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### Child Protection Legal Process: Comparing the United States and Great Britain

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# CHILD PROTECTION LEGAL PROCESS: COMPARING THE UNITED STATES AND GREAT BRITAIN

*Donald N. Duquette\**

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## I. INTRODUCTION<sup>1</sup>

The legal response to child maltreatment—or the risk of child

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1. Thanks to the many kind persons in Britain who opened their courts, offices, minds and hearts to me in the course of my visit there. From January through June 1991 I and my family

maltreatment—varies greatly from society to society and has been little studied, in part because of the idiosyncrasies of community values, social organization, history and legal traditions.<sup>2</sup> Cross-country comparison of child abuse and neglect is especially difficult because the ambiguity of social standards and the imprecision of terms used makes it difficult to define the specific behavior one is studying. Even though child maltreatment is widely prohibited, the definition of what actually constitutes child abuse and neglect is not clear *within* a particular country, much less uniform from one society to another.<sup>3</sup> This article tries to avoid some of the difficulties of cross-country comparisons by examining the child protection legal process of jurisdictions that share relatively similar social values and a common language—the United States, England and Wales, and Scotland.

With fifty-three separate jurisdictions in the United States, each having its own responsibility for child protection, drawing detailed comparisons with Great Britain is difficult. Nonetheless, even though child protection laws vary among the U.S. jurisdictions, there is some consistency among state laws because of the compelling influence of the federal government and the rich interstate discourse over the years. Some general comparisons are possible. What variation in child protection law and policy can be found by looking beyond U.S. borders? What lessons do these variations in philosophy and procedures have for us? This article is a modest attempt to look at these questions in countries with histories and cultures similar to our own.

After looking, in Sections II and III, at the history and cultural context of child protection law in the three legal systems of the United States, England and Wales and Scotland, this article describes and compares the court structures and the legal roles and actors in Sections IV and V. The more substantive issues of legal standards for intervention and court procedures are outlined in Sections VI and VII.

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lived in England while on sabbatical from the University of Michigan. I traveled extensively and visited courts, guardians *ad litem*, solicitors, barristers, social workers and policy makers throughout England and Scotland. A particular thanks is due to Carolyn Okell Jones, psychiatric social worker in London; Richard White, solicitor, London; Allan Levy, Q.C. London; Andrew Lockyer, University of Glasgow and Chair, Children's Panel in Strathclyde, the largest Children's Panel in Scotland; Mervyn Murch, of the Socio-Legal Centre for Family Studies, University of Bristol; and to the wonderful library and its staff at the National Children's Bureau, London. Thanks again to David Chambers for his review of early drafts and invaluable support.

2. *But see* CHILD ABUSE AND NEGLECT: CROSS-CULTURAL PERSPECTIVES (Jill E. Korbin ed., 1981).

3. *See* Jill E. Korbin, *Child Abuse and Neglect: The Cultural Context*, in *THE BATTERED CHILD* 23 (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987).

The differing approaches to child protection offer starker contrasts for the American reader than does interstate comparisons within the United States. The analysis reveals lessons for both the United States and the United Kingdom. For example, the United Kingdom provides more social supports for families and quite explicitly adopts a public policy emphasizing private ordering of family relationships—but with a public responsibility to assist families in raising their children. In the United Kingdom, the broader community, beyond the professional social workers and lawyers, is engaged in quite different ways in the general social obligation to look after children's welfare. The United Kingdom uses area coordinating committees to provide services outside of the court in suspected child abuse and neglect cases. In court, the British rely upon a lay volunteer judiciary. Yes, Americans, the judges are volunteers and generally not lawyers. The United States, on the other hand, elects its professional judges, uses jury trials, and increasingly allows press access to child protection proceedings. Representation of children offers a useful comparison as these countries develop and evaluate their child advocacy systems.

The jurisprudence of recent law changes in England and Wales should encourage the United States to reevaluate its current potpourri of standards for state intervention. The British, on the other hand, might look closely at the American practice of regular dispositional review hearings following a child being placed in care under state control.

## II. MODERN HISTORY OF CHILD PROTECTION LAWS

The beginning of child protection laws in the United States is traced to the oft told story of Mary Ellen, beaten and abused by her foster parents in New York in 1874. In the absence of laws protecting children from abuse, concerned citizens invoked existing animal cruelty laws, arguing to a court that as a member of the animal kingdom, Mary Ellen was due these same protections.<sup>4</sup> The court agreed, Mary

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4. Jacob A. Riis, *Little Mary Ellen's Legacy*, in *THE CHILDREN OF THE POOR* 142, 142-43 (1892). This "myth" of Mary Ellen appears in much of child welfare literature. Professor Thomas says the historical facts do not conform to the myth. The historical facts are that the case was not brought by the Society for the Prevention of Cruelty to Animals on the theory that Mary Ellen was entitled to the protection afforded to animals but by Henry Bergh, founder and president of the SPCA acting as an individual and using the Society's lawyer, by a petition for a writ *de homine replegiando*, an old English writ to remove custody of one person from another. On the basis of this writ the court issued a special warrant to bring the child before the court. Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293, 307-08 & n.59 (1971-72).

Ellen was protected, and the case sparked the creation of Societies for the Prevention of Cruelty to Children (SPCC) throughout America. These societies acquired police powers and enormous influence over the lives of the children whom they rescued. Legislation was passed in many states authorizing the SPCC to investigate matters of child cruelty and bring complaints to law enforcement officials and the courts whenever any laws affecting children were violated. By 1900, 161 societies in America were devoted to protecting children, animals or both.<sup>5</sup> Gradually the law enforcement approach gave way to a less punitive approach aimed at strengthening the child's own home.<sup>6</sup>

The National Society for the Prevention of Cruelty to Children (NSPCC), founded in England in 1884 by Benjamin Waugh, received its Royal Charter in 1895.<sup>7</sup> The Royal Scottish Society for the Prevention of Cruelty to Children (RSSPCC), which also began in 1884 as a Glasgow Society, received its Royal Charter in 1922.<sup>8</sup> The campaign of the NSPCC led to the Prevention of Cruelty Act in 1889, which empowered courts to remove ill-treated children from their parents.<sup>9</sup> The view that children were entitled not only to protection from harm but also had a right to a proper upbringing led to the creation of special courts in Britain to hear matters affecting children and to the introduction of a welfare (or best interests of the child) approach in legislation and practice.<sup>10</sup> Cases in which children were either the offenders or those offended against were heard by magistrates with special interest in this age group.<sup>11</sup>

By the middle of the 20th century, however, child maltreatment remained a hidden problem in both the United States and Great Britain. It was the work of C. Henry Kempe that brought the plight of abused children to national and international attention. In 1961, Kempe and others completed an influential study that found hundreds

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5. Thomas, *supra* note 4, at 312.

6. *Id.* (citing ALFRED KADUSHIN, CHILD WELFARE SERVICES 202-56 (1967)).

7. ANNE ALLEN & ARTHUR MORTON, THIS IS YOUR CHILD: THE STORY OF THE NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN 19, 32 (1961).

8. BRIAN ASHLEY, A STONE ON THE MANTLEPIECE 29, 113 (1985).

9. NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, OCCASIONAL PAPER NO. 9, CHILD PROTECTION POLICIES AND PRACTICE IN EUROPE 54 (Allan Sale & Murray Davies eds., 1990) [hereinafter CHILD PROTECTION, EUROPE].

10. See, e.g., Britain's Children Act of 1908 and the Children and Young Persons Act of the 1930s; Nigel Bruce, *Historical Background*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM 3, 4 (F.M. Martin & Kathleen Murray eds., 1982).

11. Bruce, *supra* note 10, at 4.

of children severely injured by their parents. They coined a new term, the "battered child syndrome," to describe the phenomenon.<sup>12</sup>

Motivated by Kempe's findings, the U.S. Children's Bureau formulated a model child abuse mandatory reporting law in 1963. Legislative action in the United States quickly followed. Within three years every state and the District of Columbia had enacted a reporting law, many patterned after the Children's Bureau model.<sup>13</sup>

Great Britain, as well as the United States, was rallied to action by the work of C. Henry Kempe. England's NSPCC linked with Kempe when setting up the Battered Child Research Department, which published numerous papers between 1969 and 1972 to disseminate knowledge and arouse professional interest in the problem.<sup>14</sup>

Then, in 1973 in Brighton, England, a little girl named Maria Colwell was killed by her stepfather. A public inquiry into her life and the circumstances of her death focused British attention and created unprecedented national interest in child abuse and neglect. A purely advisory government circular of the time had a profound impact on the structure and policy of child protection in England at the time.<sup>15</sup> Heightened concern about child abuse since the Colwell affair has led to major inquiries each year into a child death or child protection scandal. Often these investigations have revealed evidence of failures in professional practice and in the coordination of service.<sup>16</sup>

In the mid-eighties, the United Kingdom Department of Health and Social Security reviewed the findings of the Child Abuse Inquiries and reviewed the management of child abuse cases.<sup>17</sup> Their findings were eventually published in a highly regarded 1988 circular called "Working Together"<sup>18</sup> that emphasized inter-agency coordination and

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12. C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

13. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, MODEL CHILD PROTECTION ACT WITH COMMENTARY, Washington, D.C.: Government Printing Office (1977); U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT U.S. DEP'T OF HEALTH AND HUMAN SERVS., CREATING CARING COMMUNITIES: BLUEPRINT FOR AN EFFECTIVE FEDERAL POLICY ON CHILD ABUSE AND NEGLECT 17-18 (1991) [hereinafter U.S. BLUEPRINT '91].

14. CHILD PROTECTION, EUROPE, *supra* note 9, at 54; *see, e.g.*, EDWIN A. BAHER ET AL., AT RISK: AN ACCOUNT OF THE WORK OF THE BATTERED CHILD RESEARCH DEPARTMENT, NSPCC 3, 6 (1976).

15. BAHER, *supra* note 14, at 6. This circular was subsequently published in 1988 under the title of WORKING TOGETHER, *see infra* note 18.

16. BAHER, *supra* note 14, at 6.

17. CHILD PROTECTION, EUROPE, *supra* note 9, at 54.

18. HOME OFFICE ET AL., WORKING TOGETHER: A GUIDE TO ARRANGEMENTS FOR INTER-AGENCY CO-OPERATION FOR THE PROTECTION OF CHILDREN FROM ABUSE (1988).

improvements in individual professional practice. "Working Together", now revised for the Children Act 1989, is widely used by child care professionals and is a comprehensive guide on the management of all forms of child abuse, and seeks national consistency in the criteria for registering cases of child abuse.<sup>19</sup>

The Children Act 1989, discussed more fully below, has been called, "the most comprehensive piece of legislation which Parliament has ever enacted about children."<sup>20</sup> The Act became effective October 14, 1991, but integrates disparate strands of existing law and also dramatically reforms the substantive law, procedure, the duties of government agencies, the responsibilities of parents and the structure and authority of the courts that deal with children.

Public concern in Scotland took a different course in the modern period resulting in the creation of the unique and much discussed Children's Hearing System. In 1961, the Secretary of State for Scotland appointed a Committee on Children and Young Persons headed by Lord Kilbrandon.<sup>21</sup> The committee report of 1964, known as the Kilbrandon Report, set forth dramatic liberal principles and recommendations and formed the basis of the Social Work (Scotland) Act 1968 which reorganized the social work department in Scotland and established the Children's Hearing System. On April 15, 1971 the Hearing System was assigned jurisdiction, previously belonging to the courts, for cases involving minors who either commit crimes or require care and protection.<sup>22</sup>

The hearing system was founded to remove as many children as possible from the ambit of the courts and a criminal justice setting.<sup>23</sup> The child's welfare was to be a paramount consideration. The Kilbrandon philosophy rests on a welfare conception of justice,<sup>24</sup> and based on these principles:

[T]o provide treatment rather than punishment; to deal with children on the basis of their needs for what ever reason they have come to official attention

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19. CHILD PROTECTION, EUROPE, *supra* note 9, at 54.

20. DEPARTMENT OF HEALTH, AN INTRODUCTION TO THE CHILDREN ACT 1989 App. (1989) [hereinafter INTRODUCTION].

21. F.M. MARTIN ET AL., CHILDREN OUT OF COURT 1-2 (1981).

22. SCOTTISH OFFICE FACTSHEET: CHILDRENS' HEARINGS 2 (1991) [hereinafter FACTSHEET].

23. Andrew Lockyer, *The Scottish Children's Hearing System: Community or State Control?*, in THE STATE AS PARENT 151, 153 (Joe Hudson & Burt Galaway eds., 1989).

24. Andrew Lockyer, *Justice and Welfare*, in THE SCOTTISH JUVENILE JUSTICE SYSTEM, *supra* note 10, at 176.



(that is, not discriminating on the basis of offence or nonoffence grounds); to pursue the child's best interests in the context of supporting the family; involving parents in all decisions and treatment; to continue with compulsory care and to change it as necessary for as long as it may be beneficial to the child to do so.<sup>25</sup>

The welfare philosophy underlying the Children's Hearing system applies to matters where young persons are accused of offenses as well as matters of suspected child maltreatment where a child may be the one offended against. The Children's Hearing deals only with dispositional questions. If a child or his parents contest the grounds for referral to the Hearing, those grounds must be established in the formality of the sheriff court. Nonetheless, it is interesting to observe that the Social Work (Scotland) Act 1968 creating the Children's Hearing system—with its emphasis on welfare—was passed one year after the U.S. Supreme Court decided *In re Gault*.<sup>26</sup> *In re Gault* held that the procedural informality of American juvenile courts did not result in the benevolent treatment of youngsters and, indeed, amounted to denial of due process for juveniles.<sup>27</sup>

In 1974, the U.S. Child Abuse Prevention and Treatment Act (CAPTA), the first major federal child protection legislation, was passed. CAPTA created the National Center on Child Abuse and Neglect (NCCAN), which administers grant programs for research, dissemination of materials and demonstration projects. NCCAN also administers state formula grant programs for which states are eligible if they comply with certain standards for state child abuse and neglect laws and child protective agency operations.<sup>28</sup>

The other major federal initiative in the United States was the Adoption Assistance and Child Welfare Act of 1980, which conditions state receipt of federal money on their compliance with certain policy and procedural standards.<sup>29</sup> States have generally reformed their child welfare legal procedures to conform with these federal requirements. Debate continues as to whether the federal role in child protection is adequate. Most recently the U.S. Advisory Board on Child Abuse and Neglect has declared that the United States child protection system is

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25. Lockyer, *supra* note 23, at 153; see also REPORT OF THE COMMITTEE ON CHILDREN AND YOUNG PERSONS (1964).

