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DELINQUENT, DEPENDENT, AND NEGLECTED CHILDREN UNDER THE FAMILY COURT AND YOUTH COMMISSION ACTS

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NOT QUITE a decade ago, an article surveying the legal machinery in Illinois for convicting, sentencing, and correcting youthful offenders was entitled "Criminals or Delinquents?—Another Illinois Merry-Go-Round!"[1] This "merry-go-round" had resulted from the overlap of jurisdiction of the Family Court and the criminal court, and from the consequences attending the child's routing to one or another of a variety of correctional institutions. Since that time, the "merry-go-round" in the disposition of young offenders as between institutions has been checked by the statutory creation of the Youth Commission, but the initial problem of whether a child is to face the Family Court or the criminal court remains unchanged for constitutional reasons.[2] Meanwhile, substantial questions of justice persist concerning the relationship of State, parent, and child and concerning the techniques to be employed by the Family Court in working out those relationships in any concrete case.

WHAT HAS BECOME OF THE "MERRY-GO-ROUND"?

The Family Court, in Cook County a branch of the Circuit Court and elsewhere a function of the County Court, was established by statute[3] to exercise the historic chancery jurisdiction over the persons and property of infants.[4] It serves dependent and neglected children under the age of eighteen as well as delinquent boys under seventeen and girls under eighteen.

It is sometimes startling to attorneys, who have never before ap-

[1] Weiss, 34 CHI. B. REC. 151 (1953).

[2] People v. Lattimore, 362 Ill. 206, 199 N.E. 275 (1935).

[3] ILL. REV. STAT. ch. 23, §§ 2001-36 (1959).

[4] People *ex rel.* Ryan v. Sempek, 12 Ill.2d 581, 147 N.E.2d 321 (1958).

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peared in the Family Court but who are accustomed to traditional criminal procedure, to find the Family Court hearing on the case of a youth charged with being a delinquent child conducted by the Family Court in privacy as an informal, non-criminal proceeding meant to dispense individualized justice. This discomfiture is understandable, not only because of the novelty of the experience to the attorney, but also because the court has the option of committing a delinquent child beyond the control of his parents to the Youth Commission—a destination mandatory for a child in the same age bracket convicted in the criminal court of any crime except treason, homicide, rape, or kidnapping.[5] It is small comfort to be told that the court will do so only as a last resort, for this power is a sweeping one. Under the Family Court Act a delinquent child is defined as one who

> violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; . . . or wanders about the streets in the night without being on any lawful business or lawful occupation; . . . or uses vile, obscene, vulgar, profane or indecent language in any public place or about any schoolhouse; or is guilty of indecent or lascivious conduct.[6]

This definition holds a young person—by hypothesis, one who has not attained the age of wisdom—to a higher standard of conduct than that required of his elders, who generally loaf or swear with impunity. In the interest of fair play, it is suggested that no child should be exposed by statute to "correction" by the State except for behavior reasonably demonstrating that, without such measures, he is unlikely to be able to conform to the standards which will be expected of him as an adult. The requirement that a child, like an adult, conform to the laws of this State is certainly one valid standard, but discussion of the other elements of the definition of "delinquent child" is beyond the scope of this article.

A violation of the law of the State may also be a "crime" when committed by a child who has attained the age of criminal responsibility. It had been the plan of the Family Court Act that, in the case of a delinquent child above the age of criminal responsibility whose act constituted a violation of the criminal law and who might not benefit from treatment in the Family Court, the court should have

[5] ILL. REV. STAT. ch. 38, §§ 801, 803 (1959).

