held that a habitual truant could be placed in a state training school, despite apparent contrary precedent,[129] and upheld the constitutionality of such a placement over the argument that one who has committed no crime or act harmful to others cannot be restrained of his liberty. Having found that the respondent would not be benefited by probation or placement in an "open facility", and that with certain safeguards, the juvenile would be more likely to be rehabilitated in the state training school, the court concluded that the doctrine of *parens patriae* "continues in that the State has the power to perform the parental role of insuring the child's education and training, when the parent is unable to control him sufficiently to perform it."[130] Judge Dembitz also had occasion to uphold the constitutionality of section 712 in response to the charge that the phrase "habitual truant" was unconstitutionally vague.[131]

Despite the fact that Section 115 of the Family Court Act grants the family court jurisdiction over juvenile delinquency cases "as set forth in article seven" and that article seven limits the definition of juvenile delinquents to certain persons who do "any act which, if done by an adult would constitute a crime,"[132] a juvenile was this year adjudicated a delinquent for non-criminal conduct. A section of the Penal Law provides that any person under the age of sixteen who has in his possession any loaded cartridges or ammunition shall be adjudged a juvenile delinquent.[133] No provision makes the equivalent act a crime if commit-

128. 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Fam. Ct., N.Y. Co. 1971).

129. *In re* Jeannette P., 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dep't 1970) (mem.); *In re* Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1st Dep't 1970).

130. *In re* Mario, *supra* note 128 at 717, 317 N.Y.S.2d at 668.

131. The court indicated that while the phrase "habitual truant" lacks precision, under the established, if informal procedure followed by the family court, a child found to come within the provision is placed on probation or parole and specific requirements of school attendance are spelled out as a condition of probation [*see* N.Y. RULES OF FAM. CT. R. 7.6 (McKinney 1963)], and placement occurs only when the child violates the specific regulations governing school attendance. *Id.* at 715, 317 N.Y.S.2d at 666.

Section 712 of the Family Court Act has been amended and in place of the phrase "habitual truant," the statute has substituted the phrase "who does not attend school in accord with the provisions of part one of article sixty-five of the education law." N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1971).

132. N.Y. FAM. CT. ACT § 712(a) (McKinney 1963).

133. N.Y. PENAL LAW § 265.05(4) (McKinney 1967).

ted by an adult. *In re Don R. B.*[134] held that a juvenile who violated that section of the Penal Law could be adjudicated a juvenile delinquent by the family court. The court stated that "[t]here is no indication that the Legislature intended section 712 to be an all-inclusive definition of juvenile delinquency or that it intended to pre-empt the field with that section and not allow for further expansion of the definition by subsequent legislative action."[135] If the legislature is inclined to respond to the appeal of the court in *In re John "M"*, the approach adopted in this section of the Penal Law may be an appropiate vehicle for change.[136]

The Right to and Need for Treatment.—The most frequently articulated reason for granting fewer procedural rights to a juvenile charged with misdoings than to an adult has been that the juvenile court process is aimed at the rehabilitation of juveniles rather than their punishment, and that in pursuance of this goal the juvenile justice system may forgo some of the procedural protections afforded adult criminals.[137] The recognition that this goal has not yet been achieved in all cases has, of course, been a factor in the recent extension of some procedural rights to juveniles.[138] This year, the courts recognized that the absence of a need for rehabilitation or the inability of the state to offer meaningful treatment in a particular case justified not only greater pre-adjudication procedural rights, but additional remedial action as well.

While Section 712 of the Family Court Act requires only that two facts be established before one comes within the definition of "juvenile delinquent"—that a proscribed act has been committed by one of a certain age—the prosecuting authorities have, in theory at least, always been obligated to prove more. A petition in a juvenile delinquency pro-

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134. *In re* Don R.B., *supra* note 118.

135. *Id.* at 282, 320 N.Y.S.2d at 817. The court also upheld the statute over an argument that the failure to constitute the same act a violation of the Penal Law when committed by an adult was violative of the equal protection of the laws. *Id.* at 282-83, 320 N.Y.S.2d at 818.

136. It should be noted however, that an argument can be made that the family court lacks jurisdiction over juveniles charged with acts which define conduct as constituting juvenile delinquency but which do not constitute a crime if committed by an adult. Section 115(a) of the Family Court Act grants the family court exclusive original jurisdiction over "proceedings concerning juvenile delinquency . . . as set forth in article seven," and article seven appears to cover only those allegations of delinquency which arise from what would be criminal conduct if committed by an adult. *See, e.g.*, N.Y. FAM. CT. ACT §§ 712(a), 731(a) (McKinney 1963); N.Y. FAM. CT. ACT § 742 (McKinney Supp. 1971). However, Section 115(c) of the Family Court Act does grant to the family court "such other jurisdiction as is provided by law," and the statute defining juvenile delinquency in the Penal Law might possibly be read as impliedly including an extension of the jurisdiction of the court to hear cases arising under that provision.