26. *In re Gault*, 387 U.S. 1 (1967).

27. *Id.* at 21.

28. U.S. BLUEPRINT '91, *supra* note 13, at 20-21.

29. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

in crisis and has called for a reformed and more aggressive federal role.<sup>30</sup>

### III. CULTURAL CONTEXT

#### A. *Common Ground: Quest to Protect Children from Harm and Provide for their Basic Needs*

Although child rearing practices vary from one society to another, there is a common prohibition against child maltreatment. "Child maltreatment," however, may be defined by each social group. Children and their parents in these countries also face similar social and economic problems—poverty, drug abuse, unemployment, homelessness, single parenthood, limited intelligence, mental illness, etc. While the intensity and severity of these problems varies from place to place, the underlying causes of family dysfunction in the United States and Great Britain seem similar. The scourge of crack cocaine does not seem to have assailed the child protection system in Great Britain as it has in the United States. Nonetheless, the variation in severity of family problems within the United States and Great Britain and between each of these countries seems to have more to do with urbanization and poverty than it does with differences in cultural values.

Similarly, families with young children have common needs for child rearing skills, financial and emotional support, education and health care. The fundamental needs of children for food, clothing, shelter, education, emotional nurturance, and stability—are also common. Children have both a moral and legal right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse.<sup>31</sup> Children also have a right to grow up in a family environment, in an atmosphere of happiness, love and understanding.<sup>32</sup> Despite the commonality of the rights and problems, the governments studied here choose to respond to children's needs and inadequate parenting in quite different ways.

One cannot review a country's child protection legal system, however, without some reference to its social welfare system—that is, its voluntary government programs that provide families support and perhaps monitoring from the society at large. Child protection, many

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30. U.S. BLUEPRINT '91, *supra* note 13, at vi-ix.

31. U.N. Declaration of the Rights of the Child art. 19, § 1.

32. *Id.* at pmbl.

would argue, begins with family supports—with adequate food, clothing, shelter, employment and health care for the child and his family. These welfare structures operate hand in hand with legal structures in each of the countries studied both by providing services that prevent child abuse and neglect and by offering rehabilitative services for families where maltreatment has been formally identified.

Child protection presents an interesting and unique blend of social concern for the welfare of the child and his parents, and imposition of social control. Different countries have struck different balances between compassion and coercion when it comes to protecting youngsters from harm. On the compassionate side, some choose to provide more support to mothers and fathers in the form of family job leave, children's tax credits, and health care. In some societies, extended families play a more significant role in child rearing. Emphasizing social control, other governments place a greater reliance on law enforcement and courts to protect children. In the more coercive countries, like the United States, even the agents of social control in child protection—social workers, police, court authorities and related professionals such as psychologists and therapists—operate with a mixture (or a confusion) of motives between helping and nurturing the parents on one hand, and authoritatively imposing certain societal expectations on the other.

The interaction between the formal legal process of the courts and the more informal and less coercive intervention in family life by social and health agencies is one of the salient points of contrast between the United States and Great Britain. The court system of each country studied here has a unique history and has evolved different practices as it interacts with its social welfare programs.

### *B. Home Health Visitors*

One dramatic difference between the United States and the United Kingdom lies in the fact that in Britain, home health visitors are almost universally available. Health visitors are registered nurses with advanced qualifications in social studies and public health. Most of their work involves routine screening of children under five, either at clinics or at home. Eligibility for visiting is determined demographically rather than by any test of need, and home health visitors are welcomed into the homes of princesses and paupers alike.<sup>33</sup> Health visitors

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33. ROBERT DINGWALL ET AL., *THE PROTECTION OF CHILDREN* 14 (1983) ("In 1979, 82.5

have no particular legal power to see a child nor do they control financial assistance. Access to the home is purely voluntary. Health visitors are seen as a positive source of advice and assistance by the population but also serve as the most important source of identification of children in need of protection.<sup>34</sup>

Health visitors seem to be a uniquely British institution and despite strong advocacy from leaders in child protection, such as C. Henry Kempe,<sup>35</sup> they have never taken root in the United States. The most recent report of the U.S. Advisory Board on Child Abuse and Neglect recommends as one of its top two priorities that the federal government implement a universal voluntary neonatal home visitation system.<sup>36</sup> A common comment heard from British child care professionals is, "I do not know how we would get along without health visitors; I cannot believe America does not have them." Similar health visitor programs aimed at very young children and their parents are common in several other European countries such as Denmark, Finland, France and Sweden.<sup>37</sup>

### C. *Mandatory Reporting*

Mandatory reporting of suspected child abuse and neglect has been a feature of the United States child protection system since the Children's Bureau first proposed a model child abuse mandatory reporting law in 1963.<sup>38</sup> All states now require reporting by professionals likely to come into contact with children and provide for criminal and civil sanctions for failing to report.<sup>39</sup>

The United Kingdom does without the requirement of mandatory

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percent of all children in England under five received a visit in their home [from a home health visitor].").

34. *Id.*

35. C. Henry Kempe, *New Vistas in the Prevention of Child Abuse, in Child Advocacy and Pediatrics*, REPORT OF THE EIGHTH ROSS ROUNDTABLE ON CRITICAL APPROACHES TO COMMON PEDIATRIC PROBLEMS, Columbus, Ohio, Ross Laboratories (1976); C. Henry Kempe, *Approaches to Preventing Child Abuse: The Health Visitors Concept*, 130 AM. J. OF DISEASES IN CHILDHOOD 941 (1976); C. Henry Kempe, *Family Intervention: The Right of All Children*, 56 PEDIATRICS 693 (1975).

36. U.S. BLUEPRINT '91, *supra* note 13, at xix.

37. CHILD PROTECTION, EUROPE, *supra* note 9, at 15, 18, 20, 46. Britain also has a midwifery service intended to provide support during pregnancy and the first fortnight (two weeks) after birth.

38. See U.S. BLUEPRINT '91, *supra* note 13, at 18.

39. *Id.* at 18; ROBERT M. HOROWITZ & HOWARD A. DAVIDSON, *LEGAL RIGHTS OF CHILDREN* 286 (1984).

reporting<sup>40</sup> as does the rest of Europe. This may not be a matter of great practical significance in Britain, however, because any child care professional who fails to report relevant information to the local authority's social services department is likely to face public censure and professional or organizational disciplinary action.<sup>41</sup> Even though the criminal and civil penalties are rarely invoked in the United States, the statutes serve to set forth a clear societal expectation and duty that presumably overcomes the natural reluctance of many professionals to make such reports. There is some interest in Europe in exploring the mandatory reporting if it would improve the level of protection afforded children. Nonetheless, even though the American system identifies a large number of children per year who may be victims of child abuse or neglect, the United States experience is hardly compelling or without criticism.

In 1987 in the United States, 2.2 million children were reported for suspected child abuse or neglect.<sup>42</sup> Yet the percentage of unfounded reports, that is, those reports dismissed after an investigation finds insufficient evidence upon which to proceed, is estimated to be between sixty and sixty-five percent.<sup>43</sup> A burden of privacy invasion is imposed by the vast amount of reporting that occurs, creating a tone of government snooping rather than helping. A large number of highly trained personnel devote themselves to investigation rather than providing assistance to families. The state reporting systems create a registry of reports received and as more officials request access to these registries for such things as day care and foster care licensure and screening camp counselors, the government agencies will have to undergo greater care and expense in investigation, fact-finding, and due process for those accused of child maltreatment who seek expungement from the central registries. Unlike the situation in Great Britain, listing a child on a central registry in the United States does not necessarily entitle a

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40. DINGWALL ET AL., *supra* note 33, at 11.

41. *Id.*

42. Douglas J. Besharov, *Gaining Control Over Child Abuse Reports*, PUB. WELFARE, Winter 1990, at 36.

43. *Id.* at 37. The U.S. Department of Health and Human Services in *Study Findings: Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988* says that "in 1986, the alleged maltreatment was founded or indicated for an estimated 871,300 children, or 53% of those who had been officially reported to CPS. Maltreatment was unfounded for the remaining 786,300, or 47% of those reported." U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *STUDY FINDINGS, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988*, 6-6 (1988) [hereinafter *STUDY FINDINGS*].

child to a key social worker, additional services or more careful monitoring of the child's situation.<sup>44</sup>

On the other hand, a large number of endangered children are *still not reported* to Child Protective Services (CPS). In a 1988 United States government study, only forty-six percent of the children identified as experiencing harm from abuse or neglect were known to CPS agencies through official, screened-in reports.<sup>45</sup>

#### *D. Structure of Child Protective Services*

In the United States, child protective services are generally specialized social services, where social workers trained specifically in child maltreatment are assigned to investigate and handle cases of suspected child abuse and neglect. Britain, by contrast, with the notable exception of the offices of the NSPCC,<sup>46</sup> takes a generic approach to delivery of all social services so that social workers in a local authority take responsibility for administering a range of services. A worker in England, Scotland or Wales may have a caseload that includes elderly persons, those with a mental or physical disability, unemployed, or homeless persons and victims of child abuse. Interestingly, voices in the United States, criticizing the bureaucratic categorization of social services in America, call for a more integrated, generic social work approach,<sup>47</sup> while some in Great Britain discuss the advantages of a specialized protective services function and harken back to a time in the fifties and sixties when specialization in social work was the norm.

In England and Wales, responsibility for receiving complaints and investigating and handling cases of suspected child maltreatment rests with the local authority, essentially equivalent to the *county* in the United States. Most policies and procedures are uniform throughout the nation, however, under the authority of the Department of Health.

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44. The visitor must be careful not to idealize the "other system." Carolyn Okell Jones, a psychiatric social worker and recognized expert in child abuse and neglect, among others, raises concern about children placed on the child abuse register, especially in high caseload areas like London, where the promise of a key worker or access to service is not fulfilled. In such cases the criticism that government energy and resources are devoted more to investigation than therapeutic assistance to a family applies to the United Kingdom as well as the United States. Interview with Carolyn Okell Jones, psychiatric social worker, in London, England (Apr. 24, 1992).

45. STUDY FINDINGS 1988, *supra* note 43, at 7-1.

46. NSPCC enjoys a unique status in British child protection. It is a private charity specializing in child protection and is specially authorized by law to initiate legal protection proceedings.

47. See, e.g., RICHARD WEISSBOURD, MAKING THE SYSTEM WORK FOR POOR CHILDREN (1991).

Social workers from the local Social Services Department investigate cases of potential abuse, coordinate with day care workers, teachers, pediatricians, health visitors, local police, and with the Area Child Protection Committee described below. If necessary they apply to (i.e. petition) the local courts for child protective orders.

The Scottish social services system differs only slightly from England and Wales. Like England and Wales, child welfare is only part of the social work department's broader responsibility to deliver social services.<sup>48</sup> The field social workers responsible for providing services for children's hearings normally work in area teams with generic, non-specialized caseloads. Thus, there are generally no specialized child protective services workers in Scotland of the sort found in the United States. Strathclyde, however, the local authority that includes Glasgow, the largest authority in Scotland, achieves some measure of specialization. Social workers in Strathclyde concentrate on one of three general areas: Care of Children, Adult Care and Care of Elderly Persons.<sup>49</sup>

*E. Mediating Structures: Area Child Protection Committees, Child Protection Conferences and Child Abuse Registries*

Although many states in the United States have legislative mandates for multidisciplinary child abuse teams,<sup>50</sup> these are, with few notable exceptions, little relied upon in practice by the child protection agencies in the daily decision-making on their cases. England and Wales, in contrast, have extensive and well used "Area Child Protection Committees" (ACPCs) that coordinate intervention of health and welfare authorities in families where child abuse and neglect is suspected.<sup>51</sup> The Area Child Protection Committees cover the whole of England and Wales with each local authority generally having one committee. Scotland has a similar arrangement called "Area Review Committees." The ACPCs and Scottish Area Review Committees are intended to develop joint management policies for child protection

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48. Created by the Social Work (Scotland) Act 1968, which also created the Children's Hearing System.

49. See STRATHCLYDE REGION CHILDREN'S PANEL, PANEL MEMBER HANDBOOK 1990, 5 (1990) [hereinafter HANDBOOK].

50. HOROWITZ & DAVIDSON, *supra* note 39, 292. See also THE NEW CHILD PROTECTION TEAM HANDBOOK 349-53 (Donald C. Bross et al. eds., 1988).

