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THE ILLINOIS JUVENILE COURT ACT: DOES IT PROTECT THE CHILD'S BEST INTERESTS?

Parens patriae is a generic term describing the State's broad exercise of equitable powers in aid of individuals who lack the capacity to effectively enforce their rights or to seek redress for their grievances.¹ In a broad sense, the doctrine reflects

1. When the statute codifying the equitable doctrine of *parens patriae* had been on the books slightly over a decade, the Illinois Supreme Court noted proudly that the Illinois Juvenile Court Act was generally recognized as the first in this country. *Lindsay v. Lindsay*, 257 Ill. 328, 333, 100 N.E. 892, 894 (1913). Today, after some 75 years of practice under the statute in all its variations, criticism replaces commendation and modesty replaces pride. Justice Fortas described this attitude, shared by jurists and social scientists alike, when he wrote:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purposes to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.

Kent v. United States, 383 U.S. 541, 555 (1966).

In *Hamerick v. People*, the court described the doctrine in jurisdictional terms:

The court of chancery has the jurisdiction, independently of statutory enactment, and may and will, whenever it appears that the parents are grossly unfit to care for their child and fail in that respect, interfere and deprive them of the custody of their child, and appoint a suitable person or persons to act as guardian and care for the child. 126 Ill. App. 491, 492 (1906) (citations omitted).

Similarly, the court in *In re Brown*, 117 Ill. App. 332, 335-36 (1904), noted that

[t]he provisions of this humane law are not new in principle. The novelty is in procedure only. The State has always retained the ultimate control of minors. The right or duty of the parent to care for and to bring up the child is not exclusive or final. In [certain cases], the State has the right, and it is its duty, to take the child from the parents in order that it may have a chance to grow up into a law-abiding citizen.

Many social scientists view the concept of *parens patriae* in another light:

The degree of state intervention on the private ordering of the parent-child relationship ranges from a minimum—the automatic assignment of a child by birth certificate to his biological parents—to a maximum—court-ordered removal of a child from his custodians because he is found to be 'neglected' . . . or they are found 'unfit' to be parents.

GOLDSTEIN, FREUD, & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, at 4 (1973) [hereinafter referred to as *BEYOND THE BEST INTERESTS*]. See also Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 *YALE L.J.* 745 (1973), dealing primarily with delinquency proceedings but discussing the astonishingly broad discretion of juvenile courts practicing under the philosophy of *parens patriae*.

Moreover, while practice under the Juvenile Court Act is not intended to be adversary in nature, the juvenile's best interests can only be served by vigorous efforts of all involved to identify these interests and to make dispositional plans accordingly. For a fine overview of juvenile law and practice in Illinois, with special emphasis on the problems faced by counsel for parents, see generally *JUVENILE PRACTICE*, re-

society's special concern for those least able to meet its challenges. Under the rubric of "juvenile law," the Illinois legislature has sought to regulate both juvenile delinquency and adult mistreatment of minors under their care, by invoking the doctrine of *parens patriae*. In this setting it must be assumed that juveniles are the object of the State's benevolent protection, although parents or other legal guardians may also be in need of assistance, especially in cases of neglect or dependence.

Historically, the courts have relied on the *parens patriae* concept to give the provisions of the Juvenile Court Act² a broad application. For example, in the leading case of *People ex rel. Houghland v. Leonard*,³ the Illinois Supreme Court held that jurisdiction of circuit and county courts under an earlier version of the Act⁴ extended to the affairs of minors who might be under the protection of guardians appointed by probate courts.⁵ The court concluded that the broad objectives of the Act could "be narrowed to an identity with the appointment of a guardian only by mistaking method for purpose."⁶ Justice Schaefer noted:

vised ed. (Illinois Institute for Continuing Legal Education, 1974), §§ 6-1 et seq. [hereinafter referred to as I.C.L.E.].

The benevolent attitude reflected by the doctrine of *parens patriae* is, apparently, not shared by those whom it seeks to protect. *The Report of the Illinois White House Conference, On Children and Youth, May 1970*, recommended the creation of county or circuit advisory committees to the juvenile court for the purpose of reviewing programs and methods directed toward handling juveniles. The conferences concluded that major emphasis should be directed to proposing ways in which courts may shed their characterization by young persons as antagonists and punishers.

This is not to suggest that the exercise of jurisdiction under the juvenile act must necessarily lead to harsh or unjust results. See, e.g., *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). In *In re Flynn*, 22 Ill. App. 3d 994, 318 N.E.2d 105 (1974), a petition alleged that the parents of a young girl were unfit to retain the custody of any of their children by reason of depravity. Fred Flynn, a cab driver, had a regular customer named Harold Miller who told him of his desire to meet and marry a young girl, and also of his ability to help Flynn out financially. Flynn, who was in debt at the time, arranged for Miller to meet Flynn's 12 year old daughter. Miller gave Flynn approximately \$28,000 and departed with Flynn's daughter for South Carolina, where they were to be married. The trial court granted the appointment of a guardian with power to consent to adoption of all the Flynn children, and on appeal that order was affirmed.

2. ILL. REV. STAT. ch. 37, §§ 701-1 et seq. (1973).

3. 415 Ill. 135, 112 N.E.2d 697 (1953).

4. ILL. REV. STAT. ch. 23, § 191 (1951).

5. This case came before the court upon a writ of habeas corpus which raised broad constitutional questions regarding the validity of section 191 of the Act. Section 20 of Article VI of the constitution vested exclusive jurisdiction over the "appointment of guardians" in probate courts in counties in which such courts existed. ILL. CONST. art. VI, § 20 (1870). Section 18 of the same article provided that county courts should otherwise have original jurisdiction in all probate matters. ILL. CONST. art. VI, § 18 (1870). The petitioner contended that since a probate court had been established in Rock Island County, the local county court had acted beyond its jurisdiction in issuing a warrant of commitment.

6. 415 Ill. at 139, 112 N.E.2d at 699. The court also pointed out that

Further differences [between the objectives of the Act and the powers of the probate courts] could be pointed out. Those enumerated, however, are, in our opinion, sufficient to refute the argument advanced by petitioner that the entire future development of the doctrine of *parens patriae* was intended to be committed irrevocably and exclusively to county or probate courts by the constitutional references to 'the appointment of a guardian.'⁷

In effect, the court declined to infer any limitation on the breadth and applicability of the Act's provisions absent a clear constitutional mandate. A unanimous court reasoned that a circuit or county court might assume jurisdiction concurrently with another court notwithstanding problems of judicial comity, provided that differences in purpose existed.⁸ It seems certain, therefore, that the doctrine of *parens patriae* will be freely employed by the courts to achieve the legislative purposes embodied in the statute.⁹

THE STATUTORY LAW

The wording of section 701-2¹⁰ is calculated to impress a case-by-case approach upon the juvenile courts. But, like an unassuming toddler who, having drawn pictures upon the walls, seeks to remedy his mischief by rubbing it away with dirty hands, the language tends to create its own hazards.

Even more fundamental problems result from the operation of specific statutory provisions, especially those which mirror public policies at variance with contemporary scientific thought on child development. For example, in creating a residuum of parental rights and responsibilities following a transfer of legal custody or guardianship, section 701-16¹¹ reflects a public policy

the statutory provisions of the Probate Act with respect to guardians established no means for effective supervision of the conduct of guardians, whereas the Juvenile Court Act closely regulated the conduct of guardians.

7. *Id.* at 141, 112 N.E.2d at 700.

8. Strictly speaking, juvenile and probate courts do not share concurrent jurisdiction over the affairs of minors. "Concurrent jurisdiction" has been defined as the jurisdiction of several different tribunals, each authorized to deal with the same subject-matter at the choice of the suitor. See, e.g., *Cashman v. Vickers*, 69 Mont. 516, 223 P. 897, 899 (1924). Because the Act was specifically designed to extend the protection of the state to minors, only the state may prosecute in the juvenile courts. ILL. REV. STAT. ch. 37, § 704-1(1) (1973).

9. ILL. REV. STAT. ch. 37, § 701-2 (1973). This section applies to all cases falling under the provisions of the Act. See, e.g., *In re Garmon*, 4 Ill. App. 3d 391, 280 N.E.2d 19 (1972) (dependency and neglect); *People v. Hackman*, 1 Ill. App. 3d 1030, 275 N.E.2d 488 (1971) (delinquency).

