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The "Adversary" Process in Child Custody Proceedings

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THE RECENT CONCERN with procedural due process in the area of criminal law has raised interesting due process problems in analogous fields, including child custody proceedings in domestic relations cases. A conflict exists between the traditional notions of the adversary process and out-of-court investigations implemented through the ever-increasing contributions of the behavioral sciences. The purpose of this Note is to determine the proper role of the social investigation in child custody cases. In analyzing this problem it is necessary to examine, first, the due process requirements related to this type of proceeding and, second, the extent, from both a quantitative and qualitative aspect, to which investigation reports are used. From a quantitative standpoint it must be determined in what instances such reports are required, and from a qualitative standpoint it must be determined what legal limitations are imposed upon their use. In regard to due process, the adversary versus the nonadversary character of a custody proceeding must be considered, necessitating the analogy to other areas of the law.

I. DUE PROCESS REQUIREMENTS OF CHILD CUSTODY

A. The Dilemma

Where there is litigation involving the custody of a child, the judges are often compelled to make use of undisclosed reports of investigating agencies[1] as to the family situation. The reason advanced is either the need for expert advice or a distrust of tangible evidence produced from such a proceeding or both.[2] Despite the great value of these reports, there has developed a conflict between two competing social interests. One is that the fundamental principles of American law demand that the decision of a court be based on evidence produced in open court at a fair trial. The other, conversely, is that persons such as social workers who possess specialized training and experience are very much qualified to determine what is in the best interests of the child.[3]

[1] The term "investigating agency" is used broadly here to include welfare agencies, court investigators, domestic relation investigators, court welfare workers, probation officers, juvenile officers, officers of social service departments, departments of public assistance, departments of domestic conciliation, police departments, departments of public welfare, friends of court, psychiatrists, and psychologists.

[2] See, *e.g.*, Comment, 24 U. CHI. L. REV. 349 (1957).

[3] See Foster & Freed, *Child Custody* (pt. 2), 39 N.Y.U.L. REV. 615 (1964); Note,

More specifically, the former view stands for the proposition that reports used outside the record contravene the American ideal of due process of law.[4] The reasoning employed is that the reports violate the rule against hearsay and, as a result, the parties are denied the right to cross-examine witnesses, the right to hear the evidence and observe the declarant's demeanor, and the right to adduce testimony in rebuttal.[5] In addition, the declarant makes the hearsay statement without having been administered an oath as done in a court of law, leading, in turn, potentially to inaccurate out-of-court statements.

Further, the exclusion of such evidence at trial prevents an appellate court from reviewing the case upon the same evidence considered by the trial court.[6] Thus, in child custody proceedings, a universal rule exists against the judicial use of social worker reports that remain undisclosed and are not admitted into evidence.[7] This coincides with the general principle of law concerning factual questions not subject to judicial notice, namely, that a tribunal may not consider material which is unknown to the parties.[8] It should be noted that a problem of hearsay also arises when the author of the report appears in court to testify and his sources of information are kept confidential.[9]

The Family in the Courts, 17 U. PITT. L. REV. 206, 250-51 (1956). See also Annot., 35 A.L.R.2d 629 (1954).

[4] See, *e.g.*, Walter v. Walter, 209 N.E.2d 691 (Ill. Ct. App. 1965); Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955); Watkins v. Watkins, 221 Ind. 293, 47 N.E.2d 606 (1943); Commonwealth *ex rel.* Mark v. Mark, 115 Pa. Super. 181, 175 Atl. 289 (1934). The *Williams* case cited here is the leading case in support of this view, although there is no discussion of why the interest in custody is deemed to fall within the due process requirements. See also U.S. CONST. amend V, XIV, § 1.

[5] Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

The out-of-court assertion is offered as equivalent to testimony to the facts so asserted by a witness on the stand. MCCORMICK, EVIDENCE § 225, at 460-61 (1954).

[6] See Annot., 35 A.L.R.2d 629, 642 (1954).

[7] *E.g.*, Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943); Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955); Holland v. Holland, 75 N.E.2d 489 (Ohio Ct. App. 1947). See Commonwealth *ex rel.* Mark v. Mark, 115 Pa. Super. 181, 175 Atl. 289 (1934).

[8] See Interstate Commerce Comm'n v. Louisville & N.J.R.R., 227 U.S. 88 (1913).

[9] See Comment, *supra* note 2, at 357. However, it can be argued here that if the investigators who have prepared the report are available in court for cross-examination, the rule against hearsay need not be applied if one of two conditions exist: (1) no error occurs when the reports are admitted with the consent of the parties; and (2) no prejudicial error exists if the record contains other evidence supporting findings of the report. See generally Note, 29 IND. L.J. 446 (1954) and text accompanying notes 24-28 *infra*.

In opposition is the liberal view, supported by the fact that investigation reports made by competent investigators[10] do provide more information on which the judge can base his opinion because the actual living conditions of the family are revealed and the possibility of accusations which tend to hurt the adverse party are reduced. From a practical standpoint, the use of these reports minimizes the time and cost of controversial court hearings and provides the judge with realistic suggestions for custody and visitation arrangements even though questions of due process requirements remain.[11]

Nevertheless, no matter which view a court might adopt in a custody proceeding, it should be emphasized that the main concern of the court is what will be in the best interests of the child.[12]

Thus, courts are faced with a dilemma in child custody proceedings since they must choose either (1) to comply strictly with the requirements of due process, thus incurring the possibility of not being well informed about the family circumstances, or (2) in adopting the view that a child custody proceeding is not necessarily an "adversary" proceeding, to make free use of the reports without adhering to the technical rules of due process which are a natural incident to all adversary proceedings, with the concomitant possibility of denying a party his right to cross-examine and to refute information adverse to his point of view.

B. *Adversary vs. Nonadversary Proceedings*

It is suggested that the nature of a child custody proceeding is not really an "adversary proceeding" but is instead more akin to an informal hearing whereby the infant is protected as a ward of the court.[13]

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[10] Social workers, for example, are recognized as experts in family relations. See Comment, *supra* note 2.

[11] One should be cautioned here that too much dependency on such reports will negate the real purpose and effect of the "adversary" process. For a discussion on the advantages and disadvantages of the use of investigation reports by the judge, see Foster & Freed, *supra* note 3, at 615-22.

[12] Chapsky v. Wood, 26 Kan. 650 (1881). See also Foster & Freed, *Child Custody* (pt. 1), 39 N.Y.U.L. REV. 423 (1964).