51. See HOME OFFICE ET AL., WORKING TOGETHER UNDER THE CHILDREN ACT 1989: A GUIDE TO ARRANGEMENTS FOR INTERAGENCY CO-OPERATION FOR THE PROTECTION OF CHILDREN FROM ABUSE §§ 2.1-2.4 (1991) [hereinafter WORKING TOGETHER 1991]; see also DINGWALL ET AL., *supra* note 33, at 123.

among social services departments, the police, medical practitioners, community mental health workers, the education service and others involved in protecting the child at risk. The government recognizes that cooperation at the individual case level requires support from joint agency and management policies for child protection. Meetings of the ACPCs are held at least quarterly and provide a forum for developing, monitoring and reviewing child protection policies.<sup>52</sup>

While the ACPCs coordinate the development and implementation of policy at the local level, direct case coordination and decision-making is done at a Child Protection Conference—ordinarily convened by the local authority (or NSPCC) conducting a child protection investigation. Pursuant to these guidelines, “any concerned professional may ask the agency . . . to convene a child protection review when he or she believes that the child is not adequately protected or when there is a need for a change to the child protection plan.”<sup>53</sup> Ordinarily an initial conference takes place within eight working days of referral of an incident or suspicion of abuse to the social services department. The conference brings together family members and professionals from all the agencies which are involved with caring for and protecting these children. They share information and evaluate the family to determine what services are to be made available. The central decision to be taken at the conference is whether to place the child on the child protection register. If registration is decided, a key worker must be appointed, a social worker from either the social services department of the local authority or the NSPCC, whose responsibility it is to develop a multi-agency, multidisciplinary plan for the protection of the child. The key worker also is obliged to act as lead worker for the inter-agency work

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52. WORKING TOGETHER 1991, *supra* note 51, § 2.4. The main tasks of the ACPCs are:

- (a) to establish, maintain and review local inter-agency guidelines on procedures to be followed in individual cases;
- (b) to monitor the implementation of legal procedures;
- (c) to identify significant issues arising from the handling of cases and reports from inquiries;
- (d) to scrutinise arrangements to provide treatment, expert advice and inter-agency liaison and make recommendations to the responsible agencies;
- (e) to scrutinise progress on work to prevent child abuse and make recommendations to the responsible agencies;
- (f) to scrutinise work related to inter-agency training and make recommendations to the responsible agencies;
- (g) to conduct reviews required under Part 8 of this Guide;
- (h) to publish an annual report about local child protection matters.

*Id.* § 2.12.

53. *Id.* § 6.3.



in the case by facilitating communication among the agencies and coordinating the interagency contributions to the assessment, planning and review of this case.<sup>54</sup>

The decision to place a child on the Child Abuse Registry is done more carefully than is generally the case in the United States where a state central registry ordinarily contains cases "substantiated" by "some credible evidence" by a single worker and her supervisor after a child protection investigation. Before a child is registered in England and Wales, the Child Protection Conference must decide that there is, or is a likelihood of, significant harm leading to the need for a child protection plan. The Conference must find either of the following before a child may be registered: (1) one or more identifiable incidents that have adversely affected the child, e.g. acts of commission or omission including physical, sexual, or emotional abuse or neglect; or (2) significant harm is expected on the basis of professional judgment of findings of the investigation in this individual case or on research evidence.<sup>55</sup> The Conference is charged with determining the *cause* of the harm or threatened harm to the child.<sup>56</sup>

Once a child is placed on the register, a key worker is assigned and a review of the matter is conducted by the Conference in six months. The parents are not required to accept social services offered to them at this point and the action of the Child Protection Conference is not a legal decision that a person has abused a child.<sup>57</sup> The Conference, however, serves as an intermediate form of social intervention in the family. It escalates the public pressure and legitimates the social work activities without the clear accusations of wrongdoing and authoritarian power associated with court action.

Scotland relies upon case conferences and case registries for the same purposes as England and Wales. It also has an array of committees of local elected officials apart from the Children's Hearing Panel, who participate in child welfare decision-making in such matters as foster care licensing and adoption.

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54. *Id.* §§ 6.4-6.7.

55. *Id.* § 6.39.

56. *Id.*

57. *Id.* § 5.15.2.

#### IV. COURT SYSTEM

##### *A. United States*

Even though child protection in the United States is a matter for state and not federal jurisdiction, there are similarities in the court structure among the various states. Typically, a court of limited, statutory jurisdiction, commonly called a family court or juvenile court, has jurisdiction over child protection matters. Most family and juvenile court judges are elected and are relatively high status legal professionals. The court of general jurisdiction, i.e. circuit court, commonly has jurisdiction over private law matters of divorce and child custody but does not hear child abuse cases unless such charges are raised in the context of a private child custody dispute. Although there is a growing interest in placing responsibility for all family law matters, such as divorce, child custody, child protection, delinquency, and adoption in one court, only a few states have achieved this unity. Thus, family disputes are not integrated before a single court and coordination among courts remains an issue in most of the United States.

Accordingly, child protection cases generally take place in a juvenile or family court. Attorneys are generally present to represent all three principal interests—the state child protection agency, the child, and the parents.

##### *B. England and Wales*

###### *1. Magistrates' Court*

An American observing the English child protection process is initially struck by the fact that the principal court dealing with child abuse and neglect in England and Wales has, as its judicial officers, a panel of three lay persons serving as volunteer magistrates. The Magistrates' Court also has jurisdiction over minor criminal matters, minor civil disputes and traffic violations. The magistracy system has strong historical roots in England going back to the Justices of the Peace Act in 1361.<sup>58</sup> There are now more than twenty thousand magistrates serving throughout England and Wales. They sit in a panel of three without a jury and choose their own chair. Magistrates are expected to sit at least twenty-five days per year. This extensive voluntary system is the bedrock of the child protection legal system in England and Wales.

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58. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 318 (1985).

Magistrates are often referred to by their supporters as "the great unpaid" and by their detractors as "the great unlearned".

Only the more experienced magistrates are allowed to hear juvenile matters, and when sitting to hear juvenile matters, the court assumes a status separate from criminal or other Magistrates' Court proceedings. For example, at least one of the magistrates must be female. Magistrates are not ordinarily eligible for reappointment to the juvenile court after age fifty. The court should be parents not grandparents.<sup>59</sup> The juvenile proceedings are closed to the public and press coverage is limited. Juvenile proceedings are expected to be conducted separately from the other business of the Magistrates' Court and a courtroom is not allowed to be used for non-juvenile matters for at least one hour after the juvenile cases have been completed.

The Children Act 1989 became effective on October 14, 1991, and provides that a Family Proceedings Court be created within the Magistrates' Court, separate from the juvenile court and other jurisdictional matter of the Magistrates' Court. The Family Proceedings Court handles care proceedings (child protection proceedings) and will be staffed by members of the panel whose training and expertise qualify them for such jurisdiction. Members of then-existing juvenile court panels or domestic panels will not automatically become members of the family panel. There is some effort to create a specialized judiciary at the magistrate level to hear child care cases. One intention of the Children Act 1989 was to enable all proceedings affecting the child to be heard in the same court at the same time.<sup>60</sup> The Magistrates' Court is now the court presumed to have jurisdiction in all public law child protection proceedings and it is now more difficult to move a child protection matter to another court.

Solicitors appear for parents, the child and for the local authority. Legal guidance is given to the magistrate panel by a trained law clerk who advises them on procedural and substantive law but who participates in discussion leading to judgment only if invited to do so by the magistrates. The chairperson of the panel is definitely in control of the courtroom. The American observer finds the deference and respect given the magistrates essentially the same as that given to American

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59. Interviews with magistrates in several English courts, (Feb.-June, 1991).

60. RICHARD WHITE ET AL., A GUIDE TO THE CHILDREN ACT 1989, §§ 9.1, 9.2, 9.11 (1990).

juvenile and family court judges—even though the terms of address differ.<sup>61</sup>

The panel of magistrates is not necessarily consistent from one phase of a case to another. Although clerks may make an effort to assign cases so that at least one magistrate in the succeeding panel is familiar with the cases, they often do not. Cases may require five to fourteen separate hearings before resolution, so the lack of continuity of panel members creates problems.<sup>62</sup> This discontinuity also requires the lawyers to present the case fully at each hearing, including a full statement of facts and procedural history.

In larger cities, professional, law trained, full-time magistrates may sit alone as stipendiary magistrates to hear cases. The courtrooms run by stipendiary magistrates appear much more familiar to an American accustomed to a single professional judge hearing child protection matters.

## 2. *County Court*

The county court, with broad jurisdiction over less complex civil matters involving modest sums, is the court in which the citizen of England or Wales is most likely to appear in civil litigation. The county court judges are professionals—experienced barristers appointed by the sovereign upon recommendation by the Lord Chancellor in the same manner as the superior courts of High Court and Court of Appeals are appointed. Procedure is more simplified than in the High Court and thus the costs of litigation less. Solicitors as well as barristers may appear before the county courts.<sup>63</sup>

The county court has jurisdiction over undefended divorces and thus has authority over family proceedings, including child custody.<sup>64</sup> The county court's jurisdiction over certain family matters presents problems of coordination and consistency similar to the difficulties presented in the United States when the divorce court is faced with child protection questions. County courts are included in the coverage of the Children Act 1989 and its decisions are governed by the Act,

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61. Referring to the female chair of the panel: "Yes, Ma'am." "If you please, Ma'am." "May I proceed, Ma'am."

62. See SOCIAL SERVICES INSPECTORATE, DEP'T OF HEALTH IN THE INTERESTS OF CHILDREN: AN INSPECTION OF THE GUARDIAN AD LITEM AND REPORTING OFFICER SERVICE 43 (1990).

63. GLENDON ET AL., *supra* note 58, at 317-18.

64. *Id.*

which promises to provide greater uniformity and consistency in deciding cases affecting a child's welfare. For instance, under the Children Act 1989, care proceedings must be commenced in the Magistrates' Court and may then be allocated to the county court or the High Court depending on the complexity.<sup>65</sup> If the county court, hearing a divorce, child custody or similar matter, has concern that a child may need protection it can no longer make committal to care or supervision orders, i.e. orders that place a child in foster or residential care or under the supervision of the local authority. Unless the care proceeding has been properly assigned to the county court, that court must first invite the local authority to investigate the circumstances and decide whether to apply for a care or supervision order in magistrate's court. Such a case, however, could subsequently be assigned to county court. Some of the goals of the Children Act 1989 are to keep a matter in one court at a time, to coordinate among courts and to clarify jurisdiction among the courts.<sup>66</sup> It is intended that all proceedings involving the same child and family, wherever they are started, can be brought together and heard as a single proceeding.<sup>67</sup>

### 3. *High Court*

The High Court has a long and rich history, having been formed in 1873 to bring together the various courts of civil jurisdiction dating back to shortly after the Norman Conquest. It is now organized into three divisions—Queen's Bench, Chancery, and the Family Division—and enjoys a very high status. In all of England, a country of approximately fifty-two million people, there are only about one hundred High Court judges. A High Court judge may be assigned to any division and may theoretically exercise jurisdiction over an issue technically allocated to another division by Supreme Court rules.<sup>68</sup> In practice, however, judges rarely switch from one division to another.

The Family Division exercises jurisdiction over private law actions of matrimony, paternity, adoption and guardianship, and exercises appellate jurisdiction over adoption, child custody and child protection actions of magistrates' court.<sup>69</sup> There are approximately eighteen High Court judges who sit in the Family Division. Under the Children Act

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65. WHITE ET AL., *supra* note 60, § 9.9.

66. *Id.* § 9.2.

67. *Id.* § 9.6.

68. GLENDON ET AL., *supra* note 58, at 338.

69. *Id.*

1989, care proceedings will be concentrated in the hands of a limited number of judges with special training in children's matters.

The High Court has an inherent jurisdiction under British law that includes wardship—the most common vehicle for invoking the High Court in child protection actions. The Children Act 1989 restricts the local authority from invoking the private law remedies of the High Court when public law orders are available under the Act.<sup>70</sup> That is, in order to coordinate judicial involvement, the Children Act 1989 restricts a local authority from invoking the High Court's inherent jurisdiction to require a child to be placed in the care of, or to be put under the supervision of a local authority, or to require a child to be cared for by or on behalf of a local authority.<sup>71</sup> Those actions are generally to be brought in Magistrates' Court.

#### 4. *Crown Court*

Crown Court is a superior court of criminal jurisdiction at a level comparable to the civil jurisdiction of High Court. It is relevant to child protection in that criminal prosecution for the most serious crimes against children, such as child sexual abuse, will be heard there. Prior to the Children Act 1989, appeals from Magistrates' Court were heard in Crown Court. These appeals now go to the High Court.<sup>72</sup>

#### 5. *Appeals*

Appeals from the magistrates' courts—both for making and refusing to make any order—now lies with the High Court, a court with child welfare experience, rather than the Crown Court, a court likely to see children's legal issues only in the narrow context of criminal prosecutions.<sup>73</sup> The new Children Act 1989 made three quite important changes in the appeal route. First, the High Court and not the Crown Court, is the court of appeal for child protection matters (i.e. care proceedings); second, appeals lie both for making a care or supervision order and for refusing to make one; and third, local authorities, like every other party, have full right of appeal.<sup>74</sup>

The appeal route from decisions of the county or High Court has

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70. INTRODUCTION, *supra* note 20, ¶¶ 3.118-3.119.

71. Children Act 1989, § 100(2).

72. *Id.* § 94(1); WHITE ET AL., *supra* note 60, § 9.15.

73. Children Act 1989, § 94(1); WHITE ET AL., *supra* note 60, § 9.15.

74. Children Act 1989, § 94(1); WHITE ET AL., *supra* note 60, § 9.15.

not changed under the Children Act 1989. In each case, an appeal lies with the Court of Appeal, and leave to appeal is not required.<sup>75</sup> Child care matters can theoretically reach the House of Lords, and there have been a number of significant child law cases decided there.<sup>76</sup>

As the European Community develops, child care matters can be brought, under community law, to forums outside the country. Increasingly, the European Court of Justice is resorted to as the final authority for interpretation of European Community law, which covers certain family law matters. Child protection matters are finding their way to the European Court of Justice as parents seek review of government intervention in the lives of their children.<sup>77</sup>

### C. Scotland

#### 1. Generally

The legal system in Scotland is separate and distinct from that of England and Wales. Scottish private law is based on the Roman civil system as a result of an alliance with the continent in the fourteenth and fifteenth centuries. Since the Alliance of 1707, development of law in Scotland has been influenced largely by English common law. Parliamentary enactments in many areas of private law are made applicable to both England and Scotland. The system, however, remains a mix of civil and common law.<sup>78</sup> In criminal matters the Scottish system is completely self contained. In civil matters the Scottish courts are linked with the English system only at the supreme level of the House of Lords.<sup>79</sup> Child protection matters are heard in the first instance by either the Children's Hearing or, in cases where formal proof is required, the sheriff court.