10. ILL. REV. STAT. ch. 37, § 701-2 (1973). See note 11 *infra*.

11. ILL. REV. STAT. ch. 37, § 701-16 (1973). See also § 701-2 which provides in pertinent part:

(1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will

that favors parents as the persons best suited to care for their child. Yet, researchers have pointed out that:

Biological parents are credited with an invariable, instinctively based positive tie to the child, although this is frequently belied by evidence to the contrary, in cases of infanticide, infant-battering, child neglect, abuse, and abandonment.¹²

Put another way, the available evidence strongly suggests that in many cases parental interests will be in conflict with the best interests of the child.

THE "BEST INTERESTS" DOCTRINE

The main effect of the public policy implemented by section 701-16¹³ is to inject a scientifically unsound element into juvenile proceedings which is capable of distracting the court from its primary duty to determine the best interests of the child. To the extent that a judge is unlikely to possess personal expertise either in such related matters as child psychology, counselling, and child placement, or in regard to the diagnosis and treatment of the parent's problems, the potential for anomalous dispositions in neglect and dependent cases is heightened.¹⁴ Moreover, it seems apparent that decisions which might irrevocably affect the family unit must be made on the basis of a subjective balancing process without regard to available laboratory diagnostic techniques of analyzing delicate interpersonal relationships. In fact, even where resources through outside agencies are available, the offered services may be of limited utility to the court insofar as individual personalities or organizational pressures within these agencies distort their objectivity.¹⁵ Therefore, although

serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community. . . .

Id. § 701-2 (1973) (emphasis added).

12. BEYOND THE BEST INTERESTS at 17.

13. ILL. REV. STAT. ch. 37, § 701-16 (1973).

14. It has been suggested that, for lawyers, this dilemma is compounded by the fact that strict adherence to trial concepts of advocacy might result in exposing the child to further and more serious injury. Moreover, since the decision of the United States Supreme Court in *Matter of Gault*, 387 U.S. 1 (1966), in which legal representation of minors in juvenile delinquency cases was elevated to a constitutional right, the probability that such problems will become more common place has increased. See also KEMPE AND HELFER, *HELPING THE BATTERED CHILD AND HIS FAMILY*, 225-41 (1972) [hereinafter referred to as *KEMPE AND HELFER*].

Child placement ". . . involves, implicitly if not explicitly, a predication about who, among available alternatives, holds most promise for meeting the child's psychological need." BEYOND THE BEST INTERESTS at 6.

For a discussion of possible therapeutic approaches to the parents of battered children, see *KEMPE AND HELFER*, 3-22. Such persons share ". . . a common pattern . . . of child rearing characterized by a high demand for the child to perform so as to gratify the parents, and by the use of severe physical punishment to ensure the child's proper behavior." *Id.* at 4.

15. *Id.* at 127-45. The institution of social work is frequently charged

a court pursuant to the Act¹⁶ is bound to resolve any conflict between the rights of the parents and the interests of the minor in favor of the child, the introduction of such extraneous factors as the rights of the parents invites an undesirable subjective analysis of the minor's best interests in light of such rights.

THE "BEST INTERESTS" STANDARD

The so-called "best interests of the child" standard is always the goal against which judicial responses will be measured.¹⁷ The doctrine may be compared to the *parens patriae* concept insofar as the phrase "best interests of the child" clearly implies that a wide and flexible range of approaches be made available to the court in disposing of neglect and dependent cases. However, it has been pointed out that

[i]n giving meaning to this goal, decision makers in law have recognized the necessity of protecting a child's physical well-being as a guide to placement. But they have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being.¹⁸

Furthermore, the effectiveness of the "best interests" standard is mitigated by a statutory presumption that the natural parents are best fit to care for and to have custody of the child,¹⁹ notwithstanding the psychological fact that the child's

with being resistant to change due to a combination of conservative forces. Practice in many of our social service programs has become institutionalized. The agencies often serve well those who are motivated to individually seek help; but what of the others? It has been noted that "[s]ocial work administrators rationalize failure to move toward change by projecting blame on external problems—lack of budget, insufficient staff, inadequate space, heavy caseloads, and so on." *Id.* at 129. Moreover,

[t]he specifics of child protective services demand special skills in staff and an approach which seeks out the neglecting family to extend services on behalf of children despite initial rejection or resistance by sometimes hostile or disturbed parents.

Id. at 130 (emphasis added).

Ideally, a program must recruit mature and experienced personnel who have the highest social work skills and must tailor caseloads down to permit the application of these optimum skills.

16. ILL. REV. STAT. ch. 37, § 701-2(3) (1973). This subsection is new to the Act and became effective on October 1, 1973. Its effect is to incorporate the "best interests" standard into the statute. Formerly, this factor would be applied implicitly by a court acting pursuant to the Juvenile Court Act.

17. It has been pointed out by Judge John P. McGury that "best interests" will ultimately be the criterion for final disposition in *any* proceeding connected with child custody.

- (a) Neglect—Best interest of child
- (b) Guardianship—Best interest of child
- (c) Habeas Corpus—Best interest of child
- (d) Custody—Best interest of child
- (e) Unfitness—Best interest of child

ILL. JUV. PRAC., revised ed. (Ill. Inst. for C.L.E., 1974) at 8-11.

18. BEYOND THE BEST INTERESTS at 4.

19. See note 36 *infra*. Section 701-2 directs that the child's welfare

attachment to these adults results from their "day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation,"²⁰ and may be unrelated to biological ties. Moreover, it is not certain whether the standard recognizes that as the "prototype of true human relationship, the psychological child-parent relationship is not wholly positive but has its admixture of negative elements,"²¹ or even that to some degree environmental factors shape the child's development.

It appears, therefore, that the "best interests" doctrine possibly suffers from a fatal weakness, namely, that it is not designed to bridge complex psychological gaps in child-parent relationships. Consequently, the flexible "best interests" standard must be applied by the courts at the expense of consistency of result, at least from a socio-psychological standpoint.

Parental Fitness vis-à-vis the "Best Interests" Doctrine

It is in connection with the problem of unfitness as a basis for termination of parental responsibilities that the shortcomings of the "best interests" doctrine become most apparent. Although at least one commentator has properly pointed out that unfitness may not be a prerequisite to the termination of parental responsibilities in *all* proceedings involving child custody, since in most instances the test ultimately is one of "best interests,"²² it is evident that in the juvenile court context the two concepts are not mutually exclusive, but rather that the "best interests" standard was intended to encompass the fitness test.

The question of whether parental fitness will be determinative of the right to custody is one which has perplexed the courts for decades.²³ The older cases held that the rights of parents could be cut off for "good and sufficient" cause,²⁴ but it cannot

be established "preferably in his own home." ILL. REV. STAT. ch. 37, § 701-2 (1973).

20. BEYOND THE BEST INTERESTS at 17.

21. *Id.* at 19.

22. See generally Veverka, *The Right of Natural Parents To Their Children As Against Strangers: Is The Right Absolute?*, 61 ILL. B.J. 234 (1973). The author distinguishes habeas corpus proceedings, in which unfitness may not be a prerequisite, and adoption proceedings, in which unfitness is required by statute. With regard to neglect and dependence cases under the Act, there is a problem insofar as the legislature seems to have adopted both tests in the present Act. See discussion at text 8-11 *infra*.

23. See, e.g., *People v. Shine*, 271 Ill. App. 479, 483 (1933).

24. In *People v. Weeks*, 228 Ill. App. 262 (1923), a petition for habeas corpus was denied even though the relator was not found either to be negligent or unfit with regard to his daughter. However, in *People v. Shine*, 271 Ill. App. 479 (1933), a neglect petition was held not to have alleged "good and sufficient" cause for termination of William Shine's responsibility as a parent where the evidence did not disclose unfitness. Similarly, in *In re Harstad*, 337 Ill. App. 74, 84 N.E.2d 855 (1949), the court described its decision to terminate the parental rights of Leroy Har-

be gleaned from them whether or not unfitness was a condition precedent to a permanent termination of parental rights.²⁵

In 1959, the Illinois Supreme Court attempted to deal with this question in the case of *Giacopelli v. The Crittenton Home*.²⁶ The case was before the court upon a petition for writ of habeas corpus filed by Nick and Helen Giacopelli for the purpose of securing custody of their son from Anthony and Doris Legaz. Mrs. Giacopelli, apparently without the knowledge of her husband, entered a home for unwed mothers during the fourth month of pregnancy and subsequently signed a consent form authorizing adoption of the child.²⁷ This instrument was filed in the juvenile division of the circuit court of Peoria County and a dependency decree was entered, after which the child was placed in the home of respondents.

