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# Domestic Relations

Eugene N. Kaplan

## Domestic Relations—Appointment of Counsel for the Abused Child—Statutory Schemes and the New York Approach

New York State Assembly Select Committee on Child Abuse, Report (1972)

Five years have elapsed since the landmark decision of *In re Gault*.[1] The widespread impact of *Gault* and its progeny[2] on the American juvenile justice system continues to subject the legal framework surrounding children to reexamination and change.[3] The juvenile court[4] system has not fully responded to the demands thrust upon it; as the Supreme Court recently recognized, it continues to fall short of previous expectations.[5]

Present juvenile law reform has been directed almost exclusively at delinquency in an attempt to secure constitutional rights necessary to promote "fundamental fairness" in delinquency proceedings.[6] Conse-

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1 387 U.S. 1 (1967). The Supreme Court in *Gault* secured the right to counsel as a constitutional safeguard in delinquency proceedings against a juvenile defendant. The case involved a 15-year-old boy who was charged with making offensive telephone calls. The Court held:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

*Id.* at 41. The Court also held that due process required that an accused juvenile be given adequate written notice of the charges against him (*id.* at 33-34), and that he be advised of his right to confront and cross-examine the witnesses against him (*id.* at 56-57). The privilege against self-incrimination was also assured. *Id.* at 55-57.

2 In DeBacker v. Brainard, 396 U.S. 28 (1969), the Supreme Court refused to pass on the issue of whether a jury trial was required in delinquency cases. This question was recently answered in the negative. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The Court has held that proof beyond a reasonable doubt is required in these proceedings. *See In re* Winship, 397 U.S. 358 (1970). *See also* Kent v. United States, 383 U.S. 541 (1966); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

3 This point was made clear in the prefatory note to the *Uniform Juvenile Court Act*. Commissioners on Uniform State Laws, Handbook of the National Conference 246 (1968). The *Uniform Juvenile Court Act* is also contained in this volume. *Id.* at 248-89.

4 In this Note, the terms "juvenile court" and "family court" will be used interchangeably. In New York, juveniles are subject to the jurisdiction of the New York Family Court. N.Y. Family Ct. Act § 115(a)(i) (McKinney Supp. 1972).

5 "The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise." McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

6 *See* N.Y. State Assembly Select Comm. on Child Abuse, Report 147 (1972) [hereinafter cited as Child Abuse Report]. *See also* Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process*, 9 Duquesne L. Rev. 651, 651-52 (1971).

quently, other aspects of children's law have been neglected. This is not a necessary result, however. Courts dealing with children are empowered to consider much more than the problem of delinquency. All aspects of a child's welfare are within their jurisdiction.[7] One important area in which the juvenile courts of each state are given authority to act is in instances of child abuse.[8] In many states, acts of child abuse have been made the subject of criminal sanctions.[9]

7 Juvenile courts are usually afforded jurisdiction in the following areas: abuse, delinquency, neglect, abandoned children, dependent children, unruly children, child custody, termination of the parent-child relationship, adoption, judicial consent to the marriage of a minor, commitment of a mentally ill minor, and proceedings under the Interstate Compact on Juveniles. *See, e.g.*, UNIFORM JUVENILE COURT ACT § 3; Standard Juvenile Court Act § 8, in 5 NAT'L PROBATION & PAROLE ASS'N J. 344 (1959).

8 Child abuse has been defined as the "intentional, nonaccidental use of physical force, or intentional, nonaccidental acts of omission, on the part of a parent or other caretaker interacting with a child in his care, aimed at hurting, injuring, or destroying that child." D. GIL, VIOLENCE AGAINST CHILDREN 6 (1970). One statutory definition of abuse is as follows: "'Abused' means the infliction of physical injury upon a child by his parents or others legally responsible for him and shall include exploiting or overworking a child to such an extent that his health, morals, or well-being are endangered." IDAHO CODE § 16-1625(m) (Supp. 1971). *See also* N.Y. FAMILY CT. ACT. § 1012(e) (McKinney Supp. 1972), *discussed in* Note, *An Appraisal of New York's Statutory Response to the Problem of Child Abuse*, 7 COLUM. J.L. & SOC. PROB. 51, 64-65 (1971).

The statutory scheme may vary from state to state. *See, e.g.*, IDAHO CODE § 16-1626 (Supp. 1971) (abuse as separate aspect of court's jurisdiction); N.Y. FAMILY CT. ACT art. 10 (McKinney Supp. 1972) (same); CAL. WELF. & INST'NS CODE § 600 (West 1972) (incorporating abuse within court's neglect or dependency powers); MINN. STAT. ANN. §§ 260.111(1), .015(10) (1971 & Supp. 1972) (same). *See generally* Paulsen, *A Summary of Child Abuse Legislation*, in THE BATTERED CHILD 237-61 (R. Helfer & C. Kempe eds. 1968) [hereinafter cited as THE BATTERED CHILD].

> In every state, juvenile courts have jurisdiction over "neglected children." Although the statutory provisions are of great variety and may not in terms explicitly refer to the problem of child abuse, it is submitted that in all states the "battered child" falls within the category of "neglected children" as defined by the relevant juvenile court act.

Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 693 (1966). Child abuse is not a new phenomenon. "The neglect and abuse of children has been evidenced since the beginning of time. The natural animalistic instincts of the human race have not changed with the passing of the centuries. . . . This wastage of children's lives continues and appears to be increasing even in this enlightened modern day." V. FONTANA, THE MALTREATED CHILD 3 (2d ed. 1971). *See also* Radbill, *A History of Child Abuse and Infanticide*, in THE BATTERED CHILD 3. The magnitude of the abuse problem from both legal and social standpoints has been recognized only recently. *See, e.g.*, D. GIL, *supra* at 92-132; THE BATTERED CHILD App. A; Note, *supra* at 58.

The New York child abuse reporting law became effective in 1964. *See* N.Y. SOC. SERV. LAW § 383-a (McKinney Supp. 1972). From Augnst 1, 1964, to January 31, 1965, 211 reports of abuse were made; 416 cases of abuse were reported in calendar year 1966, while 3,224 were reported for calendar year 1971. CHILD ABUSE REPORT 22. In 1968 there were 36 fatalities attributed to abuse, and in 1970 there were 93. *Id.* at 23. The Select Committee on Child Abuse concluded, however, that "[c]hild abuse is much more prevalent than is revealed by current statistics." *Id.* at 22.

9 *See, e.g.*, CAL. PENAL CODE § 273a (West 1970); N.Y. PENAL LAW §§ 260.10(1), (2) (McKinney Supp. 1972).

Courts have acted and apparently continue to act in abuse cases from the ancient and now criticized concept of *parens patriae*,[10] conducting their proceedings in an informal atmosphere ostensibly designed to protect the child's interests.[11] This policy has served to deny abused children most constitutional safeguards—most significantly, the right to counsel.[12] New York, a leader in the field of juvenile law reform, has recently readdressed itself to this problem, considering both the need for counsel and the problems connected with fulfilling that need.[13]

## I

## PRESENT STATUTORY APPROACHES

Because courts have ignored the abused child's right to appointed counsel as a constitutional guarantee,[14] the legislatures of many states

10 *See In re* Gault, 387 U.S. 1, 14-25 (1967); *see* H.H. LOU, JUVENILE COURTS IN THE UNITED STATES 135 (1927); W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS 55-57, 112-14 (1966); U.S. Children's Bureau, *Juvenile Court Standards, reprinted in* H.H. LOU, *supra* at 221-31.

The Supreme Court has acknowledged that blind adherence to the doctrine of *parens patriae* can no longer be substituted for reason or used as a justification for conduct which results in the deprivation of constitutional rights. *In re* Gault, 387 U.S. 1, 16-17 (1967); *cf.* Coffee, *Privacy Versus Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 CORNELL L. REV. 571, 574-75 (1972).

11 *See In re* Gault, 387 U.S. 1, 25-26 (1967).

12 Given the complexity of modern courtroom procedure, it is clear that the presence of an attorney is the only means of assuring adequate representation of individual interests in the courtroom. *See generally* Powell v. Alabama, 287 U.S. 45 (1932). Without counsel the abused child is in no position to demonstrate to the court how his best interests may be served. Although he is the object of the controversy, he is without means to present the views and facts most significant to him. It has been said that he stands in a position no better than that of a chattel. *See* Grumet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome*, 4 FAMILY L.Q. 296, 314-15 (1970). *See also* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAMILY L.Q. 108, 117 (1971). Counsel for the child could serve his client's interests by transforming the child from the passive object of the controversy into an active, interested participant in the adjudicative process. For example, the child's lawyer could cross-examine witnesses presented by the other parties and ask questions which would otherwise go unanswered. *See* Grumet, *supra* at 314. He could make an independent investigation of the facts and allegations and apprise the court of his findings. *See* notes 22-23 and accompanying text *infra* (Kansas statutory scheme). And he could bring to light, by means of primary evidence, factors which would have been otherwise obtained by secondary evidence and inference. Inker & Perretta, *supra* at 115.

13 *See* notes 35-66 and accompanying text *infra*.

14 Only one federal appellate court prior to *Gault* (and none since that decision) has directly considered the issue of counsel in abuse cases. *See In re* Custody of a Minor, 250 F.2d 419 (D.C. Cir. 1957). In that case the court considered an appeal from the denial of a habeas corpus petition on the issue of whether a minor had the right to separate counsel in a proceeding in which his parents were charged with inadequate care and which could

have filled this gap by statute.[15] Jurisdictions can presently be classified, with some overlap, as following one of three approaches: (*1*) an absolute right to counsel for the abused child, (*2*) a non-absolute or discretionary right to appointed counsel, and (*3*) no right to counsel.[16]

### A. *An Absolute Right to Counsel*

An absolute right to counsel for the abused child is created by statutes which guarantee representation for the child in all abuse proceedings. Appointment of an attorney by the court is the standard prac-

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lead to the child's removal from his home. The court stated that it did not have to decide this issue affirmatively because the Director of Social Work had afforded the child with adequate legal representation. Circuit Judge, now Chief Justice, Burger speaking for the court went on to state:

> Conceivably a case could arise where conflict between the public welfare authority and the parents might lead the Juvenile Court to appoint separate counsel for the child but it is sufficient simply to acknowledge that possibility and leave treatment of that problem to the sound discretion of the Juvenile Court . . . .