[13] See Williams v. Guynes, 97 S.W.2d 988 (Tex. Civ. App. 1936) where the court stated:

> The proceedings are necessarily informal. It is the right and duty of the trial court to ascertain any and all facts and to make such investigation of conditions which in his judgment will assist him in reaching a proper solution of the child's problems. Technical rules of practice are not to have controlling effect. The controlling issue on the merits is which custodian is for the child's best interest. The pleading in such cases is considered of little impor-

A leading case which deals with this problem and the due process requirements of child custody is *Williams v. Williams.*[14] After the court awarded custody of the child to the father, the intervenor appealed, and the court held that it was reversible error for the judge to use a confidential report which was not available for inspection by either party.[15] Not only were the report's sources of information kept anonymous, but also the author's identity was not revealed; as a result, the investigator was neither under oath nor available for cross-examination, and thus the use of these outside reports was held to contravene "the American ideal of due process of law."[16]

In *Williams* the court drew an analogy to certain criminal trial situations.[17] One resorted to was where the trial judge, after finding the defendant guilty, made a private investigation of the scene of the crime and of certain character witnesses. The *Williams* court stated that such an investigation during the pendency of a motion for a new trial was a denial of due process.[18] Another situation disapproved by the *Williams* case was the making of an outside investigation by a specifically appointed bailiff to ascertain the credibility of certain alibi witnesses.[19]

From these analogous situations the court suggested the conclusion that all court investigations outside the realm of the courtroom tend to deny the parties their rights to due process of law. Unfortunately, this conclusion has been suggested without a distinction being drawn between the *nature* of a criminal and child custody proceeding. However, it is submitted that a major difference does

tance, and the judge exercising the jurisdiction of a chancellor has broad equitable powers. *Id.* at 989.

See also Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676-85 (1942); Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parents*, 39 U. DET. L.J. 347 (1962); Comment, 36 SO. CAL. L. REV. 255, 257 (1963).

[14] 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955).

[15] *Id.* at 2, 7, 130 N.E.2d at 292, 294.

[16] *Id.* at 7, 130 N.E.2d at 295. In many of these custody cases, the rule against the use of "secret evidence" is said to be based upon *due process* provisions. The only explanation for the inclusion of the problem of custody within these provisions comes from analogous situations. See, *e.g.*, Brooks v. De Witt, 178 S.W.2d 718, 723 (Tex. Civ. App. 1944), *rev'd on other grounds*, 143 Tex. 122, 182 S.W.2d 687 (1944) (custody interests as "property" rights); Harloe v. Harloe, 129 W. Va. 1, 5, 38 S.E.2d 362, 364 (1946) (due process protection of every litigant "in any matter affecting his or her interest").

[17] 8 Ill. App. 2d at 6, 130 N.E.2d at 294.

[18] *Ibid.*, citing People v. Cooper, 398 Ill. 468, 75 N.E.2d 885 (1947).

[19] 8 Ill. App. 2d at 6, 130 N.E.2d at 294, citing People v. McGeoghegan, 325 Ill. 337, 156 N.E. 378 (1927).

exist. While a criminal proceeding determines the guilt or innocence of a particular defendant, a child custody proceeding is primarily concerned with what is in the best interests of the child.[20] Stated differently, the former is concerned with the truth or falsity of certain facts to be determined by the jury, whereas the latter is more concerned with the *best possible remedy* to be applied by a judge to a certain set of given facts.

Therefore, in this respect it is suggested that a child custody proceeding is really nonadversary in nature and for this reason the technical rules of due process can be relaxed. This point was made quite clear in a recent Illinois case:[21]

> This special care exercised by the court on behalf of minors distinguishes *custody* cases from *adversary* proceedings. It is the *child* that is the issue, *not property.* The state is present in the person of the court to protect the child and to do what is best for his welfare. . . . Common sense tells us no less that the "notorious and public hearing" prescribed for ordinary litigation is indeed "notorious" in the worst sense when applied to custody cases.[22]

In spite of the above reasoning, the prevalent view today seems to be that the requirements of due process must be satisfied because the parties cannot be deprived without their consent of any of the usual protections guaranteed in a fair trial in open court.[23]

C. *Effect of Parties' Consent*

If a party attacking the decision has consented to the use of the independent investigation, the question then becomes whether or not such consent also goes to the use of the report even though the rules of due process are not completely satisfied.

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[20] The theory of such proceedings is discussed in text accompanying note 12 *supra.*

[21] Oakes v. Oakes, 45 Ill. App. 2d 387, 195 N.E.2d 840 (1964).

[22] *Id.* at 394, 195 N.E.2d at 844. (Emphasis added.)

[23] See, *e.g.*, Roberts v. Roberts, 216 Ark. 453, 226 S.W.2d 579 (1950); Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943); Washburn v. Washburn, 49 Cal. App. 2d 581, 122 P.2d 96 (Dist. Ct. App. 1942); Mazur v. Lazarus, 196 A.2d 477 (D.C. Ct. App. 1964); McGuire v. McGuire, 140 So. 2d 354 (Fla. Ct. App. 1962); Sheppard v. Sheppard, 208 Ga. 422, 67 S.E.2d 131 (1951); Walter v. Walter, 209 N.E.2d 691 (Ill. Ct. App. 1965); *In re* Rosmis, 26 Ill. App. 2d 226, 167 N.E.2d 826 (1960); Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955); Tumbleson v. Tumbleson, 117 Ind. App. 455, 73 N.E.2d 59 (1947); Wells v. Wells, 406 S.W.2d 157 (Ky. 1966); Wacker v. Wacker, 279 Ky. 19, 129 S.W.2d 1043 (1939); Lyckburg v. Lyckburg, 140 So. 2d 487 (La. Ct. App. 1962); Alden v. Alden, 226 Md. 622, 174 A.2d 793 (1961); Sweet v. Sweet, 329 Mich. 251, 45 N.W.2d 58 (1950); Dier v. Dier, 141 Neb. 685, 4 N.W.2d 731 (1942); Martinez v. Martinez, 49 N.M. 405, 165 P.2d 125 (1946); Holland v. Holland, 75 N.E.2d 489 (Ohio Ct. App. 1947); Commonwealth *ex rel.* Balick v. Balick, 172 Pa. Super. 196, 92 A.2d 703 (1952); Mark v. Mark, 115 Pa. Super. 181, 175 Atl. 289 (1934).

Some courts are of the opinion that when there is a stipulation or acquiescence in the use of such reports by the parties, the decision of the trial court will not be upset.[24] In *Rea v. Rea*[25] the Supreme Court of Oregon held that the consent of the parties to the independent investigation constituted a *waiver* of any objection.[26] The reasoning of the court was that the parties by giving their consent must have known that upon appeal the issue of custody could not be tried de novo, since the record would be incomplete.[27] Other cases have held that if the parties do not timely demand that the investigator appear and testify subject to the rules of evidence and the right of cross-examination, they are deemed to have impliedly consented to the procedure.[28] However, no matter what reasoning a court might use, the parties have in effect agreed that the decision of the trial judge should be final.