137. *See, e.g.*, McKeiver v. Pennsylvania, *supra* note 94.

138. *E.g., In re* Gault, 387 U.S. 1 (1967).

ceeding must contain an allegation that "the respondent requires supervision, treatment or confinement,"[139] and a PINS petition must allege that respondent requires "supervision or treatment."[140] The age and act criteria must be established at the fact-finding hearing, while proof of the need for supervision, treatment or confinement is presented at the dispositional hearing.[141]

Because the decision in *In re Winship* specifically stated that its holding did not apply to the dispositional stage of a delinquency proceeding,[142] the county's burden of proof of the need for treatment[143] need only be established by a preponderance of the evidence, while the requirements of necessary age and proscribed act must be proven beyond a reasonable doubt. Nevertheless, it is clear that the county is required to prove each of the allegations required to be contained in the petition and that failure to do so will result in the dismissal of the petition.[144]

In *In re Edwin R.*,[145] the court dismissed petitions alleging juvenile delinquency because it felt that there was no need for confinement, treatment or supervision. In that case, several respondents were charged with the fatal stabbing of a victim, an act which if committed by an adult would constitute the crime of murder. The case was not ready for trial until two years after the alleged acts occurred, in part because of lengthy pre-trial hearings and motions. In the interim, the respondents, with the assistance of their law guardians, social workers and psychiatrists were found to have made remarkable strides toward rehabilitation and adjustment. In light of this, the presiding judge called a hearing *prior to* the fact-finding hearing to determine whether the allegations in the petition

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139. N.Y. FAM. CT. ACT § 731(c) (McKinney 1963).

140. N.Y. FAM. CT. ACT § 732(c) (McKinney 1963).

141. N.Y. FAM. CT. ACT § 742 (McKinney Supp. 1971); N.Y. FAM. CT. ACT § 743 (McKinney 1963).

142. *In re* Winship, *supra* note 109 at 359, n.1.

143. While Section 731(c) of the Family Court Act lists confinement, supervision *or* treatment in the alternative, it would seem obvious that, if the *sole* purpose of proceeding under article seven was to confine the juvenile, the Family Court Act could not continue to deny the juvenile any procedural rights presently afforded adults. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Supervision, merely for the sake of supervision and not for the purpose of treatment would likewise, in the author's opinion, be an impermissible basis for proceeding in a family court which lacks all the procedural safeguards afforded adults. Only "treatment" and the hope of rehabilitation through treatment can form a proper conceptual basis for proceeding against a juvenile in the less formal family court. Thus, it is the opinion of this writer that, despite the language of section 731(c) and section 732(c) to the contrary, the prosecuting authority must allege and prove that the respondent needs treatment before a finding of juvenile delinquency or PINS can be made.

144. N.Y. FAM. CT. ACT § 751 (McKinney 1963).

145. 67 Misc. 2d 452, ___ N.Y.S.2d ___ (Fam. Ct., N.Y. Co. 1971).

reciting that respondents were in need of "supervision, treatment or confinement" were true.

After a full adversary hearing on the issue, the court concluded that respondents' voluntary pre-trial rehabilitation program had been so successful that there was no need to treat, confine or supervise respondents in the future. The petitions were dismissed. The court quoted with approval from the only earlier case that dealt with the issue:

> [A] finding of delinquency or PINS requires a basis of a finding of a *condition* showing need for the attention of the court, in addition to the mere *conduct* alleged, and in this respect differs from the criminal procedures for older persons. The Family Court does not find a child "delinquent" or "PINS" unless there is need for its rehabilitative or protective functions.[146]

While the opinion may rest in large part upon the particularly convincing proof of rehabilitation that was presented at the hearing and the presence on the bench of a judge of unusual judicial sensitivity, it should serve, at the least, as a reminder that the successful prosecution of juvenile delinquency and PINS actions requires a positive showing that there is a need for treatment.[147]

The case of *In re Ilone I.*,[148] decided in 1970, also places sharp focus on the rehabilitation premise underlying the juvenile justice process. A fifteen-year-old girl had been adjudicated a PINS and was placed in the New York Training School with directions to the institution that it provide her with the psychiatric treatment which the court apparently found respondent needed as required by Section 732(c) of the Family Court Act. Upon discovering that the training school was unable, due to inadequate staffing, to provide the treatment required by respondent, the court suggested that the law guardian move for a termination of placement under Section 762 of the Family Court Act. At the hearing, the court determined that the required treatment was not being given, vacated the order of placement, ordered a new dispositional hearing and placed respondent on probation for one year while referring her to the probation department for counseling and psychotherapy.