*Id.* at 421 (dictum). *See also* Heyford v. Parker, 396 F.2d 393 (10th Cir. 1968). Even under a restrictive reading of the *Gault* decision, however, one finds that case applicable to certain instances of child abuse. *Gault* held that counsel must be afforded as a constitutional right whenever a delinquency proceeding could result in a child's incarceration. 387 U.S. at 41. Many states empower their juvenile courts to commit an abused child to a state institution or training school. *See, e.g.*, CAL. WELF. & INST'NS CODE § 727 (West 1972); MO. REV. STAT. §§ 211.031, 211.181 (1969); OHIO REV. CODE ANN. §§ 2151.34, 2151.353 (Supp. 1971). *See also* Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK U.L. REV. 631, 674-77 (1970). Although the intent is protective rather than corrective, the result is the same. "Depriving a child of his liberty, regardless of the reason, is inherently punitive from the child's point of view." Wizner, *The Defense Counsel: "Neither Father, Judge, Probation Officer or Social Worker,"* 7 TRIAL, Sept.-Oct., 1971, at 30, 31.

The comment to Rule 39 of the *Model Rules for Juvenile Courts* also lends support for the provision of counsel for the abused child in this situation. "The child has a right to representation because his liberty or freedom of action is at stake." COUNCIL OF JUDGES OF THE NAT'L COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS R. 39, Comment at 83 (1969). When the prospect of institutionalization looms for an abused child, due process and equal protection should permit no distinction.

[15] *See* notes 17-35 and accompanying text *infra*.

> Perhaps the most significant evidence [of changing attitudes toward legal representation of juveniles] is the legislation which has been passed within the last decade. . . . In at least one-third of the States the statutes now have provisions relating to the right to representation, notice of right to counsel, or the assignment of counsel or both. In still other States similar provisions have been established by rule of court.

W. SHERIDAN, *supra* note 10, at 56. This was written in 1966, one year prior to *Gault*.

[16] The term counsel, when used in the abuse context, must mean appointed counsel or a right thereto. No state prohibits outright the appearance of private counsel in a child's behalf. *See* Campbell, *supra* note 14, at 670. The absence of such an impediment still falls far short of desirable goals. What is needed is a positive requirement that every abused child have an absolute right to court-appointed counsel in every proceeding in which private counsel has not been retained.

tice in "absolute counsel" jurisdictions; only in rare instances will private counsel be retained.

Seventeen states presently afford such representation by statute or rule of court.[17] The *Uniform Juvenile Court Act* also contains an absolute counsel provision: "Counsel must be provided for a child not represented by his parent, guardian or custodian. If the interests of 2 or more parties conflict separate counsel shall be provided for each of them."[18] Georgia[19] and North Dakota[20] have adopted this provision. The *Model Rules for Juvenile Courts* provides for mandatory appointment of counsel whenever parent-child conflict is present, as in abuse proceedings.[21]

The statutory scheme in certain states extends beyond mere appointment of counsel in all abuse cases and presents a more comprehensive approach. The Kansas juvenile act, for example, provides for the appointment of both counsel and a guardian *ad litem* in all abuse cases.[22] This guardian is required independently to investigate the facts and allegations of the petition and report his findings to the court. He

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17 Alaska (ALASKA R. JUV. PROC. 14 & 15; *cf.* ALASKA STAT. § 47.10.050 (1962)); California (CAL. WELF. & INST'NS CODE §§ 600(d), 634.5, 681 (West 1972)); Georgia (GA. CODE ANN. § 24A-2001 (Supp. 1971)); Idaho (IDAHO CODE § 16-1631 (Supp. 1971)); Illinois (ILL. ANN. STAT. ch. 37, § 701-20 (Smith-Hurd Supp. 1972)); Iowa (IOWA CODE ANN. § 232.28 (1969); *see* Orcutt v. State, 173 N.W.2d 66 (Iowa 1969)); Kansas (KAN. STAT. ANN. §§ 38-817, 821 (Supp. 1971)); Kentucky (ch. 325, § 1, [1972] Ky. Acts 1500, *amending* KY. REV. STAT. § 208.060 (1969)); Maryland (MD. ANN. CODE art. 26, § 70-18(d) (Supp. 1971). Prior to the enactment of this provision, the Maryland Court of Appeals held that in abuse cases the child was entitled to representation by a guardian *ad litem*. *In re* Cager, 251 Md. 473, 248 A.2d 384 (1968).); Minnesota (MINN. STAT. ANN. § 260.155(2) (1971)); MINN. R.P., JUV. CT. P. 2-1(3)(b), 2-1(5)); Nebraska (NEB. REV. STAT. § 43-205.06 (Supp. 1971)); New York (N.Y. FAMILY CT. ACT §§ 241-49 (McKinney 1963 & Supp. 1972)); North Dakota (N.D. CENT. CODE § 27-20-26 (Supp. 1971)); Ohio (OHIO REV. CODE ANN. §§ 2151.281, .351, .352 (Supp. 1971); *see* State v. Hershberger, 150 N.E.2d 671 (Ohio Juv. Ct. 1958)); Oregon (ORE. REV. STAT. § 419.498(2) (1972); *see* State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968)); Vermont VT. STAT. ANN. tit. 33, § 653(a) (Supp. 1972)); and Virginia (VA. CODE ANN. § 16.1-173 (Supp. 1972)).