[6] ILL. REV. STAT. ch. 23, § 2001 (1959).

the discretion to permit such child to be subjected to criminal process.[7] That plan was disrupted by the decision in *People v. Lattimore*.[8] It was there held that the jurisdiction of the criminal court of Cook County was paramount, having been defined by the Illinois Constitution, and that the juvenile (now Family) court, being a creature of statute, could not "stay a court created by the constitution from proceeding with the trial of a cause jurisdiction of which is expressly granted to it by the constitution."[9]

The consequence of this decision is that the State's Attorney may determine whether a child of Family Court age who has attained the age of criminal responsibility shall be prosecuted criminally for an act in violation of the Criminal Code, or whether a proceeding in Family Court shall be permitted instead. The lodging in the State's Attorney (who may well be the only attorney in the courtroom) of the power to override the discretion of the judge creates an unwholesome situation. So far as the State represents the People as prosecutor, this interest conflicts with its interest in the child as *parens patriae*, and thus the State's Attorney does not necessarily represent the interest of the child before the Family Court.

This area of concurrent jurisdiction of the Family Court and the criminal court, complicated as it is by the transfer of responsibility from the judge to a partisan in the case to decide which court shall proceed, is the portion of the "merry-go-round" situation which remains unchanged. Had the Judicial Amendment to the Illinois Constitution succeeded in the 1958 referendum, the anomaly could have been resolved by the necessary implementing legislation. Unless and until the Supreme Court overrules the *Lattimore* case, the difficulty will remain unless: (1) judicial reform should succeed; or (2) the age of criminal responsibility be raised so as to carve out an enlarged area beneath it within which the Family Court would have exclusive jurisdiction.

In 1953, the "merry-go-round" disposition of youthful offenders came to a halt. The Youth Commission Act,[10] passed in that year, was designed to systematize the sorting out of individuals to appropriate institutions, and the Commission obtained a facility for this purpose with the opening of the diagnostic reception center for boys near Joliet early in 1959.

[7] ILL. REV. STAT. ch. 23, § 2014 (1959).

[8] 362 Ill. 206, 199 N.E. 275 (1935).

[9] *Id.* at 209, 199 N.E. at 276.

[10] ILL. REV. STAT. ch. 23, §§ 2501–32 (1959).

Prior to 1953, the institution to which an offender might be committed depended upon the court through which he had been channeled, the attitude of the State's Attorney, and the determination of the judge. Neither the individual nor the institution had any recourse if the individual were sent to a facility unsuited to his needs.[11] The Youth Commission was established to take over existing correctional institutions and services, to receive boys under seventeen and girls under eighteen committed to it either by the Family Court or the criminal court, to make a diagnosis, and to establish a program for each individual.[12] The Commission may place the person in whichever of its facilities it deems most appropriate, or may transfer him from one such institution to another; it may order release on parole or order replacement or renewed parole; or it may even discharge the person from its custody and control. Its control over a person committed to it may never extend beyond the time he becomes twenty-one. Control may be terminated earlier by an order of discharge by the Commission, or by the expiration of the maximum sentence in the case of a criminal; if the maximum sentence has not expired and the person committed criminally has not been discharged by the Youth Commission by his twenty-first birthday, he must be turned over to the Department of Public Safety or to the Parole and Pardon Board.[13]

In addition to these duties, administered by its Division of Correctional Services, the Youth Commission also administers a Division of Community Services to be concerned with the prevention of delinquency and the development of and cooperation with community resources.[14]

The Youth Commission Act has withstood an attack upon its constitutionality as an unlawful delegation of judicial power, in a case involving the sentencing of two boys under seventeen on a criminal charge. In *People v. Fowler*[15] the court stated:

> In performing its duties with respect to the management and rehabilitation of the offender, the commission is merely executing the sentence. The sentence itself is not changed or altered, and statutes prescribing such duties do not confer judicial powers on the administrative body.[16]

[11] Weiss, *supra* note 1.

[12] ILL. REV. STAT. ch. 23, §§ 2501–32 (1959).

[13] ILL. REV. STAT. ch. 23, § 2523 (1959).

[14] ILL. REV. STAT. ch. 23, §§ 2525, 2526 (1959).

[15] 14 Ill.2d 252, 151 N.E.2d 324 (1958).

[16] *Id.* at 260, 151 N.E.2d at 329.

WHAT OTHER PROBLEMS ARE CURRENT?