Other courts, however, still require strict compliance with the requirement of due process despite the consent or acquiescence of the parties to an independent investigation.[29] The reasoning used here is that although the parties authorized the court to make the investigation, there was nothing in the stipulation which actually authorized the court to base its decision on a secret report or even consider the recommendations in arriving at its decision.[30]

Regardless of whether or not there has been consent by the parties, some courts demand strict compliance with the hearsay rule; the admissibility of an independent investigator's report in a custody

[24] See, *e.g.*, Biles v. Biles, 107 Cal. App. 2d 200, 236 P.2d 621 (Dist Ct. App. 1951) (parties' consent to use of probation officer's report); Zachary v. Zachary, 155 Ore. 346, 63 P.2d 1080 (1937) (husband's consent to use of report before trial); Luman v. Luman, 231 S.W.2d 555 (Tex. Civ. App. 1950) (investigation used only to very limited extent); Williams v. Guynes, 97 S.W.2d 988 (Tex. Civ. App. 1936) (informal proceeding which gives judge discretion to exercise broad equitable powers).

[25] 195 Ore. 252, 245 P.2d 884 (1952).

[26] *Id.* at 279-80, 245 P.2d at 896.

[27] *Ibid.* Express consent is usually required if such reports are never put in the record. See, *e.g.*, Moon v. Moon, 62 Cal. App. 2d 185, 144 P.2d 596 (Dist. Ct. App. 1944); Holland v. Holland, 75 N.E.2d 489 (Ohio Ct. App. 1947); Balick v. Balick, 172 Pa. Super. 196, 92 A.2d 703 (1952).

[28] See, *e.g.*, Noon v. Noon, 84 Cal. App. 2d 374, 191 P.2d 35 (Dist. Ct. App. 1948). This case is distinguished from Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943) on the mere fact that in the *Fewel* case a timely demand was made for the investigator to appear and testify.

[29] See, *e.g.*, Watkins v. Watkins, 221 Ind. 293, 47 N.E.2d 606 (1943).

[30] See, *e.g.*, Nelson v. Nelson, 180 Ore. 275, 284, 176 P.2d 648, 652 (1947). However, a careful reading of the facts in the *Nelson* case indicates that the real reason for the holding was that there was an actual delegation of authority from the court to the investigator who, as a result, not only advised the court but actually decided che issue of custody. If this actually occurred, perhaps the decision of the court would have been different had the investigator acted only in an advisory capacity.

case will then depend primarily upon compliance with the ordinary rules of evidence.[31] The courts point out that the information derived from outside investigations and interviews does not become competent evidence merely because it is given by employees of the court, for it may only be hearsay based upon hearsay.[32]

From this discussion it should be quite apparent that the courts differ greatly in their interpretation of the parties' previous consent to an investigation. The only generalization that can be made with some degree of accuracy is that the more the trial court complies with the requirements of due process, the stronger is the case for upholding the trial court's decision.

II. EXTENT TO WHICH SOCIAL INVESTIGATIONS ARE USED

The use of social investigations and nonjudicial considerations in the disposition of child custody matters has been considered by the legislatures of virtually every state. An analysis of these legislative pronouncements must be divided into three areas: (1) adoption proceedings, (2) divorce proceedings, and (3) proceedings involving delinquent and neglected children. This analysis will involve not only the situations in which social investigations are employed but also the scope of such investigations and the restrictions imposed upon their use.

A. Situations Calling for Social Investigations

(1) Adoption Proceedings.—A social investigation is used to some extent in the adoption proceedings of practically every state.[33] Only Alaska[34] and Oregon[35] make no provision for investigations,

[31] See, *e.g.*, Roberts v. Roberts, 216 Ark. 453, 226 S.W.2d 579 (1950); Noon v. Noon, 84 Cal. App. 2d 374, 191 P.2d 35 (Dist. Ct. App. 1948); Washburn v. Washburn, 49 Cal. App. 2d 581, 122 P.2d 96 (Dist. Ct. App. 1942); Ludy v. Ludy, 84 Ohio App. 195, 82 N.E.2d 775, *rehearing denied*, 84 N.E.2d 120 (Ohio Ct. App. 1948); Commonwealth *ex rel.* Mark v. Mark, 115 Pa. Super. 181, 175 Atl. 289 (1934).

[32] See, *e.g.*, Commonwealth *ex rel.* Mark v. Mark, *supra* note 31. Ludy v. Ludy, 84 Ohio App. 195, 201, 82 N.E.2d 775, 777, *rehearing denied*, 84 N.E.2d 120 (Ohio Ct. App. 1948) follows the same type of reasoning in that the trial court was held to have committed prejudicial error in permitting the court investigator to testify as a witness to a conversation she had with the child on the ground that her testimony was hearsay evidence.

[33] See, *e.g.*, CAL. CIV. CODE § 226.6 (Supp. 1966); ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1959); IOWA CODE § 600.2 (1962); OHIO REV. CODE § 3107.05; UTAH CODE ANN. § 78-30-14 (Supp. 1965).

[34] ALASKA R. CIV. P. 53(d) provides for a master to hear evidence in an adoption proceeding. Parties are notified of the filing of the report and may object to the master's findings.

although there are procedures for gathering information from out-of-court sources. Of the remaining states which use social investigations, ten make their use discretionary or provide for waiver of the investigation.[36] The widespread use of investigatory reports in the adoption area as compared with divorce proceedings would suggest that the requirements of an adversary proceeding are not as rigid in the former.

(2) Divorce Proceedings.—Only one state requires an investigation to aid in determining the proper party to be awarded custody of the child in a divorce proceeding.[37] Other legislatures have given their courts a discretionary power to call for an investigation,[38] while the remaining states make no provision for any kind of investigation in awarding custody pursuant to a divorce decree. Generally, these statutes authorize the courts to award custody based on the best interests of the child involved; however, there is no provision for investigation to determine the child's best interests.[39]

(3) Juvenile Proceedings.—In contrast to adoption and divorce actions where the states have taken clear positions on the need for investigations, the legislatures have treated the social investigation in juvenile proceedings in various ways. Almost one half of the states make some definite provision for an out-of-court investigation, usually by the state welfare department, in the disposition of juvenile cases.[40] A few states make the use of investigations discretionary,[41] while others require no more than a simple

35 ORE. REV. STAT. § 109.310(4) (1959) provides that the State Public Welfare Commission may submit information to the court if it so desires.