As indicated, the judiciaries of Alaska and Minnesota have promulgated rules of court which afford an absolute right to counsel, reflecting a favorable judicial attitude in these states.

18 UNIFORM JUVENILE COURT ACT § 26.

19 GA. CODE ANN. § 24A-2001 (Supp. 1971).

20 N.D. CENT. CODE § 27-20-6 (Supp. 1971).

21 MODEL RULES FOR JUVENILE COURTS, *supra* note 14, R. 39.

22 KAN. STAT. ANN. § 38-821 (Supp. 1971) provides in part:

> In all hearings the judge of the juvenile court shall appoint a guardian *ad litem* who shall be an attorney at law to appear for, represent, and defend:
>
> (a) A child who is the subject of proceedings under this act . . . .
>
> (b) . . . The guardian *ad litem* shall make an independent investigation of the facts and representations made in the petition.

For a decision under prior Kansas law, see *In re* McCoy, 184 Kan. 1, 334 P.2d 820 (1959).

must also be present at every hearing.[23] A similar but less detailed approach is employed in Ohio.[24]

### B. *The Discretionary or Non-Absolute Right to Appointed Counsel*

A number of jurisdictions leave the appointment of counsel for abused children to the discretion of the court; some restrict its application to specific circumstances. Discretionary statutes empower the court to appoint counsel when it believes that taking this action would be in the child's interest or when otherwise needed to promote fairness and justice. Non-absolute statutory schemes provide for mandatory appointment of counsel in abuse proceedings of a specified nature, such as cases in which "termination of parental rights is a possible remedy."[25] These statutes leave the appointment of counsel in other cases to the discretion of the court.

Seventeen jurisdictions follow either the discretionary[26] or the non-absolute[27] approach. The Standard Juvenile Court Act[28] and the Standard Family Court Act[29] also include the discretionary formulation. In cases in which parental rights may be terminated, two states make the appointment of counsel mandatory upon the request of a party without

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23 KAN. STAT. ANN. § 38-821 (Supp. 1971).

24 *See* OHIO REV. CODE ANN. §§ 2151.281, .351, .352 (Supp. 1971).

25 OKLA. STAT. ANN. tit. 10, § 1109(b) (Supp. 1972).

26 Alabama (ALA. CODE tit. 13, § 359 (1958)); Arizona (ARIZ. REV. STAT. ANN. § 8-225(A) (Supp. 1972) (upon finding of conflict of interest between parent and child)); Connecticut (CONN. GEN. STAT. ANN. §§ 17-66b, -66c (Supp. 1972)); District of Columbia (D.C. CODE ANN. § 16-2404(b) (Supp. IV 1971)); Hawaii (HAWAII REV. STAT. § 57-41 (1968)); Michigan (MICH. STAT. ANN. § 27.3178(598.17) (1962); MICH. JUV. CT. R. 6.3(A)(2)(a)); Montana (MONT. REV. CODES ANN. §§ 10-504, -508 (1968)); Nevada (NEV. REV. STAT. § 62.085(1) (1971)); Rhode Island (R.I. GEN. LAWS ANN. § 14-1-31 (1970); *see In re* Palmer, 100 R.I. 170, 212 A.2d 61 (1965)); South Dakota (S.D. COMPILED LAWS ANN. §§ 26-8-22.1, .2 (Supp. 1972) (when parental rights may be terminated)); Utah (UTAH CODE ANN. § 55-10-96 (Supp. 1971)); Washington (WASH. JUV. CT. R. 7.2(c); *see In re* Dunagan, 74 Wash. 2d 807, 447 P.2d 87 (1968)); Wisconsin (WIS. STAT. ANN. §§ 48.25(5), (6) (1957)).

27 Colorado (COLO. REV. STAT. ANN. § 22-1-6 (Supp. 1967) (mandatory upon request of any party without financial means when parental rights may be terminated; discretionary when court determines interests of child need further protection)); Missouri (MO. REV. STAT. §§ 211.211, .471(2) (1969) (mandatory for child when child may be committed to state training school; discretionary when parental rights may be terminated); Oklahoma (OKLA. STAT. ANN. tit. 10, § 1109(b) (Supp. 1972) (mandatory upon request of any party without financial means if parental rights may be terminated; discretionary in all other cases)); Wyoming (WYO. STAT. ANN. § 14-115.23 (Supp. 1971) (mandatory for child upon request if child and parents or guardian are without financial means; discretionary in all other cases)).