#### 2. Children's Hearing

An American accustomed to a professional judge and a fair amount of formality in child protection proceedings is struck by a rather informal panel of three volunteer lay persons, male and female,

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75. WHITE ET AL., *supra* note 60, § 9.18.

76. See, e.g., *In re D*, 1987 App. Cas. 317 (1986) (appeal taken from Eng.); *Gillick v. West Norfolk and Wisbech Area Health Auth.*, 1986 App. Cas. 112 (1985) (appeal taken from Eng.); *A v. Liverpool City Council*, 1982 App. Cas. 363 (1981) (appeal taken from Eng.).

77. E.g., *R v. United Kingdom*, 121 Eur. Ct. H.R. (ser. A) (1987).

78. GLENDON ET AL., *supra* note 58, at 160.

79. MARTIN ET AL., *supra* note 21, at 1.

who sit to determine dispositional matters in Scottish child protection cases. The panel volunteers are recruited from a large range of occupations, neighborhoods, and income groups and serve for renewable terms of up to five years.<sup>80</sup> The regional Children's Panel Advisory Committee, with some members appointed by the local authority and some by the Secretary of State, recruit and nominate members of the Children's Panels and advise the Secretary of State on the general administration of the panels, including the need for training.<sup>81</sup> Unlike the English magistracy system, the Children's Hearing is of fairly recent origin. Lacking the long English history of the magistracy and the tradition of relying on the upper classes to sit in judgment in these cases, the composition of the Scottish panels seems more democratic than that of the Magistrates' Court despite the efforts of the English magistracy to recruit their membership from a broader spectrum of society than in former times.

The Scottish Children's Hearing is more informal than that of either England and Wales or the United States. In England, the magistrates dress in business and professional clothing and generally sit on a slightly raised dais for the bench. Questions to the participants are put through the Chair. In Scotland, the attire of the panels seem more informal and casual and hearings are conducted in a "round table" fashion with all members raising questions equally.<sup>82</sup> In a Scottish Children's Hearing one gets the feeling of meeting with extended family or neighbors rather than with judges set apart from "normal" life. Nevertheless, the distribution of membership in the Children's Panel still may not be representative of the families brought before it. When the panels were first established more than three thousand people applied for one thousand positions. The make up of the panels in 1974 was overwhelmingly middle class<sup>83</sup> while the families appearing before the panels were most likely of the working or poor classes.

The Children's Hearing has authority over cases brought to it by the reporter where either the family accepts the grounds for the referral or the sheriff court has found that the legal grounds are established. Once the grounds for referral are either accepted or established, the

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80. See FACTSHEET, *supra* note 22, at 3.

81. Bruce, *supra* note 10, at 15.

82. These observations are corroborated in STEWART ASQUITH, CHILDREN AND JUSTICE 182-83 (1983). The cover of FACTSHEET, *supra* note 22, shows a panel member in a short sleeve casual shirt as he sits at a round table with other panel members, parents and two little girls.

83. See ALLISON MORRIS & MARY MCISAAC, JUVENILE JUSTICE? THE PRACTICE OF SOCIAL WELFARE 115 (1978).



hearing discusses the whole circumstances of the child and his social background. The grounds for referral are discussed, but so are matters such as relationships within the family, progress in school, and any medical or psychiatric condition that may be relevant.<sup>84</sup> The Children's Hearing has authority to order compulsory measures of care as it thinks necessary. Its options are to discharge the referral, make a supervision order allowing the child to remain at home under the supervision of a social worker, or require a child to reside in a residential establishment.<sup>85</sup>

It is important to bear in mind that the Children's Hearing is not a court of law. Questions of fact must be referred to the sheriff court; disposition is limited to what is in the best interests of the child; punitive measures are technically not allowed. The child and his parents have no right to legal representation at public expense.<sup>86</sup> Even though a representative may attend the hearing with the family, the parents are more likely to ask a friend or relative than an attorney.

On the other hand, unlike foster care review boards in the United States, the Children's Hearing has authority not just to advise the court and the agency, but also to enter enforceable orders affecting the child, his parents and the social work department.

### 3. *Sheriff Court*

The sheriff court is the court of general jurisdiction in Scotland, with broad responsibility for both criminal and civil matters.<sup>87</sup> Scotland is divided into six sheriffdoms, each consisting of a number of sheriff districts. The majority of judicial business in Scotland, both civil and criminal, is conducted in the sheriff court.<sup>88</sup> The court's subject matter jurisdiction, which includes divorce, child custody, and guardianships, results from the history and evolution of the Scottish system of justice, as well as from specific acts of Parliament placing jurisdiction with the sheriff court. It is presided over by a single, legally qualified judge—called a sheriff.

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84. MARTIN ET AL., *supra* note 21, at 12.

85. *Id.*

86. ASQUITH, *supra* note 82, at 182.

87. See 6 LAW SOCIETY OF SCOT., THE LAWS OF SCOTLAND, STAIR MEMORIAL ENCYCLOPEDIA ¶ 1024 (1988) [hereinafter STAIR MEMORIAL ENCYCLOPEDIA].

88. *Id.*

#### 4. *Overlapping Court Jurisdiction*

Sheriff court in Scotland has broad authority over nearly all legal actions affecting a family including divorce, child custody, guardianship and even criminal actions. Consequently, the risks and problems of multiple court involvement and consequent delay, procedural confusion, and inconsistent court orders, are less than in England and Wales and certainly less than in most jurisdictions of the United States.

#### 5. *Appeals*

A child or parent who is unhappy with the decision of the Children's Hearing may appeal to the sheriff.<sup>89</sup> The sheriff may grant the appeal only if satisfied that the decision of the hearing is not justified "in all the circumstances of the case."<sup>90</sup> In allowing the appeal, the sheriff may either discharge the child from further proceedings or remand the case to a Children's Hearing for reconsideration of the original decision.<sup>91</sup> If the sheriff determines that the appeal is frivolous, he may order that no further appeal may be made for twelve months.<sup>92</sup> Any decision of the sheriff may be appealed to the Court of Session, but may be brought on a point of law only.<sup>93</sup> Some cases may be reviewed by the sheriff-principal, who is the chief judge of the district. This is not technically a review by a higher court but more like a rehearing within the same hierarchical level.

### V. LEGAL ROLES AND ACTORS

#### A. *Legal Representation of the Child Protection Agency*

##### 1. *United States*

In the United States, the child protection agency is generally represented by an attorney from the county prosecutor's office, county corporation counsel's office or the state attorney general's office. The commitment, training and experience of the government attorneys assigned to child protection is generally not high, nor is priority given to child protection legal work. Throughout the United States, social workers often appear in child protection court proceedings without legal assis-

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89. Social Work (Scotland) Act 1968, ch. 49, § 49(1) (amended 1972).

90. *Id.* § 49(5).

91. *Id.* § 49(5)(b).

92. STAIR MEMORIAL ENCYCLOPEDIA, *supra* note 87, ¶ 1074.

93. Social Work (Scotland) Act 1968, § 50; MARTIN ET AL., *supra* note 21, at 13.

tance. Some state and county offices hire their own attorneys to represent the agency viewpoint in court. Despite pockets of satisfaction, and even excellence, there is widespread dissatisfaction with legal representation provided to the child protection social work agency.<sup>94</sup>

Besides issues of training and experience and the commitment of legal resources to this function, there is some dispute as to the proper role of the attorney for the agency. On one hand, some contend that the client of the government attorney is not the agency but the people of the state and that the attorney is free to determine the objectives of the litigation even though the attorney view may be inconsistent with that of the petitioning agency. On the other hand, others argue that the proper attorney role in this situation is a "private law model" in which the attorney relates to the agency as he or she would to a private client. The client agency determines the objectives of the litigation with the advice of the lawyer. Essentially, in this private law model, questions of whether a petition should be filed or what disposition ought to be sought are agency decisions. The lawyer would decide how to achieve those objectives consistent with the agency wishes and the law.<sup>95</sup>

## 2. *England and Wales*

In England and Wales the local authority is routinely represented in family proceedings by solicitors who are either appointed on a case-by-case basis or who are on staff of the local authority. The local authority retains a barrister to argue its case in High Court.

In England and Wales, lawyers also experience some tension between their conflicting duties to the court and to their clients. The ambivalence of their role has been resolved somewhat as solicitors have moved from occupying a central coordinating position in local authorities to becoming technical advisors.<sup>96</sup> Now the social work department determines the goals of the litigation and the position to be taken in any given case. The solicitor or barrister pursues the client agency's objectives.

There is a difference among local authorities, however, in the extent of the lawyer's involvement in child protection cases. Dingwall, Eekelaar and Murray describe two models the local authority solicitor

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94. See *U.S. Blueprint '91*, *supra* note 13, at 95-99.

95. Donald N. Duquette, *Liberty and Lawyers in Child Protection*, in *THE BATTERED CHILD*, *supra* note 3, 408; DAVID J. HERRING, *AGENCY ATTORNEY TRAINING MANUAL* (Monograph 1991).

96. DINGWALL ET AL., *supra* note 33, at 168.

may follow in the relationship with the social services department: Model A and Model B. In Model A, the legal department limits its role to providing advocates at a particular hearing, similar to what a barristers' chambers might do. It does not advise on the legal adequacy of cases or provide assistance in developing cases that may at first appear weak to the social workers. Under Model A, the lawyer's power is restricted to dropping cases which are legally unsound rather than advising on the relevance of proceedings or on the assembly of a persuasive body of evidence.<sup>97</sup> Often the social service staff present their own cases in court with the legal staff involved only in contested cases or cases on appeal.

In contrast, Model B involves the legal department in decision-making at an earlier stage. The solicitor will attend case conferences and team meetings and be closely involved with drafting resolutions and petitions. Dingwall, Eeklaar, and Murray favor Model B:

Plainly, Model B should, in theory, provide for more effective reconciliation of therapeutic and legal approaches. The lawyer acquires a degree of familiarity with clinical and social evidence and its acceptability in court . . . . He can advise on alternative legal remedies such as matrimonial injunctions or wardship which may fit the particular case better than care proceedings.<sup>98</sup>

Solicitors also perceive Model B as more efficient.<sup>99</sup> One disadvantage, however, is its inconsistency with traditional legal career lines for solicitors, which encourage a wide mix of experience early in one's career. Despite the interest of some solicitors in continuing to specialize in care proceedings, the tendency is "for care proceedings and similar work to be passed down to the newest recruit to the [legal] department who would, in turn, delegate them at the earliest opportunity."<sup>100</sup>

### 3. *Scotland*

In Scotland, the subtleties of the role of the attorney for the petitioner are not problematic in the Children's Hearing because lawyers do not appear *for* any party. When the parents object to the grounds for referral or appeal a matter to sheriff court, the state's position is presented by the Children's Hearing Reporter—who need not be a law-

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97. *Id.* at 168-69.

98. *Id.* at 169.

99. *Id.*

100. *Id.* at 170-71.

yer.<sup>101</sup> Although the reporter may retain counsel for sheriff court actions they do not ordinarily do so. More typically, a non-lawyer presents a contested child protection case in a court of law even against an experienced lawyer.<sup>102</sup> It is, however, normal for the reporter to employ counsel for proceedings in the higher appellate court, the Court of Sessions.<sup>103</sup>

## *B. Parents' Representation*

### *1. United States*

Although the U.S. Supreme Court has declined to hold that the U.S. Constitution guarantees the appointment of counsel for parents in every termination of parental rights proceedings,<sup>104</sup> parents are entitled to counsel under state law in a majority of states.<sup>105</sup> Similarly, in child protection proceedings where termination is not sought, nearly all states provide for counsel at government expense if the respondent is indigent.

### *2. England and Wales*

Parents are generally represented by a lawyer in child protection cases in England and Wales. Under the Children Act 1989, legal aid in care cases is available swiftly for those who are automatically parties to the proceedings, including the parents. The merits test assessing need for counsel based on the merits of the case is waived and "legal aid will be granted in advance of the means test on an emergency basis."<sup>106</sup> In a 1984 review of representation provided children and parents, MacLeod and Malos questioned whether parents are adequately advised of

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101. BRIAN KEARNEY, CHILDREN'S HEARINGS AND THE SHERIFF COURT 21 (1987). The courts had ruled that only a legally qualified reporter or deputy reporter could appear before the sheriff but the government then amended the Children Act to permit non-legally qualified reporters and deputy reporters to appear in court provided they had at least one year experience. (Children Act 1975, § 82.) *Id.* About half of reporters in Strathclyde are now attorneys. Letter from Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde (May 28, 1992) (on file with author).

102. Such instances were described to me by Ian Michel, Reporter of Irvine, Scotland Children's Hearing—but the reporter's position prevailed in his cases. Interview with Ian Michael, in Irvine, Scot. (May 1991).

103. Letter from Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde (May 28, 1992) (on file with author).

104. *Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32 (1981).

105. CLAIRE CUNNINGHAM & ROBERT HOROWITZ, CHILD ABUSE AND NEGLECT: CASES, TEXT AND PROBLEMS, ABA Center for Child and the Law 296 (1989).