The opinion makes clear that if institutionalization is ordered at the termination of a proceeding under Article 7 of the Family Court Act in response to a proven need for treatment, the receipt of such treatment is

146. *In re* Ronny, 40 Misc. 2d 194, 197, 242 N.Y.S.2d 844, 848 (Fam. Ct., Queens Co. 1963).

147. *But cf. In re* Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368 (Fam. Ct., Dutchess Co. 1970) (fifteen-year-old girl found delinquent merely upon a showing that she threw a rock at a playmate).

148. 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct., Queens Co. 1970).

a continuing condition of the institutionalization, and upon proof of a failure to receive such treatment, the juvenile may be released from the institution. The decision could provide the vehicle for the incorporation of the "right to treatment"[149] movement into the juvenile justice process.

The Cost of Treatment.—In *Jesmer v. Dundon*,[150] the Court of Appeals upheld a provision in the Family Court Act which makes the parents of a child institutionalized as a result of a finding of delinquency or PINS liable for all or part of the cost to the county for such confinement.[151] Finding that the statute merely continues the parental duty to support his child,[152] the Court found no violation of due process. The appellant argued that it was a violation of equal protection to require her to contribute to the support of a child committed under Article 7 of the Family Court Act while no statute required parents to contribute to the support of minors sentenced to institutions as a result of convictions as wayward minors or youthful offenders. The Court found "some reasonable basis" for the distinction in that minors in the latter categories were committed more for the state's own protection, and less for the parental-like goal of rehabilitation which is the articulated end sought by an article 7 commitment. The Court thus affirmed the family court order that appellant pay seventy dollars per month toward the support of her son. Perhaps the most interesting aspect of the case was the statement made in oral argument that the county was paying the institution, the Berkshire Farm for Boys, at the rate of twelve thousand dollars per year for the care of the child.[153]

When the family court, pursuant to Section 437 of the Social Services Law, seeks to revoke the parole of a minor who had been adjudicated a juvenile delinquent, committed to an institution and then paroled, the minor must be afforded notice of specific allegations of misconduct, a hearing, and the aid of counsel. Rejecting arguments that such a procedure would provoke undesirable friction between the juvenile and his social worker, and that the presence of an attorney would unduly prolong such a hearing, the Court of Appeals in *People ex rel. Silbert v. Cohen*[154] found no conceptual justification for denying juve-

149. *See* G.H. MORRIS, THE MENTALLY ILL AND THE RIGHT TO TREATMENT (1970).

150. 29 N.Y.2d 5, 271 N.E.2d 905, 323 N.Y.S.2d 417 (1971).

151. N.Y. FAM. CT. ACT § 233(b) (McKinney 1963).

152. N.Y. FAM. CT. ACT § 413 (McKinney 1963).

153. Jesmer v. Dundon, *supra* note 150 at 8 n.2, 271 N.E.2d at 906 n.2, 323 N.Y.S.2d at 418 n.2.

154. 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971).

niles a right which it had recently extended to adults in *People ex rel. Menechino v. Warden.*[155]

Further extending the rights of notice, a hearing and the assistance of counsel beyond the confines of the basic adjudicatory hearing, the Court of Appeals also held last year that these rights must be granted a juvenile when an extension of his placement is sought under Section 756(b) of the Family Court Act.[156] The right to a hearing and to counsel may not prove to be of much value, however, unless some meaningful criteria are established for determining when a continuation of placement will be granted. Is a child who has been placed after a finding of habitual truancy to be released when the preponderance of evidence indicates that he will attend school regularly, or only when he is completely "rehabilitated" in all respects?

Another court[157] has recognized the right of a juvenile to have his arrest record expunged from police files where the arrest was clearly groundless and no valid purpose would be served by the perpetuation of the records.[158] The court suggested that the problem was ripe for comprehensive legislative treatment, but felt that in the interim, courts should continue to act in appropriate cases to fashion a remedy.

New York courts had little difficulty in extending to juveniles the right to obtain a bill of particulars,[159] and the same right to obtain a transcript of the testimony of a witness who testified before a grand jury that adults presently enjoy.[160] However, it was decided that the supreme court is without power to issue a certificate of reasonable doubt when a notice of appeal is filed from the family court to the appellate division.[161] The Court of Appeals found it unnecessary to decide because of the

155. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

156. People *ex rel.* Arthur F. v. Hill, 29 N.Y.2d 17, 271 N.E.2d 911, 323 N.Y.S.2d 426 (1971). *See also* People *ex rel.* Cox v. Appelton, 62 Misc. 2d 403, 309 N.Y.S.2d 290 (Sup. Ct., Onondaga Co. 1970).