Both in delinquency and in dependency or neglect cases the Family Court must decide whether a child should remain in his home, and it has the power to order changes of custody, either temporarily, as by placement in a foster home or other facility (including the Youth Commission in the delinquency cases), or permanently, in the instances where it may appoint a guardian to consent to adoption.[17] (At the time of this writing, there remains a discrepancy between the provisions of the 1959 Adoption Act as to when a child is adoptable, and section 15 of the Family Court Act; this should be remedied before adjournment of the current session of the General Assembly.)[18]

The Family Court Act definition does not distinguish between a "dependent" child (ordinarily thought of as one whose parents through some misfortune are unable to provide for him) and a "neglected" child (ordinarily thought of as one whose parents have not bothered to care for him); moreover, it includes every child under eighteen dependent upon the public for support.[19] Inherent in this definition is a question of public policy: that is, whether measures appropriate for exercise by the court in a case of parental neglect should apply equally in the case of dependency or in the case of a child otherwise well cared for who may be sustained in his home by public funds. This question, best directed to the legislature, goes to the underlying problem of when the State may or should intervene in the parent-child relationship and in that sense is related to questions raised in recent cases.

Considerations that should guide the court in determining when and whether to sever a parent-child relationship were discussed in *Giacopelli v. Florence Crittenton Home*,[20] one of the rare dependency cases to have been appealed. A married woman had concealed from her husband the birth of their child, had represented the child to be illegitimate and had consented to a finding of dependency, granting consent to its adoption. The Supreme Court of Illinois ruled in a dispute between the natural parents and the adoptive parents that the natural parent's superior right to the custody of his child is not absolute and

17 ILL. REV. STAT. ch. 23, §§ 2009, 2012, 2013 (1959).

18 *Compare* ILL. REV. STAT. ch. 4, § 9.1-1 (1959), *with* ILL. REV. STAT. ch. 23, § 2026 (1959).

19 ILL. REV. STAT. ch. 23, § 2001 (1959).

20 16 Ill.2d 556, 158 N.E.2d 613 (1959).

only obtains when it is in accord with the best interest of the child. The parent need not be shown to be totally unfit to rear the child in order to deny to him the custody of the child. Fitness of the parent is only one of the factors to be considered in determining how the best interest of the child may be served.[21]

A concurring opinion expresses concern that "some contours should be given to the nebulous phrase 'best interests of the child.' " "To deprive natural parents of their child, in my opinion, requires more than someone else's idea of what is best for it, even if that someone else is a court,"[22] stated Justice Klingbiel, who, along with two other members of the court, felt it necessary that the parents be found unfit before their child be taken from them against their will.

The unpublished decretal order in the matter of the Kozmin children[23] fills in some of these contours. A Russian couple had come to the United States with three boys who were declared to be dependent children and placed in foster homes because of the parents' commitment to a mental hospital in consequence of their difficulties in adjusting to their life here. After the discharge of the parents from the hospital, another child was born. Not long afterward the family went on relief and the fourth child was thereupon declared a dependent and ward of the court. The parents' desire to take all four children with them when they returned to Russia required the court to decide whether to relinquish its guardianship over the children. In its decretal order the court adverted to the presumption that the parental right to the care and custody of children is good as against all the world unless that right is forfeited. Under our form of government, the order continues:

> We respect and maintain the dignity of the individual and uphold his right to live naturally and freely in and with his family so long as he respects those same rights in others. The state is subservient to the individual and his family. Other governments may hold that the state is paramount and all other rights are derived from it and the individual only lives for and by the government. The freedom to live and pursue happiness in accordance with our dedicated philosophy must nevertheless be recognized and upheld by our courts.[24]

In drawing the conclusion that the State had not sustained its burden of proving the unfitness of these parents, the trial court's order stated:

> As we respect race and color, so under our principles of democracy we respect the creed of the individual. Creed is defined as belief, faith, religion, philosophy. If natural parents are to have their children, then they must have

[21] *Id.* at 565, 158 N.E.2d at 618.