36 ARK. STAT. ANN. § 56-105 (Supp. 1965) (discretionary); HAWAII REV. LAWS § 331-8 (1955) (waiver); ME. REV. STAT. ANN. tit. 19, § 533 (1964) (waiver); MISS. CODE ANN. § 1269-05 (1955) (discretionary); NEB. REV. STAT. § 43-107 (1943); N.D. CENT. CODE § 14-11-09 (waiver); S.C. CODE ANN. § 10-2587.10 (Supp. 1966) (investigation mandatory upon filing of petition unless there is a showing of good cause); VT. STAT. ANN. tit. 15, § 437 (1959) (waiver); WYO. STAT. ANN. § 1-711 (Supp. 1965) (discretionary); MD. R. CIV. P. D 75, § b (discretionary).

37 CAL. CIV. PROC. CODE § 263.

38 FLA. STAT. § 65.21 (Supp. 1966); ME. REV. STAT. ANN. tit. 19, § 751 (Supp. 1965); NEB. REV. STAT. § 42-307 (1945); OHIO REV. CODE § 3109.04; ORE. REV. STAT. § 107.430 (1961). Martinez v. Martinez, 49 N.M. 405, 409, 165 P.2d 125, 128 (1946) holds that if the judge is not satisfied with the evidence before him, he may cause an independent investigation to be made. However, witnesses participating in the independent investigation must testify in a hearing before the court.

39 Larkin v. Larkin, 85 Idaho 610, 382 P.2d 784 (1963); Schroeder v. Schroeder, 184 So. 2d 75 (La. App. 1966); Vines v. Vines, 344 Mich. 222, 73 N.W.2d 913 (1955); Miracle v. Miracle, 388 P.2d 9 (Okla. 1964).

40 *E.g.*, CAL. WELFARE & INST'NS CODE § 582; D.C. CODE ANN. § 16-2302 (1966); N.J. REV. STAT. § 9: 6-10 (1937); VA. CODE ANN. § 16.1-164 (1955).

41 DEL. CODE ANN. tit. 10, § 1172 (1953); KAN. STAT. ANN. tit. 38, § 817 (1963); MINN. STAT. § 260.151 (Supp. 1966); N.D. CENT. CODE § 27-16-12.

preliminary investigation to determine whether or not the court should proceed.[42] A peculiar approach to juvenile investigations, and one perhaps based on considerations of due process and adversary proceedings, may be found in the statutes of Hawaii[43] and Missouri[44] which provide for out-of-court investigations only when the proceeding would involve a termination of parental rights.

At least twelve states make absolutely no provision for an investigation in juvenile proceedings.[45] A variation on the use of a public welfare agency to conduct these out-of-court inquiries is for a court to order that the child in question be examined by a doctor, a psychiatrist, and a psychologist.[46]

B. Use of the Social Investigation in Court Proceedings

(1) The Scope of a Social Investigation.—Before examining the adversary considerations of these reports, namely, the right to confront and to cross-examine and the opportunity to rebut, it is only logical that inquiry be made regarding the type of information contained in the reports. Generally, the adoption investigation is designed to determine, first, if the child is suitable for adoption, and, second, whether the adoptive parents will provide a suitable home. An example of the information generally sought in an adoption investigation is found in an Arizona statute:

> The investigator shall make inquiry among other things, with respect to: 1. Why the natural parents, if living, desire to be relieved of the care, support and guardianship of the child. 2. Whether the natural parents have abandoned the child or are morally unfit to have custody of the child. 3. Whether the proposed foster parents are financially able and morally fit to have the care, supervision, and training of the child. 4. Whether the proposed change of name and guardianship is for the best interest of the child. 5. The physical and mental condition of the child.[47]

While the adoption proceeding is concerned with acquiring

[42] *E.g.*, MONT. REV. CODES ANN. § 10-605 (1943); NEB. REV. STAT. § 43-205.03 (Supp. 1965); It is interesting to note that Pennsylvania clearly prohibits any preliminary inquiry. PA. STAT. ANN. tit. 11, § 246 (1939).

[43] HAWAII REV. LAWS § 333-17 (1955) (investigation at the request of the petitioners).

[44] MO. REV. STAT. § 211.491 (1959).

[45] These states include Alabama, Alaska, Arizona, Illinois, Louisiana, New York, North Carolina, Ohio, Rhode Island, South Dakota, West Virginia, and Wisconsin.

[46] See MD. ANN. CODE art. 26, § 63 (1957); N.M. STAT. ANN. § 13-8-69 (Supp. 1965); S.C. CODE ANN. § 15-1191 (1962).

[47] ARIZ. REV. STAT. ANN. § 8-106 (1956). See also ARK. STAT. ANN. § 56-105 (1953); DEL. CODE ANN. tit. 13, § 912 (Supp. 1964); MASS. GEN. LAWS ch. 210, § 5A (1932); MINN. STAT. § 259.27 (1961).

rights of custody in the child to be adopted, a divorce proceeding looks to the retention of a right to custody by contesting parents. Thus, there is no concern over the qualifications of the child for custody, and the inquiry focuses upon which parent will best serve the welfare of the child.[48] An Ohio statute provides a specific example of the information to be considered in seeking the best interests of the child: "Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action."[49]

The distinct characteristic of juvenile proceedings leads to still a third type of investigation. Generally, this type of inquiry dwells heavily on the background of the youth with particular emphasis on his family and environment.[50] Although the juvenile proceeding does not necessarily involve custody, in order for the court to adequately rehabilitate the child, it may become necessary to terminate parental rights.

A publication by the National Council on Crime and Delinquency sums up the problem as follows: "The juvenile court had its very origin in appreciation of the importance of the social background, and it should evolve a use of probation reports which insures fairness and reliability and at the same time encourages the application of the behavioral sciences in the court."[51] Because of this concern with social background, it would appear that the states should require some type of reform of the present systems to implement social investigations.

(2) State Attempts To Conform to an Adversary Proceeding. —The most important aspect of this analysis of custody investigations is the manner in which the legislatures have attempted to avoid any due process objections connected with the use of these reports in adversary court proceedings. It is at this point that the judicial procedures protecting against the use of secret evidence come into direct conflict with the court's need to protect the source

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48 For example, California requires the investigator to report all information pertinent to the welfare of the minor child. CAL. CIV. PROC. CODE § 263.

49 OHIO REV. CODE § 3109.04 (Supp. 1966). See also ORE. REV. STAT. § 107.430 (1961).

50 CAL. WELFARE & INST'NS CODE § 582; CONN. GEN. STAT. REV. § 17-66 (1949); IND. ANN. STAT. § 9-3208 (Supp. 1966); MINN. STAT. § 260.151 (Supp. 1966); N.H. REV. STAT. ANN. § 169:9 (1937); WASH. REV. CODE § 13.04.040 (1959). Kentucky provides that the judge shall cause an investigation to be made into the child's age, habits, school record, general reputation, home conditions, and the life and character of the one having custody of the child. KY. REV. STAT. § 208.140 (1956).