157. In a case reported in last year's Survey, *In re* Smith & Vasquez, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Fam. Ct., N.Y. Co. 1970), similar relief had been granted.

158. Henry v. Looney, 65 Misc. 2d 759, 317 N.Y.S.2d 848 (Sup. Ct., Nassau Co. 1971).

159. *In re* Edgar L., 66 Misc. 2d 142, 320 N.Y.S.2d 570 (Fam. Ct., Kings Co. 1971). *But cf. In re* Santos C., 66 Misc. 2d 761, 322 N.Y.S.2d 203 (Fam. Ct., Bronx Co. 1971).

160. Gold v. Quinones, 37 App. Div. 2d 618, ___ N.Y.S.2d ___ (2d Dep't 1971) (mem.). The court noted that only the supreme court in which the grand jury was held had the power to order production of grand jury minutes, but indicated that the family court should grant an adjournment of the trial so that respondent may apply to the court having jurisdiction of the grand jury minutes for permission to inspect them.

161. Palmer v. McInerney, 35 App. Div. 2d 428, 316 N.Y.S.2d 691 (2d Dep't 1970). The proper procedure is to apply to the appellate division to stay the execution of the family court order.

particular facts of the case before it whether protection from double jeopardy is a constitutional right that must be afforded juveniles.[162]

CHILD PROTECTIVE PROCEEDINGS

In a decision self-described as "important to the development of this area of law,"[163] a family court judge upheld the sufficiency of a neglect petition charging a parent with neglect solely on the basis that "the . . . children are likely to suffer harm in that another child . . . also in the home, was abused by the respondent father and was found to be an abused child in this Court. . . ."[164] The petitioner argued in opposition to the motion to dismiss that a finding that a parent has abused one child is sufficient to justify judicial intervention into the entire spectrum of parent-child relations in the family, and that a court is free to intervene whenever there exists a rational basis for doing so. The rational basis for so acting in this case, petitioner argued, was the fact that experts in the field of child abuse have concluded that where abuse occurs in regard to one child in the family, "some form of active supervision and help must be available if the siblings remaining in the family are to be protected."[165]

The court agreed with the petitioner's argument and found additional support in Section 1046(a)(i) of the Family Court Act which provides that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child."[166]

The decision is indefensible from a procedural point of view. Section 1031 of the Family Court Act requires that the petition contain "facts sufficient to establish that a child is an abused or neglected child."[167] A petition that alleges only that the parent had abused another child once before may contain evidence of abuse, but surely that allegation *alone* even if proven does not constitute sufficient evidence to support a finding of neglect. That such evidence alone cannot suffice to establish neglect, and thus cannot when alleged in a petition be sufficient to withstand a motion to dismiss can be demonstrated by comparing the language of the Family Court Act permitting such evidence to be intro-

162. Antonio F. v. Judges of Family Court, 27 N.Y.2d 915, 265 N.E.2d 926, 317 N.Y.S.2d 632 (1970). *See* S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL § 8 at 28-30 (1971).

163. *In re* Abeena H., 64 Misc. 2d 965, 967, 316 N.Y.S.2d 16, 18 (Fam. Ct., Kings Co. 1970).

164. *Id.* at 965, 316 N.Y.S.2d at 17.

165. R. HELPHER, THE BATTERED CHILD (1968).

166. N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney Supp. 1971).

167. N.Y. FAM. CT. ACT § 1031(a) (McKinney Supp. 1971).

duced at trial with other subsections of the same provision which provide that certain types of evidence are not only admissible, but also shall be sufficient, by themselves to establish a prima facie case of neglect.[168] The failure to provide that evidence of abuse of one child shall constitute prima facie proof of the neglect of another child is clearly indicative of a legislative determination that such evidence alone is insufficient and thus a petition containing only such an allegation cannot withstand a motion to dismiss.