The court noted that upon a hearing for a writ of habeas corpus, a trial court may always inquire into parental fitness in order to resolve the question of the best interests of the child, and held that the parents need not be totally unfit before a court may terminate their rights regarding the child. Fitness was determined to be *only one of the factors* in determining the best interests of the child.²⁸ The majority view appears to resolve the question of fitness into the larger question of "best interests."

In a concurring opinion, however, Justice Klingbiel took issue on that point: "Contrary to the pronouncement in the majority opinion, I think it is necessary that parents be found unfit before their child may be taken from them against their will."²⁹ Justice Klingbiel considered as insufficient the basis of the majority's decision that in light of all the circumstances the child's interests were best served by placing him in the custody of strangers, and stated that he would not have concurred in the result but for the court's finding that the parents were in fact unfit to retain custody of the child. The combined effect of the majority and concurring opinions was to increase judicial confu-

stad in favor of the children's stepmother in terms of their best interests, but specifically found, on the basis of the children's testimony, the defendant unfit as well.

25. Thus, later cases found little precedent value in the earlier decisions upon which to formulate an answer to this question. This fact should be kept in mind in connection with the Illinois Supreme Court decision of *Giacopelli v. The Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959), discussed in text accompanying notes 26-41 *infra*.

26. 16 Ill. 2d 556, 158 N.E.2d 613 (1959).

27. The court found that even though Helen Giacopelli had joined in the petition with her husband, she had forfeited her individual legal right to custody of the child.

28. See also *People ex rel. Edwards v. Livingston*, 42 Ill. 2d 201, 247 N.E.2d 417 (1969) (habeas corpus); cf. *Breger v. Seymour*, 74 Ill. App. 2d 197, 219 N.E.2d 265 (1966), decided under § 2009 of the Family Court Act, ILL. REV. STAT. ch. 23, § 2009, [1951] Ill. Laws (repealed 1965).

29. 16 Ill. 2d at 567, 158 N.E.2d at 619.

sion surrounding the need for unfitness as a condition to termination of all parental responsibilities.

In spite of the judicial quandry, the Illinois legislature appears to have opted for the views of the concurring opinion in *Giacopelli* by their enactment of section 705-9³⁰ of the Juvenile Court Act, permitting a ward of the court to be the subject of a petition for adoption pursuant to the provisions of the Adoption Act.³¹ Under the Adoption Act, the court may empower a guardian to consent to an adoption whenever the parents consent to it or are determined to be unfit.³² However, because section 705-9 directs a court's attention both to the child's "best interests" and to his parent's fitness, it is not altogether clear that, having made a finding on the question of fitness, the court must additionally determine that it is in the child's "best interests" to permit the adoption to proceed.

If an independent determination based upon the "best interests" test must be made, this section of the Act is indeed consistent with the majority opinion in *Giacopelli* insofar as it requires a court to consider all the circumstances of a case before empowering a guardian to consent to adoption. At the same time, it is doubtful whether a court, having already determined the parents unfit to care for the ward, could find that it is not in the "best interests" of the child to permit adoption proceedings to be instituted. A finding of unfitness in connection with termination proceedings is, in a sense, the ultimate fact in issue concerning the parents, and *a fortiori* suggests that it is not in the "best interests" of the child to permit the particular relationship to continue further.

Notwithstanding this apparent ambiguity, the question seems resolved to the extent that the incorporation by reference of both the consent and unfitness requirements of the Adoption Act into the Juvenile Court Act implicitly suggests that in the absence of a voluntary consent to adoption nothing less than unfitness will suffice. In this connection a statement of the Illinois Appellate Court is instructive:

A condition precedent to an adoption is either consent of the parent or a finding by the court that consent is not required for the reason of unfitness To prove unfitness . . . there must be clear and convincing proof supported by evidence of conduct in accordance with the definitions³³

The case of *Oeth v. Erwin*³⁴ illustrates the apparent strength

30. ILL. REV. STAT. ch. 37, § 705-9 (1973).

31. *Id.* ch. 4, §§ 9.1-1 et seq. (1973).

32. *Id.* at § 9.1-8.

33. *In re Smith*, 4 Ill. App. 3d 261, 265, 280 N.E.2d 770, 773 (1972). See also ILL. REV. STAT. ch. 4, § 9.1-1 (1971), and note 39 *infra*.

34. 6 Ill. App. 2d 18, 126 N.E.2d 526 (1955). This case is also fre-

of the foregoing statement. There, an appellate court affirmed a circuit court order granting the respondent's motion to dismiss a county court's authorization of a consent to adoption on the ground that the judge had failed either to make a finding of unfitness or to obtain the parent's consent, and that his order was consequently void for want of jurisdiction. The appellate court relied on the rule that when a court is exercising a special statutory jurisdiction, there can be no presumption of its authority to act, noting that

[i]n adoption it is not the duty of the court to determine if petitioners could best provide for the child. The court *must first determine* if statutory grounds for adoption exist. . . .³⁵

Thus, it would seem that unless the record shows on its face that a finding of parental consent or unfitness has been made in compliance with the Adoption Act, courts will be unwilling to terminate child-parent relationships.

In this light, cases such as *Smith* and *Oeth* stand like signposts to illuminate the path away from the confusion of *Giacopelli*.³⁶ Yet, although a consistent pattern of strict compli-

quently cited for its holding that juvenile court decisions are not *res judicata*.

35. *Id.* at 22, 126 N.E.2d at 528 (citation omitted) (emphasis added). ILL. REV. STAT. ch. 23, § 209 (1953) (§ 209 of the Family Court Act), was substantially similar to section 705-9 of the present Act. Even had the county court determined Mr. Erwin to be unfit, it is not suggested that its finding would have been conclusive. The standard of clear and convincing proof is a more rigid evidentiary test than that employed at the adjudicatory stage. See, e.g., *In re Overton*, 21 Ill. App. 3d 1014, 316 N.E.2d 201 (1974) (findings of the circuit court of Winnebago County that Colene Overton, the mother, was unfit because "she has failed to maintain a reasonable degree of interest, concern, or responsibility as to the children [and] she deserted the children"; reversed for lack of evidence); *In re Gibson*, 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975) (failure to maintain a reasonable degree of interest, etc.).

36. The recent decision in *In re Shuman*, 22 Ill. App. 3d 151, 319 N.E.2d 287 (1974), would seem to indicate that a finding of unfitness is essential to a permanent termination of parental responsibilities. The case came before the court on an adoption petition pursuant to the terms of the Adoption Act, ILL. REV. STAT. ch. 4, § 9.1-8 (1971). Taking note of the case law to the effect that custody can be denied a natural parent in the absence of unfitness, Justice Stouder explained:

It is essential in a case as the one at bar to distinguish between a custody proceeding [i.e., habeas corpus] and an adoption case

The distinction between the two types of actions is essential because adoption severs conclusively the rights and interests of natural parents.

22 Ill. App. 3d at 153, 319 N.E.2d at 289. Similarly, the court in *In re Bartha*, 107 Ill. App. 2d 214, 245 N.E.2d 779 (1969), rejected petitioner's contention that parental fitness was not a necessary and dominant criterion for depriving a mother of custody, if the order of dependency is in the best interests of the child. Noting that *Giacopelli* was a habeas corpus case, that its finding of dependency was the result of Helen Giacopelli's voluntary consent to adoption, and that unlike the case before it the petitioners in *Giacopelli* were clearly unfit to care for and have custody of their son, the court concluded:

[W]e cannot deny the natural mother her right to have custody of

ance with the provisions of the Juvenile Court Act has emerged from the cases, hindsight leads one to question whether the legislature truly acted in the child's "best interests" by introducing the element of parental fitness as the main issue to be resolved in adoption proceedings. Clearly, in such proceedings the interests of the parents are a legitimate concern of the courts; the exercise of a power to consent to adoption by a guardian terminates parental rights, relieves the parents of all responsibility for the child, and frees the minor from all obligations of maintenance and obedience as respects his natural parents.³⁷ But what becomes of the "best interests" doctrine when a court is precluded from acting because the parents have refused to consent and have not been found unfit? In such cases, does it automatically follow that it is in the "best interests" of the child not to authorize a consent to adoption?³⁸

At present, the ambiguous role of the "best interests" standard in neglect and dependent cases, its uncertain application by

her child, on a record which does not support the trial court's finding of parental unfitness and dependency.
107 Ill. App. 2d at 221, 245 N.E.2d at 783.