106. Children Act 1989, § 99; INTRODUCTION, *supra* note 20, ¶ 3.14.

their right to legal aid and directed to solicitors with experience in child protection. They noted that the Law Society plans to develop a list of local solicitors whose names would be used by the courts for referral.<sup>107</sup>

### 3. *Scotland*

Lawyer representation of parents at the Children's Hearing is extremely rare. Although parents and children may be accompanied by a representative of their choosing,<sup>108</sup> they are more likely to choose a relative or friend for that purpose. A distinction is made in the rare case where a lawyer is present at a Children's Hearing: he or she appears *with* the party rather than *for* the party. That is, the attorney does not speak in a representational capacity but as an advisor and counselor to the parent. Where a lawyer appears with the parent at the Children's Hearing, there is no entitlement to legal aid because a hearing does not have the status of a court.<sup>109</sup>

Parents are entitled to legal aid, however, either or at reduced cost or no cost depending upon their income, for advice such as whether to accept or reject the grounds of referral or the procedures of the hearing. If parents challenge the grounds for referral they are entitled to legal assistance in the sheriff court and on appeal.<sup>110</sup>

### C. *Child Advocates—United States*

There is a fairly general agreement in the United States that children ought to be represented independently in child protection proceedings. Federal law requires, as a condition to receiving federal funds, that states provide independent representation to a youngster in child abuse or neglect cases that result in judicial proceedings.<sup>111</sup> Full compliance with this federal requirement has not yet been realized.<sup>112</sup> Under federal law this representative is called a "guardian *ad litem*"

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107. ALISON MACLEOD & ELLEN MALOS, REPRESENTATION OF CHILDREN AND PARENTS IN CHILD CARE PROCEEDINGS 39 (1984).

108. MARTIN ET AL., *supra* note 21, at 11.

109. *Id.*

110. *Id.* at 13.

111. 42 U.S.C. §§ 5106a(b)(6), 5106c(b)(1) (Supp. 1992).

112. See ADMIN. FOR CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION (1990) [hereinafter NATIONAL STUDY 1990].

and is expected to represent and protect both the *rights* of the child and the *best interests* of the child.<sup>113</sup>

The most common way for children to be represented in the United States is through private attorneys appointed by the court on a case-by-case basis.<sup>114</sup> The child advocate is appointed at the very beginning of the judicial action and serves for the duration of the court jurisdiction over the child.<sup>115</sup>

There is a fairly widespread dissatisfaction with the quality of representation children receive. Lawyers are not specially trained in this role and often lack the knowledge of psychology, family dynamics, child interviewing, and child advocacy, which are essential to competent performance in this role.<sup>116</sup> Nor do lawyers ordinarily assume an aggressive follow-up responsibility for activities outside the court where much of value can be accomplished for the child. State laws, generally, provide neither clear descriptions of the role and responsibility of the child advocate, nor adequate pay for the services.<sup>117</sup>

Partially in reaction to this dissatisfaction with attorney representation of children, United States has witnessed the rapid growth of a social movement to provide children representation by lay volunteers. The Court Appointed Special Advocate (CASA) movement was born in 1977<sup>118</sup> and has grown to include four hundred thirty-four programs in forty-seven states with nineteen thousand volunteers who advocate for eighty-one thousand children per year.<sup>119</sup>

Research shows that trained lay advocates with proper supervision can perform as well as or better than attorneys without special training.<sup>120</sup> A national evaluation by the U.S. Department of Health and

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113. 45 C.F.R. § 1340.14(g) (1991).

114. In 72.4% of jurisdictions surveyed, private attorneys provided representation for children. NATIONAL STUDY 1990, *supra* note 112, at 17.

115. *Id.* at 19.

116. DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS* 7 (1990) [hereinafter DUQUETTE, *ADVOCATING FOR THE CHILD*].

117. See NATIONAL STUDY 1990, *supra* note 112, at 25-26, 42.

118. Nancy Neraas, Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853, 862-64 (1983).

119. NAT'L COURT APPOINTED SPECIAL ADVOCATE ASS'N, *DETAILED TESTIMONY BEFORE THE HOUSE APPROPRIATIONS SUBCOMMITTEE ON COMMERCE, JUSTICE, STATE AND THE JUDICIARY* 2 (1991).

120. See Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REF. 341 (1987); Donald N. Duquette & Sarah H. Ramsey, *Using Lay Volunteers to Represent Children in Child Protection Court Proceedings*, 10 CHILD ABUSE AND NEGLECT:

Human Services (HHS) in 1988 showed that the most common form of providing representation for children, private attorneys with no special training, was the least effective of the five models studied. In their estimation, the two models in which CASAs participated were the most effective.<sup>121</sup> Nationwide study and evaluation of the representation of children in protection cases continues. A more elaborate and detailed study commissioned by HHS is currently underway.

Debate continues in the United States as to the scope of the advocate's responsibility. Some would expect only that the advocate inform a judicial officer as to what formal action ought to be taken. Others urge adoption of a broader, more aggressive role in which the advocate takes a position in court, but also advocates for the child's interests out of court and even attempts to serve as mediator to reduce adversarial tensions in the process.<sup>122</sup> There remains no consensus on the breadth and scope of the child advocate's role.

What voice should the child have in identifying his or her best interests and the goals for the advocate? Should the child advocate pursue the child's interests as identified by the child, or pursue the best interests of the child as defined by the advocate? At what age or level of competence, if any, is the child entitled to traditional legal advocacy? These questions are far from being resolved in the United States. Statutes in most states provide that the representative of the child present the best interests of the child and ensure that these interests are served throughout the child welfare system.<sup>123</sup> When confronted with the problem of when the child disagrees with the advocate, the HHS National Study reports that attorneys in 45 percent of the counties studied said they represent the child's wishes *and* present the attorney's own assessment of best interest and let the court deal with the conflict. In 12.6 percent of the counties studied, attorneys presented the child's wishes only; and in 4.3 percent the attorney guardian *ad litem* requests a second guardian *ad litem* from the court to present the child's wishes. The remainder of the counties (approximately 40 percent) reported no

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THE INT'L J. 293 (1986). For a review of existing research on this topic, see also Donald N. Duquette, *Independent Representation of Children in Protection Proceedings*, in THE STATE AS PARENT (1989).

121. LARRY CONDELLI, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS 16-19 (1988).

122. See, e.g., DUQUETTE, ADVOCATING FOR THE CHILD, *supra* note 116; NAT'L CASA ASS'N, ROLES AND RESPONSIBILITIES OF GUARDIANS AD LITEM (1992).

123. NATIONAL STUDY 1990, *supra* note 112, at 26.



approach to reaching consensus regarding what an attorney should do in cases of disagreement with the child. CASA programs studied required the volunteers to present both the child's best interests and the child's wishes to the court where there is disagreement. For example, [i]n Wisconsin, children over the age of 12 are appointed counsel to present their wishes, but children under 12 are usually appointed a guardian *ad litem* to represent their best interests.<sup>124</sup>

Attorneys must follow the provisions of the Model Rules of Professional Conduct, which require that a lawyer abide by a client's decisions concerning the objectives of the representation.<sup>125</sup> Even when the client's ability to make adequately considered decisions is impaired by minority or some other reason, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."<sup>126</sup> The same issue arises in England and Wales, but is resolved differently.

#### D. *Child Advocates—England and Wales*

##### 1. *Guardian Ad Litem/Solicitor*

Just as Americans are shocked upon first learning that the judiciary hearing child protection cases in Great Britain are lay volunteers, the British are surprised to hear of the movement in the United States to have lay volunteers represent children as CASAs. Representation of children in England and Wales is a sophisticated and professional undertaking in which solicitors and social workers collaborate to advocate for the child's interests. Since 1984, nearly all children involved in public law protection proceedings have been appointed a guardian *ad litem*.<sup>127</sup> From a panel of carefully selected and trained social workers, the court appoints a guardian unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests. The most experienced social workers are selected for this position and are paid by the local authority as private contractors. The guardian's statutory duty is to safeguard the interests of the child in court proceedings. Rules of

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124. *Id.*

125. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2(a) (1989).

126. *Id.* at 1.14(a).

127. See SOCIAL SERVICES INSPECTORATE, DEP'T OF HEALTH, IN THE INTERESTS OF CHILDREN: AN INSPECTION OF THE GUARDIAN AD LITEM AND REPORTING OFFICER SERVICE § 1.1 (1990) [hereinafter SOCIAL SERVICES INSPECTORATE REPORT].

court and guidelines issued by the Department of Health further define these duties.<sup>128</sup>

The guardian *ad litem* then selects a solicitor to act for the child. Prior to the Children Act 1989, some local courts would select the solicitor directly, but under the new act the court is unlikely to do so, leaving the selection and appointment to the guardian.<sup>129</sup> The guardian and the solicitor then act together in the child's interest with the guardian *ad litem* "instructing" the solicitor as to the best interests of the child and the goals of the advocacy.<sup>130</sup>

Rather than relying upon the guardian *ad litem* to determine the interests of the child and then instructing the solicitor to act accordingly, the court may appoint a solicitor to act for a child directly. In such cases the lawyer would take instructions as to the child's interests from the child and not from the guardian. The Children Act 1989 permits the court to appoint a solicitor for the child if no guardian *ad litem* has been appointed for the child; the child has sufficient understanding to instruct a solicitor and wishes to do so; or it appears to the court that it would be in the child's best interests to be represented by a solicitor.<sup>131</sup> Based on discussions with numerous guardians *ad litem* and solicitors, the practice appears to be that if the child disagrees with the position of the guardian *ad litem* and has sufficient understanding to instruct a solicitor, the solicitor, with the court's permission, will represent the child's wishes directly. In such cases the guardian *ad litem*, now without legal representation for his point of view regarding the child's interests, more commonly proceeds without assistance of counsel, but may ask the court to appoint a separate solicitor for the guardian. Situations, however, in which a child's interests are independently represented by three adults (guardian *ad litem*, solicitor for the guardian *ad litem*, and solicitor for the child) appear to be rare.

The social workers from the local authority have investigated the child's situation and assessed the family much as workers in the United States would do. That information is shared with the guardian *ad litem* as well as with the court. In addition, however, the independent investigations of the English guardian *ad litem* are rather extensive. In one survey by the Social Services Inspectorate, the guardians spent thirty-

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128. Children Act 1989, § 41; JOAN HUNT & MERVYN MURCH, *SPEAKING OUT FOR CHILDREN* 9 (1990).

129. Interview with Richard White, Solicitor, in London, Eng. (Aug. 3, 1992).

130. Children Act 1989, § 41.

131. WHITE ET AL., *supra* note 60, § 8.15.

nine to ninety-eight hours per case and interviewed an average of six parties and five other people per case with some cases involving ten or more interviews. In the same survey, the care cases involved five or more court appearances—up to a maximum of fourteen. The guardians supported the social services department in eighty-four percent of the cases studied and disagreed with the recommendations of the department in sixteen percent of the cases. The courts followed the guardian *ad litem* recommendation in over ninety percent of care cases.<sup>132</sup>

The English are understandably pleased with their extensive provision for independent representation of children. Professor S.M. Cretney of Bristol University Faculty of Law has written that, "[t]his innovation has been one of the success stories of our time, and now the Children Act 1989 will give the guardian an even more important role—not only in representing the child, but also in helping the court carry out its functions of promoting the child's welfare."<sup>133</sup> The guardians themselves recognize their importance to the court and their influence on the bench. They enjoy a greater sense of status than they had in their role as social workers.<sup>134</sup>

Children deserve a truly independent advocacy where the advocate has allegiances or duties to only the child's welfare and not to another organization or interest. Many in England and Wales feel that the local authority management of Guardian *ad Litem* Panels compromises this desired independence. The local authority selects the guardians, organizes training and approves payment for services rendered. The guardians may, however, have reason to criticize this same local authority in the course of their child advocacy. The concern is that the management oversight of the guardians by the local authority may improperly temper or limit the guardian's efforts. Some are advocating changing the system so the panels are organized independently, in regions.<sup>135</sup>

The high level of concern about the guardian *ad litem's* independence is in marked contrast to the situation in the United States where the advocate is closely controlled by the court itself. Typically in the United States, the local court (often the judge, him or herself) selects the child's representative, makes decisions about competence, exercises

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132. SOCIAL SERVICES INSPECTORATE REPORT, *supra* note 127, §§ 17.2-17.5.

133. S.M. CRETNEY, *Foreword* to Pat Monro & Lis Forrester, *The Guardian Ad Litem V.* (1991).

134. SOCIAL SERVICES INSPECTORATE REPORT, *supra* note 127, § 16.1.

135. HUNT & MURCH, *supra* note 128, at 65.

some quality control and approves payment for the child advocate. The court also hears the advocate's concerns and recommendations. The concerns and recommendations criticize local services and professionals the court values or may even challenge the court's action. An advocate could appeal the court's decision or handling of a case—and then depend upon the same court for future appointments. Independence of the child advocate is an issue that certainly needs review in the United States as well.

The scope of the advocate's role continues to be debated in England and Wales as it is in the United States. Should the advocate merely inform the court as to their assessment of the situation with recommendations for formal action or should the guardian *ad litem* and solicitor adopt a broader, more aggressive role so as to advocate the child's interests outside of court and even attempt to serve as mediator among family members and the local authority? Although the formal expectations of the guardian are limited to making a formal report of his views and recommendations to the court,<sup>136</sup> many guardians report that they take a more active advocacy role on behalf of the child even outside the court. In an advocacy role the guardian may attempt to influence the local authority and family members to take actions the advocate considers necessary and in the child's interests.

The intense activity of the English guardian *ad litem* is impressive to an American visitor as are the personal qualifications and commitment level of individual guardian *ad litem*s. Surprising to the American, however, is the fact that once the court assumes formal jurisdiction and places the child under control of the local authority, the appointment and responsibility of the guardian *ad litem* ends. In the American system much of the individual advocacy for a child occurs in monitoring and nudging the social agency during the dispositional and review phases when family rehabilitation and reunification is the goal. In England and Wales there is no routine judicial review once a child is committed to the local authority. If a request is made to rescind the care order, the court will attempt to appoint the same guardian *ad litem*.