The effect of the decision is to permit a social worker acting upon mere suspicion to file a petition inadequate on its face in the hope that subsequent investigation will produce sufficient evidence to justify the judicial intervention into the family that has already occurred. If such a procedure is justifiable under the rubric of *parens patriae* the legislature should so provide. Until then, courts should follow the articulated policy of the statutes and demand that petitions contain allegations of "facts sufficient to establish that a child is an abused or neglected child."[169]

The elasticity of the definition of neglect as interpreted by the courts is further demonstrated by the decision in *In re H Children*,[170] a case decided in 1970 by Judge Potoker. In that case the petition alleged that five minor children, the oldest of which was thirteen, were neglected because the respondent-mother had removed the children from the marital home and had taken up residence with the man whom the wife intended to marry when her divorce was finalized. There appeared to have been no expert testimony to the effect that the new living arrangement had in fact been demonstrably detrimental to the children's mental or emotional condition, but the court, taking judicial notice that "[t]he gods visit the sins of the fathers upon the children,"[171] and quoting approvingly the language of an earlier case to the effect that "our courts will continue to insist upon a high level of moral conduct on the part of

168. *Compare* N.Y. FAM. CT. ACT. § 1046(a)(i) (McKinney Supp. 1971) which provides that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of . . . the respondent" *with, e.g.*, N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney Supp. 1971) which provides that

> proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent . . . shall be *prima facie evidence* of child abuse or neglect, as the case may be . . . . [Emphasis added].

169. N.Y. FAM. CT. ACT § 1031(a) (McKinney Supp. 1971).

170. 65 Misc. 2d 187, 317 N.Y.S.2d 535 (Fam. Ct., Queens Co. 1970). For a well-reasoned case reaching an opposite conclusion in a very similar factual setting, see *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (Ct. App. 1967).

171. *In re* H Children, *supra* note 170, at 189, 317 N.Y.S.2d at 537.

custodians of children, and will never succumb to the 'Hollywood' type of morality so popular today,"[172] concluded its finding that neglect had been proven with the rhetorical question: "Who can deny that the children herein . . . do not now or might not in the immediate future suffer detrimental damage attributable to the adulterous act of their mother."[173] The court was careful in limiting its holding, stating that "isolated instances of infidelity can be overlooked,"[174] but drawing the line when the married woman takes up residence with the man she intends to marry. Perhaps the ultimate irony in the case is the statement of the court that the mother "may very well have been justified in removing herself and . . . [the] children from the petitioner's home because of alleged misconduct on part of petitioner."[175] The court also should have considered whether its decision, branding the conduct of the mother as immoral and harmful to the children, might have a more detrimental effect on the emotional well-being of the children than the conduct of the mother would have were it not so categorized.

A similar fact pattern was presented in *In re Darlene T.*[176] decided by the Court of Appeals last year. The Onondaga County Family Court found a mother guilty of neglect in part because the mother "did allow men to visit her and remain in her apartment during the night, and on occasions allowed male companions to remain overnight."[177] The court made a finding that the mother was guilty of neglect and remanded the child to the custody of her mother subject to various conditions including that she not entertain male visitors in her home.

The case was appealed by the petitioner on the grounds that the court had abused its discretion in permitting the mother to maintain custody of the child and that relevant testimony had been incorrectly excluded from the dispositional hearing. The respondent chose not to appeal the sufficiency of the evidence to support a finding of neglect, in part no doubt because independent grounds of neglect apart from immorality were proven,[178] and in part because, unlike the factual pattern in

172. *In re* Anonymous, 37 Misc. 2d 411, 412, 238 N.Y.S.2d 422, 423 (Fam. Ct., Rensselaer Co. 1962).

173. *In re* H Children, *supra* note 170, at 189, 317 N.Y.S.2d at 537-538.

174. *Id.*

175. *Id.* at 187-88, 317 N.Y.S.2d at 536. The evidence adduced at trial indicated that the paramour was supporting the household and that he got along so well with the children that both their attendance and grades at school showed a marked improvement since the change of residence.

176. 28 N.Y.2d 391, 271 N.E.2d 215, 322 N.Y.S.2d 231 (1971).

177. *Id.* at 393-94, 271 N.E.2d at 216, 322 N.Y.S.2d at 232.

178. The family court had found that the respondent had left her daughter "unattended under circumstances dangerous to her welfare." *Id.*

In re H Children,[179] the mother in *Darlene T.* was found to have had sexual intercouse in the presence of the child. Presumably such activity in the presence of a child might be said with more certainty to have a detrimental effect on the emotional or mental condition of a child[180] than the mere fact that the mother is living in the same household with a man to whom she is not married.[181]

The Court of Appeals did not address the question of the sufficiency of the evidence to establish neglect but held that in the absence of a specific finding, based upon the evidence, that the mother was fit to care for the child and that the best interests of the child would be served by permitting her to remain with her mother, the trial court abused its discretion in remanding the child to the custody of the mother.

The Court, while arguing that the family court was to be granted wide latitude in determining the custody issue, stated that the trial court's decision may be set aside "where it lacks sound and substantial basis in the testimony or is opposed to everything presented to the court."[182] The Court further found that it was error to exclude at the dispositional hearing, evidence of the conduct of the respondent between the time the petition was filed and the time of the hearing, since such evidence was of probative value in determining the fitness of the mother to care for the child.