On the other hand, Judge McGury has noted that "once a finding of neglect has been entered, subsequent rehabilitation of the parents does not resurrect (in the absence of a vacation of the original finding) the superior rights of a natural parent." ILL. JUV. PRAC., revised ed. (Ill. Inst. for C.L.E., 1974) at 6-9. In *People v. Hoerner*, 6 Ill. App. 3d 994, 287 N.E.2d 510 (1972), the court found that at the time of the trial court's order adjudicating the Hoerner's children dependent the atmosphere in which the children lived "was punctuated with drunkenness, deprivation, filth and consummate hunger." 6 Ill. App. 3d at 996, 287 N.E.2d at 511. Noting that during the two subsequent years the children had enjoyed stable family situations with their foster parents, the court refused custody to the petitioners, notwithstanding proof of their rehabilitation.

37. See ILL. REV. STAT. ch. 37, § 705-9(2) (1973). Compare section 701-12 which provides in part:

'Legal custody' means the relationship created by an order of the court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline . . . to provide . . . food, shelter, education and ordinary medical care, except as . . . limited by residual parental rights . . . and the rights . . . of the guardian of the person, if any.

Id. § 701-12.

"Guardianship" is defined in section 701-11:

'Guardianship of the person' of a minor means the duty and authority, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his general welfare.

Id. § 701-12.

Moreover, it is clear that legal custody may exist concurrently with guardianship. Thus, under Section 704-7 the court may condition the return of the child to its parent, custodian, or guardian prior to adjudication or disposition. ILL. REV. STAT. ch. 37, § 704-7 (1973). In fact, the parents retain specific residual rights after an adjudication of dependence or neglect and the appointment of a guardian or custodian. Cf. ILL. REV. STAT. ch. 37, § 701-16 (1973). See, e.g., *People v. Miller*, 225 Ill. App. 150 (1922) (duty to support children).

38. For example, if the child has been with foster parents for whom he has developed an attachment during the pendency of a dispositional

courts which lack the expertise to make in-depth analyses of troubled child-parent relationships, and the far-reaching consequences of the adoption process, collectively suggest that the doctrine is ill-equipped to serve either as a basis for resolving child-parent conflicts or as a means of implementing society's interest in such affairs under the concept of *parens patriae*. In this connection it should be emphasized that although the grounds of unfitness set forth in the Adoption Act ensure that the parent will have sufficient notice of the charges to formulate a proper defense, they tend to further obscure the issue of the child's "best interests," and certainly affect child-adult relationships more decisively than other available statutory responses.³⁹ Moreover, while the Juvenile Court Act contemplates adoption as a somewhat extraordinary remedy, the fact is that the power to consent to adoption has been granted to guardians in a significant percentage of neglect and dependent cases in recent years, and it appears as though this practice will increase in the future.⁴⁰

In contrast with the present statutory scheme, the majority opinion in *Giacopelli* sought not only to implement the case by case approach implicit in the *parens patriae* concept, but at the same time, in refusing to mechanically award custody of the child to its biological parents, anticipated the avenues now being explored by child care experts.⁴¹ It must be noted that this opinion has not been overruled, and could become the operative basis of a revised Act. Such a statute should incorporate socio-psychological methods of analyzing and treating disturbed child-parent relationships, and should place less emphasis on parental

order in his case, is it in his "best interests" to replace him with his natural parents?

39. See text accompanying note 40 and notes 42-44 *infra*.

40. See ILL. REV. STAT. ch. 4, § 9.1-1(D)(L) (1973). This provision, which became effective on October 1, 1973, assigns an arbitrary period of two years as the time in which the parents of neglected children must have demonstrated their ability to correct their past mistakes. How is it to be determined whether their efforts to do so have been reasonable or sincere? What are the effects of this waiting period on the child if after two years with foster parents he is forced to be reunited with his natural ones?

It is also interesting to note the number of neglect and dependent cases which are disposed of by court authorization of consents to adoption:

JUVENILE DIVISION—CASES FILED, REINSTATED
AND ADJUDICATED FOR THE YEAR 1974
(Circuit Court of Cook County):

	1974	1973	Difference
FINDING OF DEPENDENCY	168	198	-30
FINDING OF NEGLECT	1657	1751	-94
GUARDIANS WITH CONSENT TO ADOPT	687	559	+128

Above statistics were procured from Cook County Juvenile Court, 1100 South Hamilton, Chicago, Illinois 60612.

41. See text accompanying notes 42-52 *infra*.

fitness, as suggested by the majority in *Giacopelli*. For reasons that will be more fully discussed below, the need for such swift legislative action is imperative.

*Psychological Stability of the Child vis-à-vis
the "Best Interests" Doctrine*

Another aspect of the "best interests" test which militates against its usefulness as the governing standard in neglect and dependent cases, is its apparent inability to foster solutions capable of maintaining or restoring the psychological well-being of the child. In this connection, one recent critique of the nation's various juvenile laws has suggested that present statutes fail because they neither recognize nor account for certain important socio-psychological factors.⁴²

One such factor is a child's need for continuity of relationships. In part, it is the shared experiences of a child and his parents that produce meaningful family relationships. The family provides the main backdrop for the gradual development of love, care, and affection between the minor and his parents, and the extent to which these feelings develop will largely determine the child's psychological growth.

In turn, the child's need for love, care, and affection, ordinarily corresponds to age—the younger the child, the greater his need for support and direction. And because the child's demands are inherently complex, there is a great need for continuity in his family relationships if these demands are to be fully satisfied.

In light of these considerations it might reasonably be expected that all child placements, except when specifically designed for brief temporary care, would be "as permanent as the placement of a newborn with its biological parents."⁴³ This, however, does not occur under the present Juvenile Court Act. Under its provisions, the appointment of a legal guardian is not intended to be a permanent dispositional solution of the juvenile's case, even though the guardian assumes the rights and obligations of a parent. Thus, for example, a grant of legal custody or guardianship continues until the court otherwise directs, or until the minor reaches the age of twenty-one years.⁴⁴ Moreover, while the guardian must necessarily develop an intimate relationship with his ward because of the innumerable responsibilities for the child's well-being which are thrust upon him, it is highly unlikely that the special attachment which exists

42. BEYOND THE BEST INTERESTS.

43. *Id.* at 35.

44. See ILL. REV. STAT. ch. 37, § 705-7(5) (1973).

between a child and a loving parent can be duplicated. Perhaps in order to comport with the child's need for continuity of relationship, the appointment of guardians should be strictly limited to a brief duration or eliminated from the Act in favor of a less rigid form of supervision.

In addition to the need for continuity of relationship, a second important factor not accounted for by present statutes concerns a child's sense of time. The juvenile laws fail to recognize that "[u]nlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctive and emotional needs."⁴⁵ Thus, for example, abandonment cases presently turn on the issue of the parents' intent to abandon, whereas application of a "child's sense of time" guideline would require a shift in focus to the individual child's tolerance for uncertainty in his relationships.⁴⁶ Procedural and substantive decisions in neglect and dependent cases should always be made within the time that the child-to-be-placed can endure loss and uncertainty. The present statute, however, invites long-term uncertainty and requires psychological endurance of minors who are brought within its provisions.

In contradistinction to those sections that reflect policies, principles, or substantive rules, the Juvenile Court Act's procedural provisions inject a formalism into the proceedings that undoubtedly adds to their length. As a result, the minor's time perspective is obscured and the Act's potential for benefitting the child and society is diminished.

These procedural guidelines were intended by the legislature to ensure that juvenile court proceedings would provide a fair and open forum in which all interested parties could work together to resolve questions affecting the minor's "best interests." Ironically, their cumulative effect is to create opportunities for delay which may well limit the effectiveness of any subsequent dispositional scheme. For example, while the requirement of separate petitions for each child properly narrows the court's inquiry to the individual child's position and direction, it may create administrative problems placing an added burden on the court's capacity to attend to all matters with due regard for the child's time-sense and need for continuity.⁴⁷ Combining

45. BEYOND THE BEST INTERESTS at 40.

46. *Id.* at 7-8.