[22] *Id.* at 567, 158 N.E.2d at 619.

[23] In the Matter of Kozmin, Decretal Order Nos. 220638, 220639, 220640, 237888, Family Ct., Cook County, August 19, 1959.

[24] *Id.* at 4.

the right to care, educate and train them. *We cannot, therefore, substitute our beliefs or restrict their limits of education and training so as to fit our standards.*[25]

A recent serious threat to the effective function of the Family Court consists of dictum in the case of *In re Dependency of Rosmis.*[26] The court there upset a finding of dependency with appointment of a guardian and change of custody for lack of the jurisdictional findings that the mother was an "unfit or improper" guardian, or was "unable or unwilling to care for, protect, train, educate or discipline" her children. However, the court went on to condemn the use of probation officers' confidential reports in such proceedings *under any circumstances.*

It has not been customary and it certainly would be improper for the Family Court to find jurisdictional facts—for example, acts constituting the alleged delinquency on the part of a child, or abandonment of a child, or unfitness of a parent—on the basis of such a confidential report. Of those facts it is necessary that there be substantial legal evidence in the record regardless of the informality of the hearing. Once the jurisdiction of the court is established, however, the Family Court Act enjoins that

> the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance.[27]

In the exercise of this duty the court is aided by probation officers whom the statute requires "to make such investigations as may be required by the court."[28] The probation officer "is practically a guardian ad litem" for the child and is an assistant of the court in the performance of judicial functions.[29] The proceedings before the Family Court rarely smack of adversary proceedings (although under section 2002 any interested party may request trial by a jury of six),[30] and, indeed, the jurisdictional facts are commonly admitted by the persons before the court.

Before the dictum in the *Rosmis* case is announced as a governing point of law in Illinois, it behooves the courts at the appellate level to make a careful analysis of all factors involved. The child before the

[25] *Id.* at 8. (Emphasis added.)

[26] 26 Ill. App.2d 226, 167 N.E.2d 826 (1960).

[27] ILL. REV. STAT. ch. 23, § 2001 (1959).

[28] ILL. REV. STAT. ch. 23, § 2008 (1959).

[29] Witter v. Board of Comm'rs, 256 Ill. 616, 100 N.E.148 (1912).

[30] ILL. REV. STAT. ch. 23, § 2002 (1959).

Family Court is legally an infant whose "liberty" is already severely restricted by the State with respect to school attendance, employment and property rights, and who ordinarily owes his services, wages and obedience to his parents who have the power to choose for him, among other things, his domicile and his baptismal faith. The judge in the Family Court must always be alert to a situation in which the child is as much in need of liberty from his circumstances as liberty to remain there. As the statute implicitly recognizes,[31] there may well be matter as useful to the judge in developing a program of action as it would be damaging to the child for him to disclose. The trial court's consideration of a probation officer's report, in conjunction with the evidence in the record, as he attempts to resolve the human problem before him in the spirit of the act, should not be hastily condemned.

The question for analysis is whether due process for children invariably requires the full panoply of adversary procedure, or whether due process may not be fully served by some better adapted technique of achieving the substance of justice.

THE NEXT DECADE

This review of Family Court law and its development during the past decade suggests at least two groups of questions for consideration in the decade ahead:

I. To what extent should the jurisdiction of the Family Court be exclusive and to what extent concurrent with that of the criminal court? How shall this be achieved, and who should be empowered to decide which avenue shall be taken in the case of concurrent jurisdiction?

II. When may, or should, the State interpose its control over a child, and what measures should it be empowered to take in various circumstances?

(a) What is a fair and realistic definition of "delinquent" behavior?

(b) Are "dependency" and "neglect" sufficiently differentiated that differing legal consequences should appropriately be attached to each?

(c) Since the interests of the State, of the parent and of the child are not necessarily identical, who represents the child before the Family Court?

(d) What is due process for children? Are the considerations underlying decisions in cases involving adults applicable where children are concerned?

[31] ILL. REV. STAT. ch. 23, §§ 2001-36 (1959).