The Appellate Division, Second Department, also found cause to reverse a decision reached in a dispositional hearing in a neglect case this year. In *In re Carmen*[183] the family court had entered an order removing the children from the home and placing them in the custody of the Department of Social Services after the respondent consented, without a fact-finding hearing, to the entry of a finding of neglect. The court

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179. *Supra* note 170.

180. Indeed, such conduct might constitute neglect even if the participants are married to one another.

181. One of the most difficult questions in the area of neglect is the issue of the extent to which failure of the parents to follow currently acceptable moral standards should be grounds for judicial intervention under the neglect statute or in determining custody questions. *Compare* Judge Desmond's language in Bunim v. Bunim, 298 N.Y. 391, 394, 83 N.E.2d 848, 849 (1949) ("No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to all normal concepts of sex, family and marriage.") *with In re* Raya, *supra* note 170.

182. *In re* Darlene T., *supra* note 176 at 395, 271 N.E.2d at 217, 322 N.Y.S.2d at 233. The Court of Appeals was quoting an earlier decision written by Judge Desmond which set the parameters for appellate review of such decisions. *See* Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949).

183. 37 App. Div. 2d 629, ___ N.Y.S.2d ___ (2d Dep't 1971).

found that the record did not support a decision to remove the children from the home, "a disposition, which should be employed only in grave and urgent circumstances."[184] The court indicated that the family court's order of disposition may in part have been influenced by the inability of the social worker to communicate with the respondent mother, since the respondent spoke only Spanish and the social worker spoke only English.[185]

The Family Court Act requires the court to state the grounds for any disposition it orders.[186] It would be hoped that judges reading *In re Carmen* would interpret it to require the court, before ordering the child removed from the home, to articulate the reasons why a less drastic disposition was not justified, and to state precisely the "grave and urgent circumstances" compelling removal of the child from home. Such a procedure would facilitate judicial review of the dispositional decision while possibly improving the quality of the family court judge's decision.

It is a principle now well established that, in some circumstances at least, a court may find a parent guilty of neglect for failure to provide or permit required medical treatment to be administered to a child, on the grounds that such treatment would violate the religious beliefs of the parent.[187] The difficulty arises in determining at which point the parent's failure to provide medical treatment justifies the court's intervention and substitution of its judgment for that of the parent. *In re Kevin Sampson*[188] posed that question in factual circumstances so closely weighed on either side as to make almost impossible the judge's obligation to decide the matter.

The fifteen-year-old boy involved in the case suffered from neurofibromatosis, resulting in a massive deformity of the face, which while not affecting the youth's sight, hearing, or past personality development was found to be "an overriding limiting factor militating against his future development" which, unless alleviated by surgery, would make "his

184. *Id.* at 630, ___ N.Y.S.2d at ___.

185. *Id. See In re* Urdianyk, 27 App. Div. 2d 122, 276 N.Y.S.2d 386 (4th Dep't 1967).

186. N.Y. FAM. CT. ACT § 1052(b) (McKinney 1970).

187. *E.g.*, Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); Morrison v. State, 252 S.W.2d 97 (Ct. App. Mo. 1952); Santos v. Goldstein, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1st Dep't 1962) (mem.). The cases are reviewed in *In re* Kevin Sampson, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct., Ulster Co. 1970), *aff'd*, 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (3d Dep't 1971). *See generally* Annot., 30 A.L.R.2d 1138 (1953).

188. 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct., Ulster Co. 1970), *aff'd*, 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (3d Dep't 1971).

chances for a normal, useful life . . . virtually nil."[189] The disease posed no immediate threat to the life or health of the child and the called-for surgery, even if entirely successful, while improving his appearance, would only alleviate and not cure the disease.

The recommended surgery would be dangerous in any event, but the risk would be entirely unacceptable if the surgeons respected the mother's demand, based upon her beliefs as a member of the religious sect known as Jehovah's Witnesses, that blood transfusions not be administered during surgery. Medical testimony established that from a purely medical point of view, there would be less risk if the surgery were delayed until the youth reached the age of twenty-one, and the law guardian recommended such a delay so that the child could himself make the decision.

The court, giving primary weight to its belief that "a normal, happy existence . . . difficult of attainment under the most propitious circumstances . . . will unquestionably be impossible if the disfigurement is not corrected"[190] soon, found the child to be neglected and ordered that corrective surgery be performed unless the surgeons responsible for the child's medical treatment determined that the contemplated procedures posed unacceptable medical risk to the life of the child.