51 NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 59-60 (1962).

of its information.[52] The statutes indicate that, while legislatures superficially adhere to due process standards, valiant attempts have nevertheless been made at solving the dilemma in which the court finds itself. The result is a variety of solutions with no apparent common base.

There are five distinct types of statutes which attempt to solve the conflict between the adversary system and the social investigation. The classifications are to: (1) allow the parties to inspect the report; (2) require the report be confidential and available only to the judge; (3) permit use of the reports according to a strict application of the rules of evidence; (4) require that the author of the report be made available for cross-examination; and (5) permit the parties to rebut any adverse findings in the report.

(a) Inspection by the Parties.—An easy though ineffective solution to the dilemma is to require a written report available to the parties. With no significant advantage over present methods, this plan sacrifices a portion of the vital adversary proceedings since there is still no provision for confrontation of the investigator, while the social worker's desire to protect his informant may be lost. Nevertheless, this approach is taken by a large number of states,[53] including Ohio in which the party must request access to the report.[54] Another group of states utilizes a method which may be applicable to, although probably not designed for, this situation. These statutes require that juvenile court records, including the investigation report, be closed to public inspection except by order of the court on a showing of good cause.[55] If good cause is established, a party might be able to gain access to the social investigation through this method.

(b) Confidential Reports.—At the opposite end of the spectrum is a group of states which emphasizes the necessity of protecting the source of the investigator's information. Generally,

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[52] *Id.* at 60. It might be noted that these considerations could apply to adoption and divorce proceedings as well as in juvenile court, although perhaps to a lesser degree.

[53] See, e.g., ARIZ. REV. STAT. ANN. § 8-237 (1956) (juvenile proceedings only); CAL. CIV. CODE § 226.7 (adoption proceedings); CONN. GEN. STAT. REV. § 45-66 (1953) (adoption proceedings); FLA. STAT. § 39.12 (1961) (juvenile proceedings); N.H. REV. STAT. ANN. § 461:2 (Supp. 1965); (by implication, a party may examine the report); N.J. REV. STAT. § 9:3-23 (1953) (a copy is to be mailed to plaintiff).

[54] OHIO REV. CODE § 3109.04 Supp. 1966. Tennessee also permits disclosure but only in the discretion of the chancellor. TENN. CODE ANN. § 36-118 (1959).

[55] MICH. COMP. LAWS § 27.3178 (551) (1948) (adoption proceedings); N.C. GEN. STAT. § 48-16 (1949) (adoption proceedings); ORE. REV. STAT. § 419.567 (1961) (juvenile proceedings).

these statutes provide that the investigator make his confidential report directly to the judge.[56] New Mexico has devised an approach to adoption investigations which may provide an acceptable solution to this conflict. The investigator files a duplicate copy of his report, while the clerk places one copy in a sealed envelope and submits the other copy directly to the judge. In the event of an appeal from the finding, the copy in the sealed envelope may be used by the appellate court.[57] Although the party is still deprived of any confrontation of witnesses and access to the reports at the trial level, some attempt has been made toward an adequate review.

(c) Introduction of the Reports in Evidence.—In addition to granting or denying rights of inspection by the parties, some states have attempted to spell out exactly how this report may be used in compliance with traditional due process concepts. For example, an Illinois statute provides: "In no event shall any facts set forth in the report be considered at the hearing of the proceeding, unless established by competent evidence."[58] Oregon and Nebraska require the investigation to be introduced into the record according to the rules of evidence.[59] In contrast to these states stressing the strict prohibition of secret evidence is a Florida statute which requires the report to be filed in evidence.[60] However, the Florida statute does make it clear that "the technical rules of evidence shall not exclude such report."[61] Again, the variation among the states appears to be based on a different analysis of the relative value of the social investigation.

(d) An Opportunity To Cross-Examine.—Another indication that state legislatures are aware of the due process problem is illustrated by various measures designed to insure the litigants an opportunity to cross-examine adverse witnesses. Generally, the stat-

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[56] GA. CODE ANN. § 24-2432 (1957); MINN. STAT. § 259.27 (1961); WYO. STAT. ANN. § 14-113 (1957). A number of the statutes make provision for access to these records by the state welfare department. The statutes discussed in note 55 *supra* may properly fall under the category forbidding inspections with certain exceptions. For example, the Virginia statute provides that the report "shall not be disclosed to anyone other than the judge unless and until otherwise ordered by the judge or by the judge of a court of record." VA. CODE ANN. § 16.1-209 (1955).

[57] N.M. STAT. ANN. § 22-2-7 (1951).

[58] ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1959).

[59] NEB. REV. STAT. § 42-307 (1945); ORE. REV. STAT. § 107.430 (1961). While the Oregon statute specifically requires that the report be accepted subject to the rules of evidence, the Nebraska statute states that the report *will be* competent evidence.

[60] McGuire v. McGuire, 140 So. 2d 354 (Fla. App. 1962), construing FLA. STAT. § 65.21 (Supp. 1966).

[61] FLA. STAT. § 65.21 (Supp. 1966).

utes require that the author of the report be available for examination at trial.[62] North Dakota, while not requiring examination of the author, requires that any element of the report which is relied on by the court must have been taken under oath.[63] If the investigator did not comply, then the witness must appear in court and testify a second time.

The permissive nature of these confrontation and examination provisions indicates that the states are not taking aggressive steps toward a strict application of due process concepts. In light of the nonadversary nature of custody proceedings, it is doubtful that these weak attempts to engender adversary characteristics serve any useful purpose.

(e) The Opportunity To Rebut.—One other type of statute is employed in several states to deal with social investigations. If the investigator makes a finding which is adverse to one of the interested parties, the party affected is given both notice of this aspect of the report and the opportunity to present evidence to rebut the adverse findings.[64] Thus, although there is no cross-examination, the petitioner at least is aware of the problems facing him. Contrast this situation with the Michigan[65] rule that the judge may make an order based on his examination of the report, or the Idaho[66] rule that an adverse finding by the investigator may result in a motion to dismiss initiated by the court itself.

(3) Interviews in Chambers.—A problem similar to that pre-

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62 *E.g.*, CAL. CIV. PROC. CODE § 263 (divorce); ME. REV. STAT. ANN. tit. 19, § 751 (Supp. 1965) (limited to divorce proceedings, and interested party must request that author testify). South Carolina goes somewhat further with the following requirement:

> *Provided*, that [the] signer of such report and all persons participating in, conducting, or associated with the compiling, separation and filing of such report shall be available for examination and cross-examination by any party to an adoption proceeding concerning the contents and recommendations contained in such report, in complete detail. S.C. CODE ANN. § 10-2587.10 (Supp. 1966).