28 Standard Juvenile Court Act § 19, in 5 NAT'L PROBATION & PAROLE ASS'N J. 367 (1959).

29 Standard Family Court Act § 19, in *id.* at 137.

financial means;[30] two others leave appointment to the discretion of the court.[31] In several other special situations, with limited applicability to child abuse, some statutes provide for mandatory appointment of counsel.[32]

### C. *No Statutory Right to Counsel*

A great number of states afford no statutory right to counsel. These "no counsel" jurisdictions can be divided into two distinct groups. One group makes provision for a right to counsel in juvenile court proceedings such as delinquency, but implicitly denies this representation to an abused child.[33] The other group makes no statutory mention of a right to counsel in any juvenile court action.[34] Within this second clas-

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30 Colorado (COLO. REV. STAT. ANN. § 22-1-6 (Supp. 1967)) and Oklahoma (OKLA. STAT. ANN. tit. 10, § 1109(b) (Supp. 1972)).

31 Missouri (MO. REV. STAT. § 211.471(2) (1969)) and South Dakota (S.D. COMPILED LAWS ANN. § 26-8-22.1 (Supp. 1972)).

32 In Missouri, for example, counsel must be afforded before a child can be committed to a state training school. MO. REV. STAT. § 211.211 (1969).

33 Arkansas (ARK. STAT. ANN. §§ 45-217, -227 (1964)); Maine (ME. REV. STAT. ANN. tit. 22, § 3791-800 (1964) (abused children generally; no right to counsel afforded)); Massachusetts (MASS. DIST. CT. R. 85 (counsel mandated only in delinquency cases)); Mississippi (MISS. CODE ANN. § 7187-08 (Supp. 1971) (informal proceedings)); New Jersey (N.J. STAT. ANN. § 9:6-1 to -12 (1960 & Supp. 1972) (abused children generally; no right to counsel afforded); N.J. CT. RR. 5:3-3(a), 5:9-1(d) (indigent party entitled to counsel in delinquency cases)); North Carolina (N.C. GEN. STAT. § 7A-285, -286 (1969 & Supp. 1971) (counsel guaranteed only when child may be committed to state institution pursuant to delinquency proceedings)); South Carolina (S.C. CODE ANN. §§ 15-1095.14, .19 (Supp. 1971) (same)); Tennessee (TENN. CODE ANN. §§ 37-226 (Supp. 1971) (indigent party entitled to counsel at delinquency hearings); *see* Underwood v. Adamson, — Tenn. App. — , 463 S.W.2d 952 (1970) (neglected child not constitutionally entitled to an attorney)); Texas (TEX. REV. CIV. STAT. art. 2332 (1969) (court will appoint "some suitable person" to represent child in dependency and neglect proceedings if neither parents nor guardian can be found); *see* Grider v. Noonan, 438 S.W.2d 631 (Tex. Civ. App. 1969) (failure to appoint suitable person to represent child does not render dependency order fatally defective)); West Virginia (W. VA. CODE ANN. § 49-5-13 (Supp. 1972) (counsel provided in criminal actions before juvenile court); *cf. id.* §§ 49-6-1 to 49-6-5 (1966 & Supp. 1972) (no correlative right under "procedure in neglect cases")).

34 Delaware (*cf.* DEL. CODE ANN. tit. 10, §§ 983, 1177 (1953)); Florida (*cf.* FLA. STAT. ANN. § 39.09(1) (1961); Steinhauer v. State, 206 So. 2d 25 (Fla. App. 1967) (right to counsel mandated for children to extent specified in *Gault*)); Indiana (*cf.* IND. CODE § 31-5-7-15 (1971)); Louisiana (*cf.* LA. REV. STAT. ANN. § 13:1579 (1968)); *In re* State *ex rel.* Longworth, 233 So. 2d 699 (La. App. 1970) (right to counsel mandated for children to extent specified in *Gault*)); New Hampshire (*see In re* Poulin, 100 N.H. 458, 129 A.2d 672 (1957) (construing N.H. REV. STAT. ANN. § 169.9 (1964) to allow counsel to attend juvenile proceedings, but recoguizing no right to counsel)); New Mexico (*cf.* N.M. STAT. ANN. § 13-9-4 (1968)); Pennsylvania (*cf.* PA. STAT. ANN. tit. 11, § 250 (1965). *But see* Pa. S. Bill No. 439 (1971), a proposed new juvenile act, based on the Uniform Act and affording an absolute right to counsel, pending in the state legislature; *id.* § 20 deals with the right to have counsel appointed. *See also* Comment, *Proposed Pennsylvania Juvenile Act*, 75 DICK. L. REV. 235 (1971)).

sification, a child's right to counsel exists only as far as the holding of *Gault* is interpreted to mandate.

## II

## THE RECENT NEW YORK APPROACH

The apathetic attitude regarding the plight of abused children which pervades most state statutory schemes has not gained a foothold in New York. New York's legislators, actively seeking solutions to the abuse problem, have enacted a comprehensive statutory framework affording many rights to the child, including the right to counsel.[35] These efforts, which commenced with the adoption of a uniform, statewide Family Court Act in 1962,[36] have recently been enhanced by a major legislative study.[37]

Antedating *Gault* by several years, the Family Court Act established a system of "Law Guardians," who must be attorneys, to represent all children not represented by private counsel.[38] The Act premises this guarantee upon a "finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition."[39]

In 1969, after the tragic death of a victim of child abuse,[40] the

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35 The New York Assembly Select Committee on Child Abuse expresses this view: "Although this newly established expansion of due process procedures has been primarily directed toward delinquency proceedings, its side effects, at least in the State's more urban counties, have substantially altered the character of neglect and abuse proceedings as well." CHILD ABUSE REPORT 147.