## 2. *Official Solicitor*

The Official Solicitor is a highly regarded London office charged with representing the best interests of the child in selected cases as

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136. SOCIAL SERVICES INSPECTORATE REPORT, *supra* note 127, at 1.

appointed by the court. The Official Solicitor has a staff of caseworkers who investigate matters upon court request, usually from the High Court or county court. The Solicitors from the office appear in the legal proceedings and, on occasion, the office will retain a barrister for High Court proceedings. The office has no duty to take a particular case and no attempt is made to represent all children in care.

### 3. *Complaint Process and Judicial Review*

The Children Act 1989 provides several means for holding local authorities accountable for children who are their responsibility. Although there are regular judicial review hearings of the sort common in the United States, the Children Act 1989 authorizes the Secretary of State to enact regulations providing for review of the case of each child under the care of the local authority.<sup>137</sup> This procedure will be an administrative one—should the local authority ignore the findings of the review, or fail to give satisfactory reasons for not acting on recommendations of the review panel, the authority may be subject either to action by the Secretary of State, or to judicial review. If the Secretary is satisfied that the local authority has failed to comply with a duty under the Children Act 1989 without reasonable cause, he may direct the authority to comply with its duty within a specified period.<sup>138</sup> The Secretary may enforce such a direction by application to the High Court for judicial review.<sup>139</sup>

The authority must also establish and publicize its procedure for considering any complaints made by certain persons including a child for whom it is or should be responsible, such as a child's parents or person with parental responsibility, a foster parent, or any person whom the local authority thinks has sufficient interest in the child to warrant their considering the complaint.<sup>140</sup> Even before the Children Act 1989 became effective, several local authorities had children's rights officers in place who responded to complaints from youngsters in care and attempted to advocate on such child's behalf.<sup>141</sup> Despite these

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137. Children Act 1989, § 26; *see also* WHITE ET AL., *supra* note 60, § 5.52. As of January 1992, such regulations were not yet in effect.

138. Children Act 1989, 84; WHITE ET AL., *supra* note 60, § 5.54.

139. WHITE ET AL., *supra* note 60, § 5.54; *see* Children Act 1989 § 84(4).

140. Children Act 1989, § 26.

141. Charles Mathers, Children's Rights Officer Jayside, England, remarks at the Children's Rights to Legal Services Conference: A Joint Conference held by the Scottish Child Law Centre and the Scottish Legal Action Groups, Glasgow, Scot. (May 23, 1991).

efforts, however, the review and complaints system is not fully in place and it is not yet clear how meaningful and effective it will be.

### *E. Child Advocates—Scotland*

Children generally are not represented independently in the Children's Hearing. Pursuant to a 1975 amendment to the Social Work (Scotland) Act 1968, however, the chairman of the Children's Hearing is now specifically authorized to appoint a "safeguarder" if "it is necessary for the purpose of safeguarding the interests of the child in the proceedings, because there is or may be a conflict, on any matter relevant to the proceedings, between the interests of the child and those of his parents . . ."<sup>142</sup> A safeguarder need not be a lawyer, in fact, approximately one-half of them are not—they receive no special training. A safeguarder is appointed in fewer than one percent of the cases.<sup>143</sup>

The role of the safeguarder is defined as an independent mediator when the interests of the child are not necessarily the interests of the parents; an independent reviewer of the case and the available information and an adviser to the hearing. The safeguarder is expected to provide a written report to the hearing.<sup>144</sup>

The safeguarder does not speak *for* the child but seeks to represent the best interests *of* the child. He or she is not intended to have a long-lasting relationship with the child and is not a counselor or child advocate in the sense of having broad advocacy responsibility for the child. Because it is not the safeguarder's task to resolve the conflict but to assist in the reaching of a decision in the light of that conflict.<sup>145</sup> Should a matter be referred to the sheriff court for proof or for appeal, the sheriff is not bound to appoint any safeguarder.<sup>146</sup>

There is some interest in developing independent child advocacy in Scotland that would reach more children and ensure access to remedies

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142. Social Work (Scotland) Act 1968, § 34a; Parliament seems to have recognized that the courts already had the power to appoint such persons, sometimes also called "curator *ad litem*." STAIR MEMORIAL ENCYCLOPEDIA, *supra* note 87, § 1074.

143. Interview with Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde, in Strathclyde, Scot. (May 21, 1991).

144. HANDBOOK, *supra* note 49, at 51.

145. *Id.*

146. See KEARNEY, *supra* note 101, at 208. If the sheriff does appoint a safeguarder, he is not bound to appoint the same person as may have been appointed by the hearing, but he may do so. The sheriff retains the common law authority to appoint a curator *ad litem* on behalf of a child rather than a safeguarder. A curator *ad litem* is generally a solicitor familiar with the court for whom legal aid is available but is rarely appointed now because of clear statutory powers now available to a safeguarder. *Id.*

at law.<sup>147</sup> There is, however, some substantial opposition to adding independent child representation to the Children's Hearing. The Children's Hearing is intended to be informal and non-adversarial and child representation may weaken those important aspects of this unique process.<sup>148</sup> In fact, the United Kingdom's ratification of the United Nations Convention on the Rights of the Child contains this interesting reservation:

(F) In Scotland there are tribunals (known as "Children's Hearings") which consider the welfare of the child and deal with the majority of offences which a child is alleged to have committed. In some cases, mainly of a welfare nature, the child is temporarily deprived of its liberty for up to seven days prior to attending the hearing. The child and its family are, however, allowed access to a lawyer during this period. Although the decisions of the hearings are subject to appeal to the courts, *legal representation is not permitted at the proceedings of the children's hearings themselves*. Children's hearings have proved over the years to be a very effective way of dealing with the problems of children in a less formal, non-adversarial manner. Accordingly, the United Kingdom, in respect of Article 37(d), reserves its right to continue the present operation of children's hearings.<sup>149</sup>

Legal representatives of the child, parents and child protection agencies are familiar to Americans and are roles common to all the jurisdictions studied here. The legal advisor and coordinator for the judiciary, to whom this article next turns, is novel to Americans.

#### *F. Magistrates' Court Clerk and Children's Hearing Reporter*

The roles of the Magistrates' Court clerk and the Children's Hearing reporter have no parallel in the U.S. system but are centrally important to the English and Scottish child protection process.

##### *1. Clerk—Magistrates' Court*

The clerk of the Magistrates' Court is legally trained and provides

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147. Kathleen Marshall, Director, Scottish Child Law Centre, "Linking Children With the Law—Problems and Possibilities" presented at *Children's Rights to Legal Services*, a Joint Conference held by the Scottish Child Law Centre and the Scottish Legal Action Group in Glasgow, Scot. (May 23, 1991).

148. Letter from Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde (May 28, 1992) (on file with author).

149. *United Kingdom Ratification of the United Nations Convention on the Rights of the Child*, reprinted in BRIT. JUV. & FAM. CTS. SOC'Y NEWSL. (British Juvenile and Family Courts Society, U.K.) Sept. 1992, at 1 (emphasis added).

extensive administrative and technical support to the magistrates. He or she controls the docket, schedules magistrates for particular sittings and advises them on points of law. When the clerk advises on law, she attempts to identify the legal tests that must be applied to a question, leaving the factual questions for the court. The clerk does not join in the deliberations of the panel unless invited to do so by the chair of the panel.<sup>150</sup>

## 2. *Children's Hearing Reporter*

Unlike the U.S. system, in Scotland the gatekeeper function to the formal legal process of the child protection system, i.e. between voluntary social agency intervention and the potential coercive power of the law, is not served by the social agency but by the reporter to the Children's Hearing panel. The Children's Hearing reporter is the administrator of the hearings system and serves as the intake officer. The reporter's functions are administrative, investigative, deliberative, and executive. The reporter to the Children's Hearing is not required to have legal training and most of them do not. Once the reporter is informed that a child is believed to have been neglected or harmed by his parents the reporter is required to conduct an investigation.<sup>151</sup> The report of child maltreatment may come from the social work department, but may also originate with the police, the education department, the procurator fiscal (criminal prosecutor), or from, any statutory or voluntary body or private individual.<sup>152</sup>

The Reporter is very much the hub of the wheel in the system since he provides the link between all the referral agencies e.g. Police, R.S.S.P.C.C., Education etc., and the treatment agencies e.g. Social Work, Health Authorities, Schools etc., so that there is a constant flow of information to and from the Reporter, most of which is for the benefit of panel members.<sup>153</sup>

Up to this point, this article has compared the history and social welfare context of the child protection legal process in each jurisdiction. It has outlined the court system and described the legal roles in each country. Now at last it turns to the applicable substantive law and the court procedures.

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150. GLENDON ET AL., *supra* note 58, at 317-18.

151. KEARNEY, *supra* note 101, at 21.

152. *Id.*; MARTIN ET AL., *supra* note 21, at 64-66.

153. HANDBOOK, *supra* note 49, at 4.



## VI. LEGAL STANDARDS FOR STATE INTERVENTION

A. *The United States*

There is substantial variation among the states in the statutory test to be met before the state is permitted to suspend parental rights and permit involuntary intervention into the life of the parent and child. Without modern influential federal legislation, each state has formulated its own standards and the standards vary widely from state to state. In other aspects of child protection law, federal legislation has greatly influenced the states. The Child Abuse Prevention and Treatment Act served to harmonize state child abuse reporting laws and the Adoption Assistance and Child Welfare Act has affected state laws regarding placement, disposition and review where children are in foster care or at risk of being placed in foster care.

Existing state laws are often criticized for being overly broad and imprecise.

Every state today has a statute allowing a court, typically a juvenile court, to assume jurisdiction over a neglected or abused child and to remove the child from parental custody under broad and vague standards reminiscent of those invoked by courts of equity in the nineteenth century.<sup>154</sup>

Justice Blackmun, dissenting in *Lassiter v. Dept. of Soc. Services* wrote:<sup>155</sup>

The legal issues posed by the State's petition are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge.<sup>156</sup> This Court more than once has adverted to the fact that the "best interests of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.<sup>157</sup>

State child neglect statutes have been declared unconstitutionally vague in Iowa, Alabama and Arkansas,<sup>158</sup> but a majority of appellate courts have upheld them against vagueness challenges.<sup>159</sup>

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154. ROBERT H. MNOOKIN, *CHILD, FAMILY AND THE STATE* 470 (1978).

155. 452 U.S. 18 (1980).

156. *Id.* at 45 (Blackmun, J., dissenting).

157. *Id.* at 45 n.13 (citing *Smith v. Organization of Foster Families*, 431 U.S. at 835 n.36; *Bellotti v. Baird*, 443 U.S. 622, 655 (1979); and *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

158. *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court of Polk County*, 406 F. Supp. 10 (S.D. Iowa 1975); *Davis v. Smith*, 583 S.W.2d 37 (Ark. 1979).

159. See, e.g., *In re J.T.*, 115 Cal. Rptr. 553 (Ct. App. 1974); *People v. Schools*, 305 N.E.2d 560 (Ill. App. Ct. 1973), *appeal dismissed sub nom.*, *Schoos v. Illinois*, 417 U.S. 963 (1974); *In re Huber*, 291 S.E.2d 916 (N.C. App.), *appeal dismissed*, 294 S.E.2d 223 (N.C.

There are, however, some common elements among the state standards for intervention. For example, some statutory standard is required before a court may assert its jurisdiction, so that a court may not assert its power based simply upon the best interests of the child. The language of the statutes generally allow intervention based on physical abuse, abandonment, failure to provide proper food, clothing, shelter, or parental care and supervision, sexual abuse, emotional abuse, educational and medical neglect, and failure to protect a child reasonably from physical or sexual abuse. Although the "best interests of the child" is not the proper legal standard for initial adjudication, it is the most common test for framing dispositional orders. Increasingly, however, the subjectivity of the "best interests" standard is leading states to devise more precise statutory tests for various decisions—removal from parents' custody requiring a showing of "substantial risk of harm;" permanency planning hearings creating presumptions of return to parents or creation of an alternative permanent placement for children; termination of parental rights requiring certain statutory grounds before the court considers "best interests of the child."

Past efforts to reform the statutory tests for intervention have met with limited success. The Institute of Judicial Administration and the American Bar Association in the Juvenile Justice Standards Project developed twenty-three volumes of recommendations, twenty of which were approved by the ABA House of Delegates. The volume on Child Abuse and Neglect, although published, has never been approved.<sup>160</sup> The time may be right for the United States to revisit the question of standards for intervention in child protection cases and to provide leadership to the states in their efforts to modernize their statutes. The recent history of England and Wales and the development of the Children Act 1989 may have lessons for the United States' efforts.

### *B. England and Wales: Children Act 1989*

The Children Act 1989 represents a dramatic and far-reaching reform of child law in England and Wales and its contribution to the jurisprudence of child protection deserves serious study by Americans—far more attention than the brief outline provided here. The

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1982); *State v. McMaster*, 486 P.2d 567 (Or. 1971); *In re K.B.*, 302 N.W.2d 410 (D.S.D. 1981); *In re Aschauer's Welfare*, 611 P.2d 1245 (Wash. 1980).

160. JUVENILE JUSTICE STANDARDS PROJECT, INSTITUTE OF JUDICIAL ADMIN. & AMERICAN BAR ASS'N, STANDARDS RELATING TO ABUSE AND NEGLECT (1981).

Act's attempts to integrate and coordinate the actions of Magistrates' Court, county court and the High Court were discussed in Section IV above. The procedures of the Act are presented in Section VII below, while the substantive law, the legal principles and standards governing state intervention are outlined next.