In reaching its decision, the court was obligated to distinguish a decision by the Court of Appeals, *In re Seiferth*[191] which held that medical treatment could not be ordered over a parent's religiously based objections in the absence of "present emergency."[192] *Seiferth* was found to be of "doubtful validity" because of the presence in that case of a dissent joined in by three members of the court, and the subsequent passage of the New York Family Court Act which the family court judge found "to confer upon the court the broadest power and discretion to deal with these matters."[193]

The court also chose to ignore the law guardian's plea that surgery be delayed until the child reached the age of twenty-one and could make the decision himself.

The family court judge quoted with approval from Judge Fuld's dissenting opinion in *Seiferth* to the effect that the child's consent is not made necessary or material under the statute or case law, and that in

189. *Id.* at 660, 317 N.Y.S.2d at 644.
190. *Id.* at 674, 317 N.Y.S.2d at 657.
191. 309 N.Y. 80, 127 N.E.2d 820 (1955).
192. *Id.* at 85, 127 N.E.2d at 823.
193. *In re* Sampson, *supra* note 188, at 670, 317 N.Y.S.2d at 654.

any event the proceeding is based on the finding of neglect by the parent, and the child's condoning of neglect "cannot be operative on the question as to whether or not they are guilty of neglect."[194]

While it is true that the child's desires are nowhere mentioned as controlling, it would certainly be desirable to take his opinion into account, since at the least, the child's feelings may be relevant to the issue of whether the proposed course of action will be beneficial to the youth's future rehabilitation. An individual who believes that surgical treatment received by him, even if court ordered, has violated his religious tenets may be psychologically and developmentally worse off with corrective surgery than without it. To the extent that the opinion *totally* ignores the feelings of the youth, it may be criticized.[195]

Two courts were asked to decide whether respondents in a child protective proceeding would be permitted to examine hospital records of the child who was allegedly mistreated, and the courts reached opposite conclusions. In *In re Walsh*[196] the court refused to permit the parents to view their child's hospital records prior to the fact-finding hearing on the grounds that they were protected by the physician-patient privilege.[197] In light of the fact that the Family Court Act specifically provides that the physician-patient privilege shall not be grounds for excluding evidence in a child protective proceeding,[198] the ruling seems clearly erroneous. If the material will in any event be introduced at the trial, there seems to be no valid reason for denying a party access to it prior to trial.[199] In *In re Carolyn D.*,[200] it was held that pertinent records of a county hospital which conducted a physical examination of the child at

194. *In re* Seiferth, *supra* note 191, at 87, 127 N.E.2d at 824 (dissenting opinion).

195. In *Seiferth* the Court of Appeals stressed the need to consult the child and seek his approval in order to assure his cooperation in future efforts to rehabilitate him. The family court judge in that case had the fourteen-year-old child become fully aware of the surgical procedures involved in correcting a cleft palate and harelip and made every effort to fully inform the child of the ramifications of the operation prior to asking him for consent.

It should be noted that *Seiferth*, unlike *Sampson*, involved a case in which there was no unusual danger involved in the operation and a delay in performing surgery would make more difficult the surgical procedures. Thus, the differences between the two cases were such that the case for non-intervention by the court was stronger in *Sampson* than it had been in *Seiferth*.

196. 64 Misc. 2d 293, 315 N.Y.S.2d 59 (Fam. Ct., Westchester Co. 1970).

197. The privilege is codified in N.Y. CPLR § 4504 (McKinney Supp. 1971). The fact that the law guardian did not assert the privilege is irrelevant, since the privilege attaches automatically unless there is an affirmative waiver by the patient. *See* RICHARDSON, THE LAW OF EVIDENCE § 450 (9th ed. 1964).

198. N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney Supp. 1971).

199. *Cf.* Williams v. Florida, 399 U.S. 78 (1970).

200. 65 Misc. 2d 752, 317 N.Y.S.2d 784 (Fam. Ct., Westchester Co. 1970).

the request of petitioner were discoverable pursuant to Rule 3120 of the CPLR. The court found that such disclosure was appropriate since it would assist the parents in preparing for trial.

In the *Walsh* case,[201] respondent's request for a trial by jury was denied on the grounds that the neglect proceeding is not criminal in nature. Since a parent cannot, as a result of a finding of neglect or abuse, be sentenced directly to jail,[202] and in no event can be jailed for more than six months for failure to comply with the terms of a court order under article 10,[203] the decision is clearly correct in regard to the parent's request for a jury trial, at least under present judicial interpretation of the sixth amendment.[204] A more interesting question would have been posed had the law guardian asserted that the *child* was entitled to a jury trial under the sixth amendment, but not only has that argument never been made, but the decision in *McKeiver v. Pennsylvania*,[205] probably precludes the possibility of its successful presentation in the future.