36 N.Y. FAMILY CT. ACT. (McKinney 1962), originally enacted as ch. 686, [1962] N.Y. Laws 3043.

37 This is the study made by the New York State Assembly Select Committee on Child Abuse. *See generally* CHILD ABUSE REPORT; notes 48-59 and accompanying text *infra*.

38 N.Y. FAMILY CT. ACT. §§ 241-49 (McKinney 1963 & Supp. 1972). *Id.* § 241 (McKinney Supp. 1972) presently provides as follows:

> This act declares that minors who are the subject of family court proceedings should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensible to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

*Id.* § 242 provides that Law Guardians must be attorneys. *Id.* § 249 requires the appointment of a Law Guardian for any minor who is the subject of an abuse proceeding and who does not have independent legal representation.

39 *Id.* § 241 (McKinney Supp. 1972).

40 The body of 3-year-old Roxanne Felumero was found in the East River on March

Speaker of the New York State Assembly appointed a select committee to study the laws governing the investigation and adjudication of abuse cases and to recommend changes in those laws.[41] The initial work of this committee culminated in the unanimous adoption by the legislature of article 10 of the Family Court Act, concerning the law and procedure to be followed in child abuse (protective) proceedings.[42]

At the recommendation of the Child Abuse Committee, article 10 was amended in 1970 to require notice of the right to counsel, retained or appointed, to all children involved in abuse proceedings.[43] The law was also amended to direct the corporation counsel of the City of New York and the district attorney of each county to become a "necessary party" in these cases to aid in the presentation of petitions and to fulfill an investigatory and fact gathering role.[44]

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25, 1969. The child's stepfather was subsequently indicted for murder. A barrage of newspaper publicity followed the discovery that a neglect petition, charging the child's mother with assault, had been filed in the Family Court several weeks prior to the child's death. The case of Roxanne Felumero led to a tremendous public outcry against the problem of child abuse and the existing abuse laws. It resulted in a judicial investigation as well as the legislative actions taken. *See* JUDICIARY RELATIONS COMM. OF THE APPELLATE DIVISION, FIRST DEP'T, REPORT ON THE ROXANNE FELUMERO CASE (1969), *reprinted in* 161 N.Y.L.J. 1 (June 30, 1969), 162 *id.* 1 (July 1, 1969), *id.* 1 (July 2, 1969), and *id.* 1 (July 3, 1969)).

41 *See* CHILD ABUSE REPORT ii.

42 N.Y. FAMILY CT. ACT. art. 10 (McKinney Supp. 1972), originally enacted as ch. 264, [1969] N.Y. Laws 1011. The press called this the "Children's Bill of Rights." *See* CHILD ABUSE REPORT ii-iii.

43 N.Y. FAMILY CT. ACT. § 1043 (McKinney Supp. 1972).

44 *Id.* § 254(b). The Committee summarized the changes effected in the counsel provisions of the law by the 1969 and 1970 amendments in the following terms:

> This Committee was cognizant of these problems when it redrafted Article 10 in 1970. Section 1016 of the 1969 law provided that "in the City of New York an abused child . . . be represented by a police attorney" or outside the City, by the appropriate District Attorney. This was an attempt on the Committee's part to insure the presence in Court of someone obliged and capable of protecting an allegedly abused child by forcefully collecting and presenting evidence to the Family Court. The dual roles of prosecuting the parent and representing the child were hence assigned to the Police Attorneys and District Attorneys. Although the prosecutorial emphasis improved the discovery and presentation of information to the court, the dual role presented professional problems for the attorneys involved. For example, the Police Attorney might obtain information from the child in an Article 10 proceeding which he might want to use to prosecute the child in a delinquency proceeding. In addition, there is obvious ambiguity in prosecuting the parent and representing the child whose desire, rightly or wrongly, is to remain with his parents.
>
> For these and other reasons, the Committee concluded that it was inappropriate to continue the dual role of these public prosecutors and so reintroduced the Law Guardians as representatives of the child. In accomplishing the latter, certain changes were made in the operative Family Court Act sections to clarify past ambiguities. Previously, section 241 provided that children had "a right to the assistance of counsel." The words "shall be represented by counsel" were substituted to make it clear that the Law Guardian had the child as his client.

The Committee continued its work beyond the achievement of these immediate goals. It held hearings throughout the state and re-evaluated the effectiveness of the law in operation.[45] This three-year investigation culminated in the comprehensive *Child Abuse Report* published in April 1972, directing attention to the role of counsel in abuse cases and representing a major thrust toward better representation. The Committee's primary conclusion concerning counsel for the child was that in many political subdivisions of the state, the Law Guardians had failed to protect and represent the interests of the child adequately.[46] Its major recommendation was that a position known as the "Children's Attorney" should be created to conduct effective investigations and to present abuse petitions on behalf of the child.[47]

The *Report* strongly criticized the role that the Law Guardians had played. The Committee found them ineffective, in most instances, in the investigation and presentation of abuse cases, and generally falling far short of the contributions expected of them.[48] The assemblymen

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To buttress this change, section 241 was further amended to state that the purpose of counsel for the child is "to help protect their interests and to help them express their wishes to the court."