As recently as 1965, Utah added a provision requiring the author of an investigation in a juvenile proceeding to appear as a witness when he is reasonably available. UTAH CODE ANN. § 55-10-96 (Supp. 1965).

63 N.D. CENT. CODE § 27-16-18. Apparently, the legislators favored the values of the social scientist although the truthfulness of the testimony was the only judicial concern.

64 HAWAII REV. LAWS § 331-8 (1955); ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1959) (adoption proceedings); NEV. REV. STAT. § 127.130 (1965) (adoption); ALASKA R. CIV. P. 53(d) (master's report). Nebraska provides that the report be available to the parties in any event but specifically affords parties an opportunity to rebut its findings. NEB. REV. STAT. § 42-307 (1945).

65 MICH. COMP. LAWS § 2731.78 (546) (1948) (adoption).

66 IDAHO CODE ANN. § 16-1506 (1951) (adoption proceedings).

sented by out-of-court investigations is that of the private interview of the child by the judge. Similarly, the judge is utilizing an out-of-court device to discover what is in the child's best interests. There are several recent cases dealing with this very problem, many of which find such out-of-court interviews to be nonprejudicial. An Illinois appellate court approved of this practice because it was motivated by a desire to lessen the ordeal to the child rather than to obtain secret evidence.[67] The courts of Minnesota and Washington permit such interviews only with the consent of the parties.[68] By way of contrast, the New Jersey courts continue to hold that such out-of-court interviews by the judge are beyond his discretion.[69]

(4) Related Findings by the Courts and Legislators.—In a case which interprets the provision enacted by Congress implementing social investigations in juvenile proceedings in the District of Columbia, a federal court of appeals examined the intent of Congress: "Congress clearly intended, in this section, to encourage the disposition of cases on a social rather than legal basis."[70] A few states recognize the importance of such investigations vis-à-vis holdings that any due process requirements are met by implication.[71] This rather perfunctory application of due process labels appears consistent with the legislative steps previously outlined. It seems inevitable that a continued emphasis on procedural due process and the increasing competence of the behavioral sciences will require many legislatures to revise their inadequate provisions on social investigations.

III. THE SOCIAL WORKER'S VIEW

The dilemma experienced by the social worker in a courtroom arises out of the distinction between traditional legal evidence and

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67 Stickler v. Stickler, 57 Ill. App. 2d 286, 291, 206 N.E.2d 720, 723 (1965). It might be noted that the objection to this procedure is not based solely on the secret evidence argument.

68 Currier v. Currier, 271 Minn. 369, 376, 136 N.W.2d 55, 60 (1965); Christopher v. Christopher, 62 Wash. 2d 82, 88, 381 P.2d 115, 118 (1963). The argument set out in these cases is that by consenting to the interview the parties have waived any due process objections.

69 *E.g.*, Kridel v. Kridel, 85 N.J. Super. 478, 484, 205 A.2d 216, 320 (Super. Ct. 1964).

70 Shioutakon v. District of Columbia, 236 F.2d 666, 668 (D.C. Cir. 1956). Despite the apparent emphasis on the social nature of the proceeding, the court held that informing the juvenile of his right to counsel was not inconsistent with this purpose.

71 Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881, (Dist. Ct. App. 1965); Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958) (no denial of due process where rights of child's natural parents are not involved).

the more modern social evidence.[72] The social worker is trained to make determinations based on intangible factors such as "parental attitudes or value standards" discovered by interview, whereas determinations by a court are based on overt facts.[73] Another reason for the mutual distrust between the two professions results from the lack of respect shown by the judicial process for the confidential relation between social worker and subject.[74]

It is with these competing considerations in mind that the social worker criticizes the judicial procedures used in custody cases. A relatively recent study of child placement agencies by the Child Welfare League of America revealed the following objections to adoption procedures: (1) such hearings should be conducted privately in chambers; (2) the proceedings should take on a more dignified and less routine atmosphere; (3) more adequate safeguards should be developed with respect to confidential information; (4) parental rights should be given greater consideration; (5) the adopting parents should be required to attend the proceeding; and (6) a licensed representative of a child placement agency should be required to attend.[75]

It is the goal of the social worker to place the child in a home which will best serve his needs. Apparently, the legislatures of many of the states agree and have provided by statute for social investigations, especially in the case of adoptions.[76] The social worker, however, is of the opinion that sufficient consideration is not given to these reports by the courts.[77] This disillusionment with the judicial system may result from the exclusion of large portions of investigatory reports either under the rules of evidence or through a consideration by the courts of evidence apart from the investigation.

In the area of juvenile proceedings, one author suggests that any investigation by an officer of the court prior to the filing of the petition actually tends to hinder the adversary process.[78] If the court commences a fact-finding study through its own employees,

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[72] FAMILY SERVICE ASS'N OF AMERICA, THE LAWYER AND THE SOCIAL WORKER 16-17 (1959).

[73] *Ibid.*

[74] *Id.* at 17.

[75] SHAPIRO, A STUDY OF ADOPTION PRACTICE 97-98 (1956).

[76] For a partial list, see text accompanying notes 33-46 *supra.*

[77] *E.g.*, SHAPIRO, *op. cit. supra* note 75, at 95-96.

[78] DE FRANCIS, THE COURT AND THE PROTECTIVE SERVICES: THEIR RESPECTIVE ROLES 14 (1960).

it will subsequently be virtually impossible for the court to make an impartial determination at the hearing. Although several states provide for preliminary investigations, from the point of view of an impartial fact-finder, the best solution is perhaps the one adopted in Pennsylvania which specifically forbids this practice.[79]

A contribution by E. Donald Shapiro to a Conference on The Extension of Legal Services to the Poor in 1964, in considering the problem of the need for the social investigator in the sphere of the adversary proceeding, pointed out that a basic premise of adversary proceedings is that "from strife emerges truth."[80] The behavioral sciences, on the other hand, are not oriented to the concept of a "winner and loser" in every circumstance. While the lawyer is ever alert to the needs of his client, a social scientist may look to a broader social good at the expense of individual rights.[81]

Shapiro is of the opinion that many of today's social problems are not adaptable to strict adversary proceeding solutions,[82] applying this theory to domestic relations as follows:

> How does the adversary system work in a divorce action? Well, frankly, it does not work. Who is there to protect the children? Who is there to protect the interests of society? Since there is really no adversary footing on the part of the parties, the safeguards built into the adversary system are nonexistent.[83]

As an alternative to the inadequate adversary process, Shapiro suggests a greater reliance on the social worker, provided that the latter can gain a better understanding of the traditional notions and policies of the adversary system.[84]

As the behavioral sciences become more reliable, the legal profession will be compelled to come to grips with the basic objections to judicial procedure voiced by the social sciences. Perhaps many of these conflicts between legal and social evidence and the confidential nature of sociological reports can be resolved by an increased understanding of the goals and procedures of the two professions. The formation of the National Council of Lawyers and Social Workers may be a step in this direction. In any event it is clear

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79 PA. STAT. ANN. tit. 11, § 246 (1939).