47. See ILL. REV. STAT. ch. 37, § 704-1(1) (1973). When a petition is filed, the clerk of the court issues summons directed to the minor and to each person named as a respondent in the petition. This summons must contain a statement that the minor or any of the respondents is entitled to have an attorney present at the hearing on the petition, including court appointed counsel. Again, failure to comply with these statutory requirements will nullify an order of court stemming there-

the potential effects of this provision with those of sections relating to the use of supplemental petitions, conditions of custody and guardianship, and the manner of conducting adjudicatory and dispositional hearings—to mention a few—the need for statutory revision is clear.⁴⁸

from. See ILL. REV. STAT. ch. 37, § 704-3 (1973). But cf., *In re Finch*, 40 Ill. App. 2d 18, 189 N.E.2d 678 (1963) (respondent who signed printed consent form held to have waived service of process).

In fact, failure to comply with the statutory requirements for the filing of petitions may create more than mere administrative headaches; since proceedings under the Act are purely statutory, a defective petition destroys the court's subject matter jurisdiction and renders its orders void. Moreover, because juvenile court proceedings are not *res judicata*, so that even a rejected petitioner can subsequently raise the same matters before the court, a faulty petition can have definite disruptive effects on the minor's home life.

48. With regard to the use of supplemental petitions section 704-1(6) provides that one or more such instruments may be filed at any time before dismissal of the petition or before final closing and discharge of the case under section 705-11. The nature of these petitions will vary widely, but requests for the appointment or termination of guardianships and custodial relations, or the seeking of an authorization for a consent to adoption present common examples of the uses to which supplemental petitions may be put. See, e.g., *In re Gibson*, 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975); *In re Nyce*, 131 Ill. App. 2d 481, 268 N.E.2d 233 (1971).

In connection with guardianship or custodial care under section 705-11, the Act provides that both proceedings and wardship automatically terminate upon the minor's attaining the age of 21 years or whenever the court finds that the best interests of the minor and the public no longer require wardship of the court. However, under the latter circumstances the court may continue or terminate any custodianship or guardianship respecting the minor. See ILL. REV. STAT. ch. 37, § 705-11 (1973). Cf. *Witter v. Cook County Commr's.*, 256 Ill. 616, 100 N.E. 148 (1912). In this respect, the court's discretion with regard to the guardianship or custodian permits the State to maintain some control over the minor's home life. But the potential for disrupting the minor's psychological development is similar to that created by the use of supplemental petitions. The statement of Ms. Elizabeth Nolan, Asst. Att. Gen. for Iowa, reflects the degree of interference which is possible under this type of situation:

A person who is [under 18] and married is still entitled to the protection or guardianship of the state, and the fact of marriage does not *ipso facto* thrust the person into majority for all purposes. 1 Family Law Repr. 2070 (Nov. 26, 1974) (emphasis added) (Family Law Repr. hereinafter cited as F.L.R.). Accord, *Richardson v. Brown*, 18 F.2d 1008 (D.C. Cir. 1927).

As to procedural difficulties at the adjudicatory and dispositional stages of the proceedings, the basic problems stem from a shift in the standard of proof as the case moves from an adjudication of the child status as either a neglected or dependent minor to the creation of a dispositional scheme. See text accompanying notes 72-83 *infra*.

On the other hand, sections such as 701-21, which provide that the State's Attorney is to represent the people of the state in proceedings under the Act, permit juvenile proceedings in an orderly atmosphere that is conducive to an early resolution of the minor's "best interests."

Although somewhat of an anomaly, *In re Morris*, 331 Ill. App. 417, 73 N.E.2d 337 (1947), demonstrates the inherent danger of permitting a special prosecutor to handle what is, essentially, a matter of state interest. Here, the county probation officer brought in her own attorneys to prosecute a neglect petition and succeeded in turning the hearing into an adversary proceeding. She was called as a witness and permitted to testify over objection to specific hearsay matters tending to blacken Morris's character. Furthermore, the court refused to permit Morris to have character witnesses of her own. Not surprisingly, the appellate court reversed and remanded with directions to dismiss the order granting the probation officer power to consent to adoption.

The courts further emasculate protection of the minor's "best interests" by strictly construing and rigidly enforcing the Act. The appellate court's statement in *Oeth v. Erwin* is illustrative of this attitude:

When the court is exercising a special statutory jurisdiction there is no presumption of jurisdiction, but the record must show on its face that the case is one where the court has authority to act, and if it does not, the judgment is void and subject to collateral attack⁴⁹

Yet, in fairness to the courts it should be mentioned that they have been thrust into the awkward position of having to resolve legal questions solely on the basis of the minor's "best interests," while remaining duty-bound to observe and enforce statutory rules of law that may cut against this standard's effectiveness.

Nonetheless, prior case law suggests that speedy yet expeditious disposition of juvenile matters under the "best interests" standard is not some mere pipedream or misty *Xanadu* which evaporates before it can be fully realized, but rather is well within the sweep of our legislative and judicial machinery. Thus, in *People ex rel. Wallace v. Labrenz*,⁵⁰ the trial court unhesitatingly entered an order finding that Cheryl Labrenz, then 8 days old, was a dependent child whose life was endangered by the refusal of her parents to consent to a necessary blood transfusion.⁵¹ The court appointed a guardian to consent to

49. 6 Ill. App. 2d 18, 21-22, 126 N.E.2d 526, 528 (1955).

50. 411 Ill. 618, 104 N.E.2d 769 (1952).

51. This was established by hospital records and other medical evidence which established a rare blood disease. Two doctors testified that death was certain to result if the transfusions were not administered. A third testified that severe permanent physical damage was likely to result. All agreed that the risk of injury from failure to give the transfusion greatly outweighed the dangers inherent in the administration of the transfusion itself.

Many courts have recognized that emergency medical care provides a fertile ground for state intervention into family affairs. See, e.g., *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (1970); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962). But cf. *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (life not in immediate danger).

Certain other well-recognized grounds for invoking the *parens patriae* doctrine include: (1) Rejection or physical and emotional neglect. See, e.g., *In re Carl*, 22 N.Y.S.2d 782, 194 Misc. 985 (1940). It is apparent that neglect need not be based solely on physical mistreatment but may well exist where the facts demonstrate a lack of affection or guidance by the parent for the child. In *In re Harstad*, 337 Ill. App. 74, 84 N.E.2d 855 (1949), there was some evidence that the father had a drinking problem, but its severity had not been shown in an entirely clear and convincing manner. On the other hand, it was undisputed that he had the financial means to support his five children, and his interest in their welfare seemed apparent from the fact of his petition seeking their custody. However, at the trial the older children's testimony indicated a lack of affection that a parent ordinarily manifests toward his children, as well as a lack of instruction or parental guidance. The court denied the father's petition and permitted the children's stepmother to retain their custody.

(2) Abandonment. In *Robinson v. Neubauer*, 79 Ill. App. 2d 362,

the transfusion, and returned the child to the custody of her parents only when her health had greatly improved. Here, a court functioning within the limits of the Act was able to respond quickly and decisively in the best interests of the child,

223 N.E.2d 705 (1967), the evidence demonstrated that after the father had placed his children in the home of the Robinsons following the death of his wife, he continued to pay them weekly visits and even moved into the same neighborhood in order to be nearby. Based on these facts the court could not find that he had abandoned his children. Justice Craven noted:

The facts in this case do not establish abandonment as that term has been used in adoption proceedings. Abandonment has been defined as any conduct on the part of the parent which evidences a settled purpose to forego all claims to the child. . . . Desertion . . . is something less than abandonment but would necessarily require the establishment of the existence of an intention by the parent to terminate, permanently, custody over the child but not to relinquish all parental duties.

Id. at 365, 223 N.E.2d at 707. Because this case arose under the Adoption Act, the unfitness standard was applied to his alleged conduct. Since this is a more demanding standard than that which is applied in neglect or dependent cases, abandonment undoubtedly would suffice as the basis for a neglect or dependent petition.

(3) Anticipated neglect. Apparently, in some jurisdictions, a petition that alleges facts demonstrating anticipated neglect will receive the court's consideration. However, Illinois is not among these jurisdictions. See, e.g., *In re Nyce*, 131 Ill. App. 2d 481, 268 N.E.2d 233 (1971).