CHILD ABUSE REPORT 151-52. The Committee continued:

> This Committee's findings concerning Law Guardians, led it, in 1970, to provide Corporation Counsels and District Attorneys as "necessary parties" in child abuse proceedings. Their role is to aid in the "presentation" of petitions, which includes investigations and fact-gathering. . . . The presence of an effective advocate, someone to gather, marshal and present evidence is crucial to the adjudication of child protective cases.

*Id.* 154 (citation omitted).

45 Public hearings were held in Albany, Syracuse, Rochester, Mineola, and New York City. Inspections were made of child care facilities and courts. Discussions were held with many "Family Court judges, attorneys, child welfare professionals, and families in trouble, the 'consumers' of child welfare services." *Id.* vii.

46 *See id.* at 147-53.

47 *See id.* at 154-56.

> [T]o ensure that the Children's Attorney is independent of any local agency, he should be appointed by the county executive or legislature with the proviso that, although he may be the local legal official, he may not be an employee or official of any other county agency or department.

*Id.* at 155.

48 The Report discusses how the Law Guardian had been expected to serve both as attorney and as guardian *ad litem*. The Committee cited Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501, 519 (1963) to support their position:

> The role of the lawyer representing a child in a neglect proceeding may differ substantially from that which he performs in delinquency or person in need of supervision proceedings. It is in the neglect proceeding that his role as a guardian rather than as an advocate becomes predominant. He is not called upon to defend but rather to ascertain where the best interests of his ward lie and to exert his efforts to secure the disposition which in his view would best serve those interests. The ultimate decisions he will be called upon to make will be basically non-legal

also discovered a significant difference in the quality of performance of these lawyers in urban and non-urban areas of the state.[49] The effectiveness of the urban Law Guardians, who are generally attorneys of the Legal Aid Society,[50] was found to be undermined by two factors: heavy caseloads[51] and the lawyers' "institutional bent."[52] Emphasis was placed on the fact that these Law Guardians also represented children in delinquency actions, which created a bias on their part toward trying to prevent removal of the child from his home—a bias that had been wrongly carried over into abuse proceedings.[53]

The Committee's response to the operation of the Law Guardian system in the non-urban subdivisions of the state was more favorable. They observed that in a number of these areas, attorneys fulfilling this role conducted active pre-trial investigations and played a forceful part in proceedings.[54] The *Report* noted, however, that these "effective" attorneys represented only a minority of all Law Guardians[55] and that the Law Guardians as a group had failed to assume a role of active representation.[56]

Viewing the Law Guardians as ineffective, the Committee proposed that a full time "Children's Attorney" be appointed in each county.[57] A bill to effectuate this proposal was introduced in the legislature by the Committee and the Speaker of the Assembly.[58] The pro-

in character and will impose upon him an awesome responsibility since the disposition made may effect the entire future life of his client for good or ill.

*Quoted in* CHILD ABUSE REPORT 148.

49 "The nature of the role of Law Guardian seems to vary from attorney to attorney, but most distinctly from urban to rural or suburban areas." CHILD ABUSE REPORT 148.

50 *See id.* at 148-49.

51 *See id.* at 149. The Committee found that "many Law Guardians perform no pretrial investigations, collect little evidence and play a passive, watching role during the Court proceedings—save to make occasional recommendations to the judge." *Id.* It also pointed out that "the publicly funded Legal Aid Law Guardian has a caseload of such size that he cannot adequately prepare any of his cases." *Id.*

52 *Id.*

53 *Id.* at 149-50.

54 *Id.* at 148. "When they are convinced that a child is abused or neglected, these attorneys take on a prosecutor-like role as they press for a Court adjudication and appropriate disposition." *Id.*

55 *Id.*

56 "This Committee had hoped that the combination of these changes [the 1969 and 1970 amendments] and the history of the Felumero case would cause the Law Guardian to assume a more active role in child protection proceedings. This has not happened." *Id.* at 152-53.

57 *Id.* at 154-56. "[G]iven the continuing failure of the majority of Law Guardians to fulfill the role envisioned for them, the Committee now concludes that there must be a legal office established in each county with responsibility for the effective investigation and presentation of *all* child protective cases." *Id.* at 155 (emphasis in original).

58 (1972) Assy. Int. No. 12234 (Committee on Rules) (introduced April 21, 1972). This

posed Children's Attorney would assume the role presently given to the corporation counsel of the City of New York and the district attorney of other counties.[59] He would be a specialized public prosecutor and a "necessary party" to all abuse proceedings, being charged with the duty to investigate and present the petition in abuse proceedings.[60] The Children's Attorney would represent the petitioner, the state, and its subdivisions—not children themselves,[61] although his purpose would be "the protection of children and the community through justice and due process."[62] The Law Guardian would remain the child's attorney, despite the Committee's prior findings.[63]

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measure would repeal N.Y. FAMILY CT. ACT. § 254 (McKinney Supp. 1972) and replace it as follows:

§ 254. Presentation by children's attorney.