80 Shapiro, *Specific Technique for Providing Social Workers With Legal Perspective*, in CONFERENCE ON THE EXTENSION OF LEGAL SERVICES TO THE POOR 148-49 (1964).

81 *Id.* at 149.

82 *Id.* at 150.

83 *Ibid.*

84 *Id.* at 153.

that with an increased knowledge of intangible and tangential causes of human behavior, legal procedures based solely on establishment of overt facts will not serve the purposes of society.

IV. Analogous Nonadversary Situations

A. *Due Process Guaranty in Criminal Pre-Sentencing Hearing*

It is suggested that the nonadversary nature of a pre-sentencing hearing in regard to due process requirements is analogous to the circumstances existing in a child custody proceeding where the judge utilizes outside investigation reports. Those writers who advocate the individualized treatment of criminal offenders are of the opinion that each sentence should be based upon the fullest possible knowledge about the prisoner's character, background, and antecedent criminal career.[85]

In the case of *Williams v. New York*,[86] the United States Supreme Court was faced with the issue of whether the rules of evidence should apply when a judge obtains and uses outside information to guide him in the imposition of sentence upon the convicted defendant. After the jury found the appellant guilty of murder and recommended a life sentence, the judge, instead, imposed the death sentence.[87] In sustaining the death sentence, the Supreme Court held that the judge is empowered to consider information obtained outside the courtroom from persons whom the defendant has not been permitted to confront or cross-examine[88] and that such a procedure is not a violation of the due process clause of the fourteenth amendment.[89]

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[85] See, *e.g.*, Note, 49 COLUM. L. REV. 567 (1949).

[86] 337 U.S. 241 (1949).

[87] *Id.* at 242-43.

[88] Consideration of this additional information was pursuant to a state statute which provides:

> Before rendering judgment or pronouncing sentence the court shall cause the [defendant's] previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant. *Id.* at 243, citing N.Y. CODE CRIM. PROC. § 482 (Supp. 1966).

[89] The court made its point when it said:

> The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues. . . . The due process clause should not be treated as a device for freezing the evidential procedure of sentencing into the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts — state

The policy conflict involved is, on the one hand, the desire to have the sentencing court supplied with the fullest possible information about the offender although the degree of credibility is unknown and, on the other, the desire to protect the offender against any possible prejudice from false data even though such protection might result in the exclusion of other important and accurate information.

In order to cope with this conflict, the Court distinguished between a trial, which is governed by the ordinary evidentiary rules of an adversary proceeding, and a pre-sentencing hearing, which is in the nature of a nonadversary proceeding.[90] The logical reason for this distinction is that after the defendant has been found guilty, the judge must concern himself primarily with individualizing the punishment so that it fits the offender as well as the crime.[91] The judge is no longer concerned with the narrow issue of guilt which, of course, must be decided according to the strict rules of evidence. Instead, a more flexible standard is applied so that he might decide what is the best correctional treatment for the defendant.[92]

If this proposition, namely, that a pre-sentencing hearing is nonadversary in nature, is true,[93] then it should be quite obvious that the rule of *Williams v. New York*[94] can be applied by analogy to the facts in a child custody proceeding. In support of this it should be emphasized that in both a pre-sentencing hearing and a child custody proceeding, the background of the persons involved, as revealed by the reports under discussion, are essential for a correct determination. Both are very much concerned with individualized treatment because of the unique facts that exist in each case. Moreover, the nonadversary nature of both types of proceedings reduces

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and federal — from making progressive efforts to improve the administration of criminal justice. *Id.* at 250-51.

[90] *Id.* at 246-49.

[91] Prevalent modern philosophy also supports the view that the punishment should fit the offender and not merely the crime. *E.g.*, Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937); People v. Johnson, 252 N.Y. 387, 392, 169 N.E. 619, 621 (1930).

[92] In the federal system, the probation service of the court makes an investigation and then reports to the judge on the defendant. See FED. R. CRIM. P. 32.

[93] See also, Williams v. Oklahoma, 358 U.S. 576 (1958) (state's attorney explained details of the crime and petitioner's criminal record); United States v. Nugent, 346 U.S. 1 (1952) (litigious interruption can be crucial because of nature of the hearing); United States v. Maroney, 355 F.2d 302 (3d Cir. 1966) (suggestion that there are two standards of due process in criminal and civil proceedings); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), (parole revocation proceedings not adversary hearing requiring constitutional due process); Ward v. California, 269 F.2d 906 (9th Cir. 1959) (report made available to sentencing jury but not judge).

[94] 337 U.S. 241 (1949).

the importance of an opportunity to cross-examine and rebut the information contained in the report, the lack of which might otherwise result in a timely and costly retrial of collateral issues. Because a custody proceeding is nonadversary, the court's use of outside reports in such proceedings should not be considered a deprivation of due process because of the analogy to the rules pertaining to a pre-sentencing hearing.[95]

B. Similarity to Nonadversary Juvenile Court Proceedings

An additional analogy in support of the proposal that custody proceedings are nonadversary in their use of outside investigation reports is the similar underlying reasoning of juvenile court proceedings.

Over the years, court decisions had repeatedly stated that a juvenile court proceeding is not criminal in nature.[96] Its philosophy was not to punish the child but to take him out of an environment which would be detrimental to both the child and society.[97] The juvenile court therefore functioned on a socio-legal basis, recognizing the fact that the law, without assistance, was incompetent to decide what is the best treatment for delinquent and criminal individuals.[98] However, the recent United States Supreme Court case of *In re Gault*, affording the juvenile, among other protections, his full constitutional rights to counsel and confrontation, as well as the privilege against self-incrimination, has thrown this area into a state of uncertainty as to precisely what type of proceeding juvenile hearings are regarding the *adjudication* of an alleged delinquent.