(4) Depravity. See, e.g., *In re Flynn*, 22 Ill. App. 3d 994, 318 N.E.2d 105 (1974); *Oeth v. Erwin*, 6 Ill. App. 2d 18, 126 N.E.2d 526 (1955).

(5) Physical Abuse. See "The Abused and Neglected Child Reporting Act." ILL. REV. STAT. ch. 23, §§ 2041-2047 (effective July 1, 1975).

Insufficient grounds for a finding of neglect or dependence include:

(1) Religion. See *Lindsay v. Lindsay*, 257 Ill. 328, 100 N.E. 892 (1913). Cf. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). Distinguish the situation where religious beliefs are alleged to be the reason for child neglect from situations wherein they are asserted as a defense for conduct which constitutes a recognized ground of neglect.

(2) Birth control. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *In re M.K.R.*, 1 F.L.R. 2080 (Mo. Sup. Ct., Nov. 12, 1974), the mother of a 13 year old mentally retarded child filed a petition to have the court approve "an abdominal hysterectomy." The court noted:

Whatever might be the merits of permanently depriving this child of the right [to bear children], the juvenile court may not do so without statutory authority—authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people.

Id. (3) Political beliefs. See *De Jonge v. Oregon*, 299 U.S. 353 (1937) (alleged communist affiliations).

(4) Poverty. See *In re Morris*, 331 Ill. App. 417, 73 N.E.2d 337 (1947). But where conditions of poverty give rise to parental conduct amounting to a legally sufficient basis for a finding of neglect or dependence a different result will be reached. See, e.g., *In re Flynn*, 22 Ill. App. 3d 994, 318 N.E.2d 105 (1974).

(5) Immorality. In *In re Wallingford*, 129 Ill. App. 2d 227, 262 N.E.2d 607 (1970), the evidence disclosed that an unmarried "roomer" was living at the family home; that the defendant mother's youngest child had been born out of wedlock; that one of her six children moved from the residence because of differences between the child and the roomer; and that another daughter, age 16, was engaged to a 29 year old man. Conversely, the testimony at trial revealed that the family's standard of living was adequate and that there was a lack of evidence

with remarkable magnanimity in a delicate setting. While the extent to which the urgency of the situation shaped the court's actions is difficult to determine, it is, unfortunately, less difficult to conclude that cases such as this do not reflect the day-to-day operations of our juvenile laws.⁵²

CONSTITUTIONAL OBSTACLES TO A REVISED ACT

As outlined by the previous discussion, the quality of juvenile justice depends not only upon the degree to which a set of standards is tailored to meet the minor's needs, but also upon efforts to correlate the length of proceedings with the minor's tolerance for inconsistency in his relationships with adults. Yet, somewhat ironically, many of the problems affecting the smooth operation of the statute, including the length of proceedings thereunder, arise from considerations of procedural due process.⁵³

For example, in *In re Estate of Hoffman*⁵⁴ Jack and Rose Rosen, who had no biological or legal ties to the child in question, challenged a protective order of the Family Court of Cook County restraining them from interfering with his care or custody.⁵⁵ At the close of evidence during the adjudicatory hear-

that the defendant "carried on" with her roomer in the presence of the children. The court found in favor of the defendant.

(6) Social standing. Because financially troubled parents are more likely than others to foster neglected or dependent children, social standing as a basis of neglect or dependence is expressly forbidden by the Act. See ILL. REV. STAT. ch. 37, §§ 702-4(2), 702-5(2) (1973).

(7) Unusual living conditions. See *In re Pima County*, 18 Ariz. App. 219, 501 P.2d 395 (1972). Cf. *Lindsay v. Lindsay*, 257 Ill. 328, 100 N.E. 892 (1913).

52. A third element not accounted for by the present Act is its own inability to supervise interpersonal relationships and to make long-range predictions. Accordingly, it has been noted that:

The process through which a new child-parent status emerges is too complex and subject to too many individual variations for the law to provide a rigid statutory timetable.

BEYOND THE BEST INTERESTS at 48.

53. ILL. REV. STAT. ch. 37, § 701-20 (1973).

54. 49 Ill. App. 2d 436, 200 N.E.2d 37 (1964).

55. The protective order provided

[t]hat the petitioner, Jack Rosen, and his wife, Rose Rosen, their agents and attorneys and all persons acting in concert with them, be and each of them hereby is enjoined and retracted from interfering in any manner with the care and custody of the child . . . or with her supervision by the respondents or this court.

Id. at 439, 200 N.E.2d at 38. Cf. § 705-5(1)(a) which provides that such an order may require any person before the court, "[t]o stay away from the home or the minor. . ." § 705-5(2) contemplates that notice and opportunity for hearing be afforded to a person subject to a protective order.

§ 705-4 deals generally with the supervisory powers of the probation office over the custodian of a minor. And § 705-6 warns that violations of either § 705-4 or § 705-5 may warrant contempt of court citations. Subsection (2) of 705-6 grants the clerk of the court discretion to issue certificates of notice to persons "affected by" a protective order or an order

ing the court suggested a plan for the child, but the respondents, who were the adoptive parents, protested, stating their belief that the Rosens would "look over the shoulder of whoever is treating the child."⁵⁶ When Jack Rosen, the only appellant to appear at the hearing, warned that if the future treatment of the child were not to his liking he would again bring the matter to court, the trial judge ordered him from the courtroom, declared the child a dependent in the custody of his parents, and subsequently directed that the protective order be prepared. The appellants moved to vacate the order on various grounds. Rose Rosen argued that she had not been a party to the action since she was not served with process, never submitted to the jurisdiction of the court, nor was ever present during any of the proceedings. It was also contended that the order was invalid as it related to Jack Rosen because there was no evidence or hearing within his presence. The motion was denied and an appeal taken.

Although the trial court's methods had clearly gone beyond the section of the Act regulating the issuance of protective orders, the respondents insisted that the protective order had been entered pursuant to the court's inherent ancillary jurisdiction to enforce and protect its orders and not pursuant to its authority under the Juvenile Court Act.⁵⁷ Justice Kluczynski was not impressed, noting that "[t]his argument begs the question. A court may have authority but it must be exercised in accordance with due process of law."⁵⁸ While conceding that the trial court

of protective supervision. The certificate, in turn, when presented to any peace officer, authorizes the taking-into-custody of a violator, who must then appear before the court to explain his conduct.

56. 49 Ill. App. 2d at 438, 200 N.E.2d at 38.

57. See ILL. REV. STAT. ch. 23, § 2009.1 (1963), which expressly covered persons before the court pursuant to service of process or voluntary appearance. Cf. § 705-5.

58. 49 Ill. App. 2d at 441, 200 N.E.2d at 39. *But cf.* *People v. Davis*, 11 Ill. App. 3d 775, 298 N.E.2d 350 (1973), where the reviewing court refused to consider appellant's due process attack upon the order of a trial court.

In *People v. Davis* a petition was filed to have Mario Davis declared a dependent minor for the reason that he was not receiving proper care due to the mental condition of his mother. At the first of four hearings, Lillian Davis, the mother, was called by the State pursuant to section 60 of the Civil Practice Act. Over objection she testified. On appeal from an order declaring Mario a dependent, the mother contended that compelling her testimony as an adverse witness was contrary to the Act, a denial of due process, and in violation of her right against self-incrimination. On the issue of whether compelling a parent named as a party in a dependent petition to testify amounted to a violation of such person's right against self-incrimination, the appellate court noted that it did not, holding that the phrase "in any criminal case," as used in the United States and Illinois Constitutions, is interpreted to include civil actions only where a person's testimony might tend to convict him of a criminal offense or subject him to a fine or incarceration. The court further concluded that the mother was not so threatened and that in any case the privilege can be raised only after the witness has been sworn and asked

undoubtedly acted with the best interests of the child in mind, he added that "it had no basis as a matter of principle or law, for the entry of this order."⁵⁹ Thus, because Jack and Rose Rosen were not afforded their fundamental rights to receive notice, and to appear and be heard in open court, the appellate court could not close the door on the possibility of an extended custody fight affecting the best interests of the child.