Judge Dembitz has ruled that the mere fact that a judge in a hearing to determine if one person is guilty of neglect, directs that a neglect petition should be filed against another person[206] is not in itself grounds for demanding that a different judge be assigned to hear the neglect case that has been instituted under the direction of the first judge.[207] Declaring that to hold otherwise would jeopardize the desirable movement to assign one judge to conduct all phases of a single case, the court found support for its position in "principle, precedent, and policy."[208]

In the same case, the court held that a social worker who had interviewed the respondent in a neglect case could testify as to their conversation even if the social worker had not warned respondents that her statements could be used against her in court. It was held that since the proceeding was civil, and since to hold otherwise would frustrate the state's performance of its role as *parens patriae*, no warning was required and, furthermore, that in the factual circumstances in which the information was obtained, the statements would not be suppressed even if the proceeding were criminal in nature.[209] The question is worthy of

201. *Supra* note 196.
202. N.Y. FAM. CT. ACT § 1052 (McKinney Supp. 1971).
203. N.Y. FAM. CT. ACT § 1072 (McKinney 1970).
204. *See* Baldwin v. New York, 399 U.S. 66 (1970).
205. 403 U.S. 528 (1971).
206. This procedure is authorized by N.Y. FAM. CT. ACT § 1032(e) (McKinney Supp. 1971).
207. *In re* Diana A., 65 Misc. 2d 1034, 319 N.Y.S.2d 691 (Fam. Ct., N.Y. Co. 1971).
208. *Id.* at 1040, 319 N.Y.S.2d at 697.
209. *Id.*

further consideration. Whatever the merits of the argument that the Constitution does not require a warning be given, it is possible that a respondent caught in the poverty cycle who has had several occasions to deal with social workers may feel obligated to speak with them, and may well feel betrayed and unwilling to cooperate with any social worker in the post-hearing probation stage of the case when she finds at the trial that her conversations with the social worker are being used against her. Thus it is possible that permitting such testimony in the absence of clear knowledge by the respondent that it may be used against her may do more to frustrate the state's real goals of rehabilitation and correction than would the contrary practice.

Publicity.—In the wake of considerable controversy concerning the handling of neglect and abuse cases in Onondaga County, the Commissioner of Social Services sought a court order permitting him to release his records, kept pursuant to statute,[210] to a local newspaper. The supreme court held that the applicable statute did not authorize release of the records on the application of the Commissioner.[211] While the decision was based on a narrow question of statutory interpretation, the court spoke of the need to protect involved individuals from the glare of publicity, and the need to assure privacy in order to encourage the resolution of family problems through legal means. The court found in dictum that the petitioner's request was motivated not so much by a desire to serve the public interest as "for the purpose of apology or explanation of their official acts," and indicated that any change in policy must be made by the legislature.[212]

Permanent Neglect.—Prior to June 25, 1971, a child could not be found to be "permanently neglected" unless the agency having custody of the child alleged in its petition and proved that it had made "diligent efforts to encourage and strengthen the parental relationship" while the child was temporarily in their custody.[213] The effect of this provision was to require the authorized agency to encourage the parent to assume parental responsibilities even when it was convinced that the best interests of the child would not be served by a return to the home. In at least one case, a court refused to find a child to be permanently neglected because the agency, certain that adoption, not a return to the parents, was in the best interest of the child, failed to encourage the parents to

210. N.Y. SOC. SERV. LAW § 372 (McKinney Supp. 1971).
211. *In re* Lascaris, 65 Misc. 2d 787, 319 N.Y.S.2d 60 (Sup. Ct., Onondaga Co. 1971).
212. *Id.* at 788, 319 N.Y.S.2d at 63.
213. N.Y. FAM. CT. ACT § 611 (McKinney 1963).

prepare for a return of the child.[214]

The legislature has cured this problem by amending the relevant provisions so that the agency is required to show that it has attempted to strengthen the parental relationship only "when such efforts will not be detrimental to the moral and temporal welfare of the child."[215] The amendment will create no greater difficulty of proof for the petitioner than existed under prior law, since the petitioner has always been required to allege and prove that the best interests of the child require permanent termination of parental custody.[216]

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214. *In re* Clear, 58 Misc. 2d 699, 296 N.Y.S.2d 184 (Fam. Ct., N.Y. Co. 1969). The court suggested that corrective legislation was needed.

215. N.Y. FAM. CT. ACT. § 611 (McKinney Supp. 1971). *See also* N.Y. FAM. CT. ACT § 614(c) (McKinney Supp. 1971).

216. N.Y. FAM. CT. ACT § 614(e) (McKinney 1963).