### 1. *Underlying Principles*

#### a. *Parental Responsibility*

The Children Act 1989 codifies a new legal concept of "parental responsibility" as a collection of powers and duties that follow from being a parent and raising a child, rather than as rights that may be enforced at law. Persons acquire parental responsibility as parents married to one another at the time of conception, as an unmarried father upon agreement with the mother or upon order of a court, or upon court orders of guardianship, residence or care and protection.<sup>161</sup> Several persons, including a local authority, may have concurrent parental responsibility.<sup>162</sup> The fact that another person may acquire parental responsibility does not mean that a person who previously had parental responsibility ceases to have it.<sup>163</sup> The Act "seeks to establish parenthood as a continuing or enduring status."<sup>164</sup> The concept reflects the everyday reality of being a parent and emphasizes the responsibility of all who are in that position. In the Parliamentary debates,

Lord Mackay LC said, when introducing the Bill for its second reading, that the concept of "parental responsibility" emphasizes that the days when a child should be regarded as a possession of his parent—indeed when in the past they had a right to his services and to sue on their loss—are now buried forever. The overwhelming purpose of parenthood is the responsibility for caring for and raising the child to be a properly developed adult both physically and morally.<sup>165</sup>

The Act moved England and Wales away from the view of child-rearing as a public matter in which the task of imparting community standards and expectations are delegated to the parent, toward a view of child rearing as a private affair in which the public interest is best

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161. Children Act 1989, §§ 2, 4, 5(6), 12, 33(3), 44(4).

162. *See id.* §§ 2(5), 33(3), 44(4).

163. *Id.* § 2(6).

164. Andrew Bainham, *The Privatisation of the Public Interest in Children*, 53 MOD. L. REV. 206, 209 (1990).

165. WHITE ET AL., *supra* note 60, § 2.3 (citing 502 PARL. DEB., H.L. (5th ser.) 490 (1988)).

served by the private ordering of family relationships. The Act, however, also gave effect to a philosophy of public support for the private responsibility of parenthood.<sup>166</sup>

*b. The Welfare Principle*

When a court determines any question with regard to the upbringing of a child or administration of his interests, the child's welfare is to be the court's paramount concern.<sup>167</sup> "[This] welfare principle means that the court's decision will be that which most promotes the child's welfare and is in his best interests."<sup>168</sup> The welfare principle "does not mean that every question decided by a court under the Act will simply turn on what is best for the child. In a number of instances, certain other *conditions* [discussed below], . . . must be satisfied before the welfare principle comes into play."<sup>169</sup> The welfare principle, with its focus on the best interests of the child, is shared by both the United States and Scotland.

*c. Presumption of No Order*

The Children Act 1989 creates a new non-interventionist principle that prevents a court from making an order under the Act "unless [it] considers that [doing so] would be better for the child than making no order at all."<sup>170</sup> Previously, it was thought that if the conditions to making an order were met, in the public law sphere of care and protection or in the private sphere of matrimonial proceedings, the orders would be entered without considering whether the child's position was necessarily improved by the order. The entry of such orders sometimes polarized the attitudes of the individuals involved in a way that worked to the detriment of the child. "It is hoped that [the Act] . . . will strengthen the welfare principle by underlining the need to justify an order being made."<sup>171</sup>

*d. Delay*

Concern for the "child's sense of time" is reflected in the principle

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166. Bainham, *supra* note 164, at 207-08.

167. Children Act 1989, § 1.

168. INTRODUCTION, *supra* note 20, § 3.14 (citing J.V.C. 1970 App. Cas. 668 (1969) (appeal taken from Eng.)).

169. *Id.* § 3.15.

170. Children Act 1989, § 1(5).

171. INTRODUCTION, *supra* note 20, § 3.22.

that delay is to be avoided. Pursuant to the Act, the court shall have regard to the general principle that delay in determining the question which is likely to prejudice the welfare of the child."<sup>172</sup>

## 2. *Conditions Precedent to Issuing Orders*

Under section 31(2) of the Children Act 1989, before a court may issue a child care or protection order, it must be satisfied by the balance of probabilities, i.e. preponderance of the evidence, that the following conditions are met:

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to—
  - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
  - (ii) the child's being beyond parental control.<sup>173</sup>

"Harm" is defined in section 31(9) of the Act as: "ill-treatment or the impairment of health or development."<sup>174</sup>

While these conditions are necessary, they are sufficient grounds for the entry of a child protection order. The court must also apply the principles of welfare, presumption of no order and delay, as discussed above.

The conditions to entering an order in England and Wales, while similar to those operative in the United States, are less broad and less vague than most American statutes. Nor is a U.S. court reminded that entry of an order may not necessarily be in the best interests of the child—even when the minimum statutory grounds are met.

## 3. *Orders Which the Court May Enter*

The Children Act 1989 spells out specific orders that may be entered under the Act. The Act has attempted to simplify an old body of public and private law that seemed unnecessarily complicated to many,

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172. Children Act 1989, § 1(2); INTRODUCTION, *supra* note 20, § 3.23.

173. Children Act 1989, § 31(2).

174. *Id.* § 31(a); see INTRODUCTION, *supra* note 20, § 3.52 ("ill-treatment" includes "sexual abuse and non-physical ill-treatment such as emotional abuse." "Health" means physical or mental health and "development" means physical, intellectual, emotional, social, or behavioral development. A helpful interdisciplinary book on the meaning of "significant harm" has recently been published that attempts to analyze the term from legal, social work, cultural, psychiatric and pediatric points of view. See SIGNIFICANT HARM: ITS MANAGEMENT AND OUTCOME 1-2 (Margaret Adock et al. eds., 1991).

lacking guiding principles and resulting in overlapping remedies with many anomalies.<sup>175</sup> The orders authorized are: assignment of parental responsibility to a father, appointment of a guardian, "section 8 orders," and "care or supervision" orders. Section 8 orders are intended to resolve disputes between parents and others who have custody orders and are not ordinarily used in care and protection proceedings.<sup>176</sup> They may be made for a specific period and are intended to encourage the adults involved both to maintain their involvement in the child's life, and to avoid driving unnecessary wedges between themselves and the child.<sup>177</sup>

Care and supervision orders are the two main public law child protection orders. They may be made only upon application of the local authority (or an authorized person, generally meaning the NSPCC).<sup>178</sup> A care order places the child in the care of a local authority, i.e. in a foster home or residential placement. A supervision order may leave a child in the custody of a parent (or relative) but under the supervision of the local authority.<sup>179</sup> Once such orders are entered they are effective until the child's eighteenth birthday unless they are discharged by a subsequent court order.<sup>180</sup> There is no requirement of judicial review once a care or supervision order is entered.

### C. Scotland

In neither Scottish nor United States jurisprudence do we find principles favoring private ordering of family relationships spelled out so clearly as in England and Wales in their underlying principles of parental responsibility, pre-eminence of a child's welfare, the presump-

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175. See INTRODUCTION, *supra* note 20, §§ 3.1-3.2.

176. These "section 8 orders" are defined by § 8(1):

"a contact order" means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other; "a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court; "a residence order" means an order settling the arrangements to be made as to the person with whom a child is to live; and "a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

177. INTRODUCTION, *supra* note 20, § 3.32.

178. Children Act 1989, § 31.

179. *Id.* § 35; WHITE ET AL., *supra* note 60, at §§ 6.28-6.31.

180. *Id.* § 91(12), (13).

tion of no order and the presumption that delay will prejudice a child's welfare. In Scotland, a child is defined as a person under the age of sixteen (or under eighteen if a supervision requirement is already in force). A child may be in need of compulsory measures of care, including protection, control, guidance and treatment if:

- (a) he is beyond the control of his parent; or
- (b) he is falling into bad associations or is exposed to moral danger; or
- (c) lack of parental care is likely to cause him unnecessary suffering or seriously to impair his health or development; or
- (d) any of the offences mentioned in Schedule I to the Criminal Procedure (Scotland) Act 1975 [sexual offences and assault or neglect against a child] has been committed in respect of him or in respect of a child who is a member of the same household; or
- (dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offences mentioned in Schedule I to the Criminal Procedure (Scotland) Act 1975; or
- (e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household; or
- (f) he has failed to attend school regularly without reasonable excuse; or
- (g) he has committed an offence; or
- (h) he is a child whose case has been referred to a children's hearing in pursuance of Part V of the Act. (Children moving to Scotland referred to a reporter by a juvenile court in England, Wales or Northern Ireland, by a local authority in England and Wales or by a welfare authority in Northern Ireland.)<sup>181</sup>

#### *D. Privacy of Court Proceedings*

In England and Wales, the High Court and county court were authorized to sit in private when considering children's cases, and the Children Act 1989 authorizes enactment of rules of court permitting the magistrates also to sit in private.<sup>182</sup> Even without specific rules, Magistrates' Court practice has excluded persons without a legitimate interest in the proceedings.<sup>183</sup> It is a criminal offence to publish material that is likely to identify a child as being involved in a magistrate's court proceeding.<sup>184</sup> The prohibition extends to radio and television as well as to printed material.<sup>185</sup>

In Scotland, the press may be present but may not report the name, address or school, or any particular that would identify the

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181. Social Work (Scotland) Act 1968, § 32(2).

182. Children Act 1989 § 97(1); see WHITE ET AL., *supra* note 60, §§ 9.23, 92.4.

183. WHITE ET AL., *supra* note 60, § 9.23.

184. Children Act 1989, § 97(2).

185. *Id.* § 97(2), (5), (6); WHITE ET AL., *supra* note 60, § 9.25.

child.<sup>186</sup> In the United States, some states now permit the press and public to attend child protection proceedings unless there is a specific showing that closing the hearing is necessary to prevent further harm to the child.<sup>187</sup>

## VII. COURT PROCEDURE IN CHILD PROTECTION

### A. *Procedural Outline—United States*

In the United States, child protection procedures vary from state to state but have many common elements—even though the words used to describe them vary. In every state there is some provision for emergency protection of a child in danger. The government child protection agency is the petitioner in the vast majority of child abuse and neglect cases in the U.S. courts. After the filing of a *petition* or complaint, a *preliminary phase* requires some legal finding, usually probable cause, that the facts are true and justify formal court action. At the *adjudication* or trial stage, the grounds for court jurisdiction are established through formal process. At the *dispositional phase*, the court orders the rehabilitative steps necessary to make the home fit for the child; specific court orders addressed to the agency as well as the parents are more and more common. *Review hearings* are held regularly where the effectiveness of the dispositional order is evaluated. To qualify for federal funds under the Adoption Assistance and Child Welfare Act, states must implement a *permanency planning* hearing of some sort after a child has been in foster care twelve to twenty-four months.<sup>188</sup> Finally, state laws provide for termination of parental rights, which may free a child for adoption. These child protection proceedings co-exist and often interact with other legal arrangements for children including guardianships, long term relative and foster care placements and child custody orders in the context of divorce and paternity.

In U.S. courts, a child's sense of time and need for permanency is increasingly recognized—although not always realized. Courts generally have time limits established throughout the process—but court adherence to these limits in specific cases is often problematic.

### B. *Procedural Outline—England and Wales*

The Children Act 1989 brings about the most fundamental change

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186. MARTIN ET AL., *supra* note 21, at 11; Social Work (Scotland) Act 1968, § 58(1).

187. See, e.g., Michigan Court Rule (MCR) 5.925(A) (1992).

188. 42 U.S.C. § 675(5)(c) (1991) (requiring hearing within 18 months of placement).



of child law in this century for England and Wales.<sup>189</sup> As discussed above, many of the changes are substantive and modify the underlying philosophy of state intervention in families on behalf of children. Formerly the law developed in a piecemeal fashion and seemed to lack guiding principles making it unintelligible to both participants and practitioners.<sup>190</sup> Court procedure has also changed and will be outlined here.

Even though there is no mandatory reporting system in Britain, reports of suspected child maltreatment reach the local authority.<sup>191</sup> Statutes require the local authority to conduct an investigation under five circumstances:

- (a) where they have reasonable cause to suspect that a child who lives or is found in their area is suffering or is likely to suffer significant harm [section 47(1)(b)];
- (b) where they have obtained an emergency protection order in respect of a child [section 47(2)];
- (c) where they are informed that a child who lives or is found in their area is subject to an emergency protection order or is in police protection [section 47(1)(a)];
- (d) where a court in family proceedings directs them to investigate a child's circumstances [section 37(1) . . .];
- (e) where a local education authority notify (sic) them that a child is persistently failing to comply with directions given under an education supervision order . . .

<sup>192</sup>

Emergency Protection Orders may be applied for by anyone and a court may grant an emergency order if:

the court . . . is satisfied that—(a) there is reasonable cause to believe that the child is likely to suffer significant harm if—(i) he is not removed to accommodation provided by or on behalf of the applicant; or (ii) he does not remain in the place in which he is then being accommodated."<sup>193</sup>

The order remains effective for as long as the court specifies but for no longer than eight days.<sup>194</sup> Unlike other provisions of the Act, no appeal may be taken when a court either makes or refuses to make an Emergency Protection Order. Nor may an appeal be sought against any direction given by the court in connection with the order.<sup>195</sup>

189. WHITE ET AL., *supra* note 60, at v.

190. INTRODUCTION, *supra* note 20, § 3.1.

191. See *infra* part III C.

192. INTRODUCTION, *supra* note 20, § 6.3.

193. Children Act 1989, § 44(1)(a).

194. *Id.* § 45(1).

195. *Id.* § 45(10).

Child assessment orders may be issued upon application of the local authority or the NSPCC if the court is satisfied that:

- (a) the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
- (b) an assessment of the state of the child's health or development, or of the way in which he has been treated, is required to enable the applicant to determine whether or not the child is suffering, or is likely to suffer, significant harm; and
- (c) it is unlikely that such an assessment will be made, or be satisfactory, in the absence of an order under this section.<sup>196</sup>

In addition, other preliminary orders, such as recovery orders and search warrants are also possible.