Today, section 701-20 of the Act sets forth the rights of parties to juvenile proceedings. These include the right to be present, to be heard, to present evidence material to the proceeding, to cross-examine witnesses, to examine pertinent court files and records, and, although juvenile proceedings are not intended to be of an adversary nature, the right to be represented by counsel. The right to be heard is extended to all current and previously appointed foster parents or representatives of an agency interested in the minor, even though such persons do not thereby become parties to the proceeding. In addition, any current foster parent is entitled to and must be given adequate notice at all stages of any proceeding wherein the custody or the status of the minor is at issue.⁶⁰ Although exceptions to the exercise of such rights have also been defined in this section, constitutional guarantees of procedural due process undoubtedly lengthen the duration of juvenile court proceedings and have the potential to disrupt a minor ward's life.

The problems created by section 701-20 are not without difficulty, for if juvenile court proceedings may be viewed as the beginning of a process of analysis and correction regarding the neglected or dependent child's domestic milieu, then the propensity of constitutionally safeguarded rights to effect such results is self-defeating. Is it possible to reconcile the goals of the Juvenile Court Act with the procedural rights of third parties?

In the recent case of *O'Conner v. Donaldson*,⁶¹ a former patient of a state mental hospital brought an action under 42 U.S.C. § 1983, in United States District Court, alleging that the hospital superintendent and other members of the hospital staff had intentionally and maliciously deprived him of his constitutional right to liberty. The facts of the case reveal that Donaldson's commitment was initiated by his father; that after hearings

a potentially incriminating question. However, it has been suggested that where a separate proceeding is pending against the parents in criminal court, the objection to a section 60 examination might be sustained.

59. 49 Ill. App. 2d at 442, 200 N.E.2d at 40.

60. See, e.g., ILL. REV. STAT. ch. 37, § 705-9.4 (1973), which represents the codification of *Stanley v. Illinois*, 405 U.S. 645 (1972). See also Comment, *New Adoption Proceedings in Illinois*, 7 J. MAR. J. 194 (1973).

61. 422 U.S. 563 (1975).

he was found to be suffering from "paranoid schizophrenia"; and that he was committed for "care, maintenance, and treatment" pursuant to Florida statute.⁶² Although the hospital staff had the power to release a patient, the superintendent refused to allow the power to be exercised in Donaldson's case.⁶³ Moreover, the evidence showed that plaintiff's confinement was a simple regime of enforced custody rather than a program designed to alleviate or cure his supposed illness. The trial judge instructed the jury that they should find that O'Conner had violated Donaldson's constitutional right to liberty if he had been confined against his will and that he was not dangerous.⁶⁴ The jury returned a verdict and damages for the plaintiff.

The Court of Appeals "affirmed in a broad opinion dealing with the far-reaching question whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals."⁶⁵ It held that where the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided.⁶⁶

Justice Stewart, speaking for the Supreme Court, concluded that

the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. . . . As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty.⁶⁷

Having deftly managed to avoid a head-on collision with the issues raised in the appellate court's opinion, he proceeded to ask whether the State may confine the mentally ill merely to ensure

62. The statutory provisions have since been repealed. See 422 U.S. at 566, n. 2.

63. The evidence at trial demonstrated that Donaldson was a non-dangerous patient, and that many respectable persons were willing to vouch for his conduct when, and if, he was released.

64. Noting that in his instructions the trial judge had used the phrase "dangerous to himself," Justice Stewart attempted to explain the word's meaning by defining the condition as being present whenever the committed patient is "helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends." 422 U.S. at 574, n. 9.

65. 493 F.2d 507, 509 (5th Cir. 1974).

66. *Id.* at 521. The district court defined a minimum level of "treatment" as being such "as will give him a realistic opportunity to be cured or to improve his mental condition."

67. 422 U.S. at 573. O'Connor argued that the adequacy of treatment is a "nonjusticiable" question that must be left to the discretion of the psychiatric profession, but the Court rejected that contention:

That argument is unpersuasive. Where 'treatment' is the sole asserted ground for depriving a person of liberty, is it plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.
Id. at 574, n. 10.

them a living standard superior to that they enjoy in the private community, then answered by stating:

That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.⁶⁸

Although the judgment of the Court of Appeals was vacated and the case remanded for a determination of whether O'Conner was immune from liability, the Supreme Court's decision appeared to be motivated by other factors:

Of necessity our decision vacating the judgment of the Court of Appeals *deprives that court's opinion of precedential effect*, leaving this Court's opinion and judgment as the sole law of the case.⁶⁹

Consequently, while the Supreme Court's affirmation of the mental incompetent's right to receive treatment must await future decisions, its eventual recognition seems likely at present.

As a result, *Donaldson's* discussion of the rights of non-dangerous mentally incompetent persons suggests a basis for striking a balance between the goals of the Juvenile Court Act in neglect and dependent cases and the pernicious side-effects of the exercise of procedural rights by third parties. For not only have mental incompetents and infants historically been accorded roughly equivalent legal status, but in a modern context, the relative legal positions occupied by mentally incompetent persons who have undergone commitment and minors who become embroiled in the juvenile court process, also permit an analogy that envisions the extension of *Donaldson* rights into other areas encompassed by the *parens patriae* concept.⁷⁰ Moreover, it is undoubtedly clear that courts possess the power to declare

68. *Id.* at 575.

69. *Id.* at 578, n. 12 (emphasis added).

70. Note especially the Court of Appeals's statement that, [W]here, as in *Donaldson's* case, the rationale for confinement is the '*parens patriae*' rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided 'To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.' 493 F.2d at 521 (5th Cir. 1974). Chief Justice Burger, however, took issue with the Court of Appeals's failure to explain its basis for determining that the rationale for *Donaldson's* confinement was that he needed treatment, and concluded that its premise must have been that the State has no power to confine the non-dangerous mentally ill without providing them with treatment. After reviewing the power traditionally exercised by the States in this area, he summarized:

In short, the idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin, and there is no historical basis for imposing such a limitation on state power. *O'Conner v. Donaldson*, 422 U.S. at 582 (1975) (separate opinion) (footnote omitted).

answers to *Donaldson* type questions, as well as the power to apply the underlying principles in new areas.⁷¹

Nevertheless, the various legislatures also possess the power to make these decisions, and in the area of juvenile law, especially as regards cases involving neglected and dependent children, they appear best suited to undertake the task of doing so. In connection with the Illinois statute, the legislature should bear in mind that neglected and dependent children rarely present a physical danger to themselves or to others, that the statutory preference for not removing a minor from his surroundings suggests a course of treatment rather than one of incarceration, and that, in a very real sense, the uncertainty thrust upon the child by the institution of juvenile court proceedings can have an adverse psychological effect on him that closely resembles the retarding effect of incarceration upon non-dangerous mentally incompetent persons. At the same time, it must recognize that the exercise by adults of their procedural rights may work to delay the onset of treatment and thereby militate against its effectiveness.

However, under any set of circumstances the questions here involved are of an extremely delicate nature, for the legislature must not only decide whether a minor's right to treatment exists, but it must also decide the extent to which this right protects the minor from the effects of the constitutional rights of other persons. Furthermore, the very novelty of a right to treatment warrants that the decision-making process must proceed slowly and carefully, so that the legislature, in its enthusiasm to improve the quality of juvenile justice, does not unduly restrict more established constitutional rights.

STANDARDS OF PROOF

In light of the likelihood that any meaningful reform of the Juvenile Court Act can emerge only after a time consuming process of legislative decision-making, an interim method of implementing the suggestions of child care experts might be achieved by manipulating its standards of proof. Sections 704-6 and 705-1 of the Act regulate the scope and presentation of evidence at the adjudicatory and dispositional stages, respectively, in neglect and dependent cases.⁷²

71. Chief Justice Burger's concurring opinion critically questioned the propriety of judicial review in areas traditionally operated by the various state legislatures. However, he did concede that questions regarding the adequacy of procedure and the power of a State to continue particular confinements are ultimately for the courts, but added that he was "not persuaded that we should abandon the traditional limitations on the scope of judicial review." 422 U.S. at 587.

72. Section 704-6 provides in part that "[a]t the adjudicatory hearing, the court shall first consider only the question whether the minor is a

The adjudicatory hearing provided for in section 704-6 is designed to determine the minor's status as a delinquent, neglected, and dependent child, or as a minor in need of supervision, and utilizes the standard of proof and rules of evidence applicable to any civil proceeding. Thus, questions of status will be decided by a preponderance of the evidence.