(a) In order to preserve and protect the rights and safety of a child, it is deemed essential that there be a public official solely responsible for the effective investigation, preparation and presentation of cases in the family court. This declaration is based upon a finding that counsel in support of the petition is essential to obtain the full disclosure and presentation of evidence to the court, and is indispensable for accurate determinations of law and findings of fact and for proper orders of disposition.

(b) As used in this act, "children's attorney" refers to the public official designated under this section to present family court cases by the appropriate local executive official with the consent of the local legislative body. The children's attorney shall be an attorney at law duly admitted to practice in the state of New York. The local law official may be designated the children's attorney but in no event shall the children's attorney be an official or employee of any other agency or subdivision of local government.

(c) As a public law enforcement official, the children's attorney shall seek the protection of children and the community through justice and due process. His conduct should be guided by the best interests of children before the court.

(d) In all child protective proceedings, the children's attorney shall present the case in support of the petition and assist in all stages of the proceedings, including appeals in connection therewith.

(e) In all other proceedings under this act, the family court or the appropriate appellate division may request the children's attorney to present the case in support of the petition when, in the opinion of the family court or appellate division, such presentation will serve the purposes of the act. When so requested, the children's attorney shall present the case in support of the petition, and assist in all stages of the proceedings, including appeals in connection therewith.

(f) To the fullest extent possible, the services performed by the children's attorney shall be purchased by local departments of social services in the furtherence of their responsibilities. When so purchased, such services shall be considered reimbursable by the state and shall be reimbursed by the state in the same manner and to the same extent as if the children's attorney were an employee of such local department.

59 *See* note 44 and accompanying text *supra.*

60 *See* (1972) Assy. Int. No. 12234 (1972) (Committee on Rules) (proposed N.Y. FAMILY CT. ACT § 254 (a)); CHILD ABUSE REPORT 155.

61 CHILD ABUSE REPORT 155.

62 (1972) Assy. Int. No. 12234 (1972) (Committee on Rules) (proposed N.Y. FAMILY CT. ACT § 254 (c)).

63 *See* notes 48-56 and accompanying text *supra.* No changes were proposed for the sections of the Family Court Act that establish the Law Guardians or specify their duties and role. It was apparently the belief of the Committee that the Law Guardians should

The Children's Attorney bill was rapidly approved in both houses of the legislature,[64] but it was vetoed by Governor Nelson Rockefeller.[65] The Governor explained that although he recognized the seriousness of the problem of child abuse and the weaknesses of the present law, he found the legislation infirm in structure, unwise financially, and in need of further study.[66]

## CONCLUSION

The work of the Committee on Child Abuse and its *Report* represent a significant step in the study of abuse and the role of counsel for the child. Their conclusions demonstrate many of the strengths and weaknesses of an operational "right to counsel" system. The criticisms of the Law Guardians as counsel for abused children reveal flaws which must be remedied to ensure truly effective representation. The suggestion that a public attorney specialize in the prosecution of children's cases is an interesting innovation which could serve to alleviate the problems inherent in this type of litigation.[67]

The great need for counsel to represent abused children effectively was clearly recognized by the New York Assembly Select Committee on Child Abuse and should be recognized as a safeguard which society is obliged to protect. A child's future can be conclusively determined in an abuse proceeding, and without the "guiding hand of coun-

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remain the nominal representatives of the children but that actual, effective representation be transferred to the Children's Attorney. *See* CHILD ABUSE REPORT 152-56.

64 The bill was passed by the Assembly on April 26, 1972 and by the Senate on May 9, 1972.

65 N.Y. Exec. Release No. 282 (June 8, 1972).

66 *Id.* The Governor made several significant statements in his veto message. He recognized that "[t]he victims of child abuse are the young and innocent; its after effects linger for years—harming the child, his family and the society with which he must cope." *Id.* He expressed "complete agreement with the objectives of the [bill], to insure that the resources of the State, local governments and voluntary agencies will be most effectively employed in a unified fight against this emotionally crippling phenomenon." However, he concluded that "many of the key operative procedural provisions . . . [are] too vague to permit appropriate implementation without further revision. Moreover, the [bill] would impose an additional financial burden . . . without assurance that adequate funds would be available." *Id.* The Governor expressed hope that further study and modification would result in a measure in which he could concur.

67 One aspect of the proposed measure perhaps deserves further consideration. The goals of adequately representing the child and of investigating and preparing the case are not necessarily at odds with one another. Future reforms might combine the roles of the Law Guardian and the short-lived Children's Attorney in a single child representation specialist. The problems present in serving dual interests, such as those of attorney and guardian *ad litem* (*see* note 48 *supra*), must first be solved.

sel" the results can be tragic. As the French philosopher Jean-Jacques Rousseau recognized over two centuries ago, the time is at hand for us to "speak less of the duties of children and more of their rights."[68]

*Eugene N. Kaplan*

[68] *Quoted in* THE BATTERED CHILD ix.