The main concern here is related to the use of hearsay in a juvenile court proceeding in the form of investigation reports. As to the use of hearsay during the *adjudicatory* stage, juvenile courts generally hold that hearsay evidence is inadmissible because there is no opportunity to cross-examine.[99]

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[95] One could attempt to argue that such an analogy cannot be made because one proceeding is civil and the other is criminal, thereby requiring two different degrees of proof. However, the validity of this argument is weakened by the mere fact that in the leading case of Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955) the court, in a custody proceeding, relied very heavily on two criminal law cases. For a discussion of this case, see text accompanying notes 17-20 *supra.*

[96] See, *e.g.*, *In re* McDonald, 153 A.2d 651 (D.C. Munic. Ct. App. 1959); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955); *In re* Gonzalez, 328 S.W.2d 475 (Tex. Civ. App. 1959); Canta v. State, 207 S.W.2d 901 (Tex. Civ. App. 1948).

[97] See 33 OHIO JUR. 2D *Juvenile Courts* §§ 5-6 (1958).

[98] LOU, JUVENILE COURTS IN THE UNITED STATES 2 (1927).

[99] *E.g.*, State v. Shardell, *supra* note 101, at 342, 153 N.E.2d at 513.

In spite of the *Gault* case and the general disapproval of outside reports during adjudication,[100] it is suggested that hearsay may properly be resorted to during the more critical stage of *disposition*, at which time it is common for the judge to consider probation reports, psychological and psychiatric data, and other information germane to a proper disposition.[101] Therefore, in regard to the dispositional stage of a juvenile court proceeding, the judge should not be limited by the rules of evidence because the prior adjudication has established his jurisdiction to impose, at his discretion, the necessary treatment. In essence, he is seeking external aid in making his decision of what is the best disposition for this particular child.[102]

This procedure is certainly analogous to that presented in a child custody proceeding because both are nonadversary by their very nature. Similarly, both are concerned with the background information in the case as revealed by the outside investigation so that the causes of the existing problems and their future consequences can be accurately considered in order to better determine where to place the child. More important, it should be apparent that both proceedings are concerned primarily with *what is in the best interests of the child.*

V. USE OF SUMMARY REPORTS AS A REMEDY TO OBJECTIONS

Briefly, it can be said without question that there are three situations in which outside investigations can be used without infringing upon due process requirements: (1) admission of reports into evidence provided full disclosure is made;[103] (2) consent of the parties in certain jurisdictions;[104] and (3) consideration of outside reports when there is sufficient legal evidence supporting the same findings.[105]

Through the use of summary reports, in which the judge relates in a very general way in open court for both the record and the

100 NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 58 (1962).

101 *Ibid.*

102 *Id.* at 58-59.

103 Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955) is the leading case which by implication represents this proposition.

104 For a discussion of this situation, see text accompanying notes 24-28 *supra.*

105 This opinion can be justified on the theory that judges disregard such incompetent evidence; but this, of course, is a mere presumption. Cline v. May, 287 S.W.2d 226 (Tex. Civ. App. 1956). For a more general discussion, see also Note, 29 IND. L.J. 446 (1954).

parties what the outside report contained, the court is able to make full use of the report without any deprivation of due process of law. Such partial disclosure tends to overcome the "secret evidence" objection. Stated differently, it is, in essence, a compromise between the rule against "secret evidence" and the necessity of protecting an informant's identity.[106]

When the contents of an outside investigation are partially disclosed through their introduction as evidence in court, two hearsay problems definitely arise. First, the report itself may be inadmissible as hearsay when the social worker is not in court to testify subject to the rules of evidence.[107] Second, even if the social worker is in court, the report is still an out-of-court statement offered for the truth of the matter asserted.[108] In order to overcome these problems, the report could be admitted into evidence under one of the following exceptions to the hearsay rule: (1) business records;[109] (2) official written statements;[110] (3) past recollection recorded if the investigator testifies;[111] or (4) the possibility of a new exception being established for summary reports.[112]

It is apparent at this point that there are cogent reasons supporting the confidentiality of outside investigations, at least in child custody proceedings which are actually of a nonadversary nature.[113] In addition, the informants would not cooperate if they knew that the parties might learn of their identity; as a consequence, strained relations might develop among the informants, investigators, and parties.

Furthermore, collateral issues to be tried would arise as to the truth or falsity of certain facts, meaning that custody proceedings would be more time consuming and would eventually lead to a fur-

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106 *Cf.* Parker v. Lester, 227 F.2d 708, 722 (9th Cir. 1955).

107 Dier v. Dier, 141 Neb. 685, 4 N.W.2d 731 (1942).

108 Grand Forks Bldg. & Dev. Co. v. Implement Dealers Mut. Fire Ins. Co., 75 N. Dak. 618, 31 N.W.2d 495 (1948).

109 McCORMICK, EVIDENCE § 280 (1954).

110 *Id.* § 278.

111 The reason is that the investigator will probably have forgotten the contents of the report. For a discussion of these and other exceptions to the hearsay rule, see generally *id.* §§ 276-99.

112 One possibility is allowing a privilege as to the identity of the informants. However, the validity of this is doubtful in that such an "informer's" privilege has been denied in cases of a more threatening nature to society, namely, criminal and security cases. See, *e.g.*, *In re* Oliver, 333 U.S. 257 (1948); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

113 For a discussion of the classification of such proceedings, see text accompanying notes 20-22 *supra.*

ther clogging of the trial docket. As a result, it is possible that judges would dispense with such reports completely in order to avoid the necessity of trying disputed collateral issues of fact, thereby subverting the whole principle of seeking "what is in the best interests of the child."[114] Moreover, when summary reports are used, they become part of the trial record of use on appeal. Consequently, it is suggested that the use of summary reports in child custody proceedings will satisfy the normal requirements of due process of law.

VI. CONCLUSION

A study of legislation in this area indicates that present statutory provisions fail to meet the requirements of due process as regards, for example, the failure to provide an adequate opportunity for cross-examination. An explanation for the deficiency is that many of these statutes were enacted prior to the recent interest in due process problems and the current advancements in behavioral science.

Because child custody proceedings are nonadversary, the courts must be willing to recognize that certain requirements of due process should not restrict the use of outside investigations by competent investigators. This can be accomplished by a revision of the state statutes to stress the necessity for investigatory reports. The judges will then have more information on which to make an accurate determination of what is in the best interests of the child.

In order to achieve revision, legal authorities have encouraged greater cooperation between the courts and the behavioral sciences. It is necessary, though, that the social worker become better educated as to the nature and function of the judicial process so as to make his report more consistent with the traditional notions of justice. The courts in turn must recognize the increased competence of the social sciences and the potential contributions of investigatory reports in child custody cases.

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[114] It should be noted here that this is based upon the assumption that hearings at this stage would be frequent and time consuming. It seems probable, however, that if such reports are true, there will be no disputed facts or they will at least be kept proportionately small in number.