The final orders, applying the principles and conditions discussed above in Section VI, are entered after a reasonable opportunity for investigation by the guardian *ad litem* and full presentation of the case by the local authority. Time limits are not established by the Children Act 1989 but a case-by-case schedule is to be established by the court at the earliest hearing.<sup>197</sup> Proposing and monitoring of the time line is one responsibility of the guardian *ad litem*.<sup>198</sup> Jurisdiction is said to be "concurrent" among the courts although the Magistrates' Court is the most likely court to assume jurisdiction. Orders under the new Act may be made in High Court, county court or Magistrates' Court.<sup>199</sup>

Before a child is placed in the care of the local authority under a full or interim care order, the court must consider what arrangements the local authority has made, or proposes to make, for contact between the child and other people, particularly the child's parents and other interested relatives.<sup>200</sup>

Once a care order is entered in favor of the local authority, no subsequent judicial review of the case plan or progress of the child and family toward rehabilitation or alternative permanent plan is required. A care order may be discharged on the application of the local authority, the child concerned, or any person who has parental responsibility for him.<sup>201</sup>

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196. *Id.* § 43(1).

197. *Id.* § 32.

198. INTRODUCTION, *supra* note 20, § 3.114.

199. WHITE ET AL., *supra* note 60, at v.

200. Children Act 1989, § 34(1), (11).

201. *Id.* § 39(1).

### C. *Procedural Outline—Scotland*

Any person who has reasonable cause to believe a child may be in need of compulsory measures of care may give such information about the child as that person has been able to discover to the Children's Hearing reporter—not to the local social work office.<sup>202</sup> The local social work department, upon request of the reporter, investigates allegations of child abuse or neglect, presents reports to the Children's Hearing and then supervises the child and his family as required by the panel.<sup>203</sup> Social workers from the Scottish local authority are required to provide reports to the Children's Hearing on the child and his social background.<sup>204</sup> The social work department is required to obtain "information from any such person as the reporter or the local authority may think fit"<sup>205</sup>—implying that duties of confidentiality are relaxed for purposes of the Hearing.

The reporter receives referrals from the police, procurator fiscal, education department, social work department or from any person who has reasonable cause to believe that a child may be in need of compulsory measures of care, and must then assess "whether one of the grounds for state intervention under the 1968 Act is satisfied and whether the child appears to be in need of compulsory measures of care."<sup>206</sup> Pursuant to the Act, the reporter may obtain information from the social work department, the child's school, the police, the medical services or from any other person . . . to whom the child might be known."<sup>207</sup> Following the assessment the reporter may take no further action or refer the matter to the social work department for family services on a voluntary basis.<sup>208</sup>

If the reporter decides to bring the matter before a Children's Hearing, he or she must arrange a hearing with three panel members and provide written notice to the parents of the time and place of the hearing together with the grounds of referral.<sup>209</sup>

In the case of emergency, however, a social worker, police officer, or an officer of the Royal Scottish Society for the Prevention of Cruelty

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202. See Social Work (Scotland) Act 1968, § 37(1).

203. See Bruce, *supra* note 10, at 13-16.

204. Social Work (Scotland) Act 1968, § 39(2) & (4).

205. *Id.* § 39(4).

206. See MARTIN ET AL., *supra* note 21, at 10; see also Social Work (Scotland) Act 1968, §§ 32(2), 39(1), (2) & (3).

207. MARTIN ET AL., *supra* note 21, at 10.

208. Social Work (Scotland) Act 1968, § 39(2).

209. MARTIN ET AL., *supra* note 21, at 10.

to Children may apply to a Justice of the Peace or to a sheriff for an order by which a child may be removed from his home to a place of safety.<sup>210</sup> When such an order is executed, the reporter must be notified immediately and he must either discharge the place of safety order or convene a hearing within seven days at which the hearing panel may discontinue the place or safety order or issue a warrant to detain the child for twenty-one days if it finds any reason why the child should not remain at home.<sup>211</sup> This detention may be extended once by the hearing for an additional twenty-one days.<sup>212</sup> The sheriff may extend the place of safety order twice more on the application of a reporter.<sup>213</sup>

Before the Children's Hearing may consider what course of action is necessary in the best interests of the child, its jurisdiction must be established. Either the parents accept the grounds of referral or the matter is referred to the sheriff court where the grounds may be established upon proof. If the parents deny the grounds of referral, the hearing may discharge the case at this stage, or refer the matter to the sheriff court. If the sheriff court finds the grounds established, the case will return to the Children's Hearing for further action. The sheriff does not deal with children's matters in open court but instead conducts such proceedings in chambers. "The procedure does not correspond either to that of a criminal trial or to that of civil proof, and has been described by a distinguished legal commentator as a procedure *sui generis*."<sup>214</sup>

Child protection matters reach the sheriff court principally in two ways: first, for legal proof of grounds when the family does not accept the grounds for referral or the child lacks understanding to accept them,<sup>215</sup> or, second, upon appeal from the Children's Hearing, where the children or parents wish to contest a decision of the Hearing.<sup>216</sup> This division of responsibility between the sheriff court and the Children's Hearing preserves the Children's Hearing as an informal, non-adversarial setting in which to address the welfare of the youngster.

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210. Social Work (Scotland) Act 1968, § 37(2).

211. See *id.* § 37(3)(4); HANDBOOK, *supra* note 49, at 18. The first hearing is variously called the "warrant," "custody," "place of safety," "emergency," or "first lawful day" hearing. See *id.*

212. Social Work (Scotland) Act 1968, § 37(5).

213. *Id.* § 37(5)(5A) & (5B).

214. MARTIN ET AL., *supra* note 21, at 12 (citing Gerald Gordon, *The Role of the Courts*, in CHILDREN'S HEARINGS (F.M. Martin & Kathleen Murray eds., 1976)).

215. Social Work (Scotland) Act 1968, § 42(2).

216. *Id.* § 49.

The view of the Kilbrandon Report was that the court was an inappropriate forum for such dispositional welfare decisions.<sup>217</sup>

This division of adjudication and disposition also protects the integrity of the trial process. The desire to help a youngster may infect the duty to adjudicate fairly so that cases of weak and questionable evidence would be decided against the child and his family in order to permit the court to order a disposition that would accomplish things *for* a child.<sup>218</sup> Referring the welfare or dispositional aspects of the case to a separate panel is intended to protect the integrity of the trials.

A matter may be sent to sheriff court for proof if the parties refuse to accept the grounds *or* if the child is too young to accept them. About one-third of the referrals to sheriff court are based on the child's lack of understanding and are not truly contested by the parents. The sheriff in these cases can make a finding of proof without additional evidence being presented.<sup>219</sup>

In Scotland, as in the United States, truly contested trials in sheriff court are not the norm.<sup>220</sup> For example, in Scotland, 4,996 care and protection cases (cases of neglect, abuse and moral danger or at risk of these) were referred to hearings in 1989. Of the 3,293 sent for proof, about one-third (1,098) were on the basis of the child's lack of understanding—in which the sheriff can find the proof established without evidence being presented.<sup>221</sup> These "lack of understanding" cases are only nominally contested and recommendations have been made to dispense with the application to the sheriff in such cases and thereby enable Children's Hearings to proceed with only parental acceptance of the grounds for referral in cases where the children are unable to understand the grounds.<sup>222</sup>

The truly contested cases numbered about 2,195 in 1989—thirty-four percent of the total care and protection cases. Of the truly contested cases, about eighty percent (1,745) were established at sheriff court and sent back to the Children Hearing for disposition.<sup>223</sup> Murray reports, however, that "in 1980 applications for findings were made to

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217. MARTIN ET AL., *supra* note 21, at 2.

218. *Id.* at 300.

219. Social Work (Scotland) Act 1968, § 42(7).

220. See MARTIN ET AL., *supra* note 21, at 300.

221. Social Work (Scotland) Act 1968, § 42(7).

222. Scottish Office, Review of CHILD CARE LAW IN SCOTLAND, 1990 at 27, 28 (1990).

223. Extrapolations made from interview with Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde, in Strathclyde, Scot. (Feb. 3, 1992).

the sheriff in [only] 15 per cent of all hearing referrals"—including both care and protection and delinquency matters.<sup>224</sup>

Supervision requirements of the Children's Hearing must be reviewed within one year and reporters and panel members report that a majority are reviewed in a shorter period. A supervision order, if not reviewed, lapses after one year and the law provides that "[n]o child shall continue to be subject to a supervision requirement for any time longer than is necessary in his interest."<sup>225</sup> An annual review, attended by the parents and generally by the child, is scheduled for ten to eleven months after the initial order at which the supervision order may be discharged, continued or altered.<sup>226</sup> The social work department may request a review at any time. A child or his parents, however, are only permitted to request a review three months after a supervision requirement is varied, or after six months if the supervision requirement was continued at the previous hearing.<sup>227</sup> The average number of hearings is 1.4 per family per year.<sup>228</sup>

The Review Hearings are not required to focus on any particular statutory test or questions such as found in some of the state laws. The supervision order is continued, modified or dismissed as the panel determines is in the best interest of the child. In Scotland, there is no parallel to the U.S. permanency planning hearing.

The Children's Hearing does not have jurisdiction over orders of adoption or freeing a child for adoption, i.e. termination of parental rights. Such jurisdiction lies concurrently with the sheriff court and the Court of Session although the sheriff court is the main forum for adoption.<sup>229</sup>

### VIII. CONCLUSION

Does the American observer learn more from the comparison with Great Britain than he or she would from comparisons among the states? On several dimensions the answer is "yes." The underlying sup-

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224. Bruce, *supra* note 10, at 17.

225. Social Work (Scotland) Act 1968, § 47(1).

226. *Id.* § 48.

227. *Id.*

228. Interview with Andrew Lockyer, former Chairman of the Children's Panel in Strathclyde, in Strathclyde, Scot. (May 21, 1991).

229. "In 1982 the Court of Session dealt with two applications for adoption, the sheriff courts with 1158. In 1985 three applications were initiated in the Court of Session, and 916 were disposed of in the sheriff courts." 6 STAIR MEMORIAL ENCYCLOPEDIA, *supra* note 87, ¶ 1064 (citing CIVIL JUDICIAL STATISTICS SCOTLAND (1982)).

portive social welfare services available in Britain probably prevent some families from falling within the web of the child protection system and from being brought before a court as child abusers. The British may actually prevent some children from being abused in the first place through services like home health visitors. The United States has been discussing child abuse prevention for years but, with notable exceptions, our emphasis has been on more punitive investigative approaches.

The United States' policy does not emphasize the role of community in the shared goal of raising a child but has persisted in a commitment to individual responsibility when it comes to child rearing. We should move toward the philosophy of the African proverb, "it takes a whole village to raise a child." The United States could copy the British system on supportive services to families, particularly the home health visitor.

On the continuum from compassion to coercion, the British have a well-developed intermediate structure between voluntary community assistance and the formal authority of the courts. The Child Protection Conference, while not a formal judicial body, gathers information about a child from many professionals and family members themselves, and serves to determine whether a child is at risk. If the child is placed on the child abuse registry, a key worker is appointed and the conference coordinates services, develops a unified plan, and reviews the progress within the family every six months. Although the conference has no legal force and cannot require a family to accept services, it escalates the level of community pressure and concern. The Child Protection Conference plays a social control function but also provides an important coordination of services. Multidisciplinary teams of this sort are in operation in some parts of the United States and are provided for in many state statutes. Their implementation and effectiveness are limited, however, and we could learn from the British experience in this regard.

The broader community is engaged in the child protection legal process in different ways in the United States and Britain. Lay judicial officers serving as magistrates and Children's Panel Members are foreign to the American experience. We, however, have other ways to engage the community in child protection. For example, we elect our judges for the most part. Some states preserve a right to a jury trial on charges of child abuse or neglect. Some states have open court procedures so the press and public can observe and report on child protection

procedures. The CASA movement represents an influx of volunteer child advocates into a court system dominated by professionals that will, over time, develop a large, knowledgeable constituency for children.

Child representation has taken a different direction in England and Wales compared with the United States. Both countries seem committed to seeing that children are independently represented but differ as to how this individual advocacy should be organized. The British reliance on highly experienced social workers acting as guardians *ad litem*, who work in tandem with solicitors on behalf of the child's interests, differs from the United States system of reliance on private lawyers with no special training. Scotland has only recently begun to feel the stirrings of concern that perhaps children should be independently represented in protection proceedings. The question is, by whom, with what training, and with what role expectations? The experiences of each country can inform the other as we move toward a tradition of vigorous and independent advocacy for the child.

Similarly, England and the United States are struggling with achieving the proper legal representation for the child protection agency. Different models exist in both countries and empirical research and analysis from both countries will inform the public policy choices of both countries.

In recent years most United States' jurisdictions have adopted statutes that place more careful controls on services being provided to children in foster care or at risk of being placed in foster care. These reforms, fueled by the Federal Adoption Assistance and Child Welfare Act of 1980, have not achieved all that their supporters had hoped, in part because of limited funding, but by and large, they are successful in imposing a discipline on foster care leading to prompter case resolutions and quicker permanent plans for children in care. A shortcoming of the British Children Act 1989 is that it does not require judicial oversight of local authority case plans once a child is placed under the supervision or care of the local authority. England and Wales may wish to take a close look at that dimension of their child welfare program, review the American experience for what it may tell them, and move to add some sort of external, authoritative review of children placed in foster care. Such a system should include independent representation of the child.

The Children Act 1989's contributions to the jurisprudence of child protection law should be carefully evaluated in the United States.



We are ready for a national effort addressing the public law standards and jurisprudence of state intervention in families. Both the Child Abuse Prevention and Treatment Act and the Adoption Assistance and Child Welfare Act have had substantial beneficial effects on practices in the states. The 1981 ABA Juvenile Justice Standards regarding child abuse and neglect were never adopted by ABA House of Delegates—although twenty of the twenty-three volumes of Juvenile Justice Standards were so endorsed. Another effort to conceptualize a jurisprudence of child protection and to develop standards should carefully study the England and Wales innovations and the ensuing commentary and experience. Its emphasis on private family ordering, but with a public responsibility to assist families in raising children, has much to commend it to the United States.