At the dispositional hearing all evidence which is helpful in determining the best interests of the child and the public will be heard and considered, "even though [it is] not competent for the purposes of the adjudicatory hearing."⁷³ In addition, responsible parties have a limited right to controvert social service agency reports, and they may request that the proceedings be adjourned for a reasonable length of time to gather additional evidence. When presented with the latter type of motion, the court must make temporary arrangements for the custody of the child.

Due to the complex nature of the matters decided at the dispositional stage, the greatest danger of judicial error is likely to arise at this point in the proceedings. Recognizing this, and also that the scope of the disposition process encompasses "[a]ll evidence helpful in determining [the "best interests" of the minor and the public] . . . to the extent of its probative value. . ."⁷⁴ the courts have demanded that the State prove its case by more than a mere preponderance of the evidence. Case illustrations may be helpful in attempting to visualize the effect of this limitation.

*In re Gibson*⁷⁵ concerned an appeal from a decree terminating the parental rights of Virginia Gibson, mother of two and one-half year old Rose Gibson. Following her appointment as guardian for the child, Patricia Gould, a psychologist and the director of the Floberg Center where Rose had been placed, filed a supplemental petition seeking to terminate the parent's rights and to obtain a power to consent to the adoption of the child on the basis of inadequate visitation by the mother. Gould testified that the mother's visits had been infrequent up to the time of the supplemental petition, but that thereafter their frequency had increased dramatically. The mother stated that at first she had visited Rose "all the time,"⁷⁶ but that due to transportation

[delinquent, dependent or neglected child, or a minor in need of supervision]." ILL. REV. STAT. ch. 37, § 704-6 (1973).

Section 705-1 provides that "[a]ll evidence helpful in determining [the minor's 'best interests'] may be admitted and may be relied upon to the extent of its probative value. . . ." ILL. REV. STAT. ch. 37, § 705-1(1) (1973).

73. ILL. REV. STAT. ch. 37, § 705-1(1) (1973).

74. *Id.*

75. 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975).

76. *Id.* at 983, 322 N.E.2d at 224.

problems, she later had to reduce the frequency of her visits. On the whole the evidence was conflicting. The trial court granted the petition, the mother appealed, and on appeal the decree was reversed. The appellate court noted that "[a] finding that a parent is an 'unfit person' requires more than a preponderance of the evidence," and concluded: "We are of the opinion, therefore, that clear and convincing evidence must be shown in the present case before finding the respondent mother an unfit person."⁷⁷

The history of this case reveals that at the adjudicatory stage the State was able to establish the child's dependent status by a preponderance of the evidence; that a period of court appointed guardianship thereafter commenced and ran uninterrupted until the reversal of the trial court's dispositional order for lack of clear and convincing evidence; and that following the reversal, mother and daughter were reunited. Without passing either on the court's finding of the mother's fitness or on the substantive validity of the petition, the instant case paints the ironic portrait of a child who is separated from her family and thrust into an unfamiliar environment for possibly an intolerable length of time as a means of protecting her "best interests," only to be returned because the State could not establish any danger to her health or well-being.

Moreover, the potential for this type of result is not limited to cases involving termination of parental rights and responsibilities. For example, *In re Nyce*⁷⁸ concerned an appeal from a dispositional order of the circuit court placing a "neglected" minor under the guardianship of the Department of Children and Family Services. The mother of the child alleged, *inter alia*, that the facts set forth in the petition had not been established by a preponderance of the evidence, and that the court relied on inadmissible hearsay and opinion evidence in adjudicating the child a "neglected" minor. The mother was herself a ward of the court at the time she gave birth to her daughter. Family Services apparently felt compelled to intervene in the child-parent relationship as quickly as possible, because seven days after the child was born, while the mother was still recuperating from delivery, they took custody of the infant. A neglect petition was filed, and at a detention hearing held the following day, the mother learned for the first time that her daughter had been removed from the hospital. At the adjudicatory hearing the State called the mother as a witness.⁷⁹ She testified that she

77. *Id.* at 984, 322 N.E.2d at 225.

78. 131 Ill. App. 2d 481, 268 N.E.2d 233 (1971).

79. The most important evidence in a case may well be the testimony

was seventeen years old and unmarried, but that the people with whom she was living had offered to adopt both herself and her baby. Kenneth Hallum, a social worker with Family Services, testified that he had seen the mother on about fifteen occasions, but that their meetings never lasted the usual time because the girl would become enraged, say foul things to him, and leave. In his view she was unfit to be the mother of the child. Similarly, Agnes Piszcyek, liaison officer for Family Services and

of the parents, guardian or legal custodian of the minor. Section 60 of the Civil Practice Act provides in part:

Upon the trial of any case *any party* thereto . . . may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination . . . may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

ILL. REV. STAT. ch. 110, § 60 (1973) (emphasis added). However, other important types of evidence at the adjudicatory stage may be included:

(1) Hospital/Medical Records. *See, e.g., People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952).

(2) Expert Testimony. In a case where the referral to a psychiatrist is ordered by a court, a copy of the report will be furnished to both attorneys. If the attorneys agree, the report may be seen and considered by the judge at the adjudicatory stage. If either attorney objects to the admission of the report, the attorney who wishes to rely on it may subpoena the psychiatrist. A difficult question may arise when the parent's attorney advises the court that the parents will not appear for an examination by the court psychiatrist but wish to produce their own psychiatrist to testify that such evidence is not appropriate to the case. In such a situation the court could properly consider the refusal as evidence against the parents. At the dispositional stage, however, these problems are likely to be mitigated by the broad scope of section 705-1 of the Act. *Cf. Sup. Ct. Rule 215, ILL. REV. STAT. ch. 110 A, § 215 (1973); Rule 702, FED. R. EV.*

(3) Reputation Evidence. *See, e.g., People ex rel. Edwards v. Livingston*, 42 Ill. 2d 201, 247 N.E.2d 417 (1969). In this category of evidence the State is likely to produce as witnesses school teachers, welfare case workers, social workers, etc.

(4) Probation Officer's Report. When a minor is detained prior to an adjudicatory hearing, a probation officer will be appointed. His duties will include making a full investigation of the family situation, including interviews with the parents. He may recommend dismissal of the petition. On the other hand, he may recommend to the state's attorney that findings be sought and a guardian appointed. But query: can the parent's attorney seek to bar the receipt of this report on the basis of attorney-client privilege? The late Judge Alfred Cillela deplored the invasion of privacy inherent in the making of the social investigation prior to a determination of wardship, especially since a petition concerning a child might later be dismissed. Nonetheless, it is reversible error for a court to avail itself of confidential reports from a probation officer and not make such reports a part of the record or permit cross-examination of the probation officers. *See In re Rosmis*, 26 Ill. App. 2d 226, 167 N.E.2d 826 (1960).

In *People ex rel. Ryan v. Sempek*, 12 Ill. 2d 581, 147 N.E.2d 295 (1958), the appellant argued that the power to investigate facts and supply evidence is an executive function which cannot be conferred upon the court or its probation officer. However, the court refused to consider the question since the ultimate facts had been admitted by appellant's motion to dismiss. *Cf. Witter v. Cook County Commr's*, 256 Ill. 616, 100 N.E. 148 (1912).

(5) Caseworker's Investigative Report. The important feature of an investigative report is that it may be given the greatest weight by the court. *See, e.g., People v. Hoerner*, 6 Ill. App. 3d 994, 287 N.E.2d 510 (1972). Because this type of report is usually conclusory, speculative,

the Juvenile Court, stated that the girl was highly emotional and unstable. The Director of the Chicago Foundlings Home testified that once or twice the girl had become angry and had started to scream, but that such conduct was not unusual for girls at the Home.

Against the measuring rod of section 702-4, the appellate court held that the evidence did not show by a preponderance that the baby was a "neglected" minor:⁸⁰

or based on hearsay, it may not be admissible at the adjudicatory stage. On the other hand, it may be considered a public record and therefore outside the hearsay rule. Cf. Rule 901(b)(7), FED. R. Ev.

80. Before a court acting pursuant to the Act can exercise its broad equitable powers to create a dispositive scheme in the "best interests" of the child, it must declare the child a delinquent, dependent or neglected minor, or a minor in need of supervision. See ILL. REV. STAT. ch. 37, § 702-1 (1973).

Section 702-4 of the Act defines a neglected minor while section 702-5 defines a dependent minor. At the present time in Cook County neglect petitions greatly outnumber dependency petitions as indicated below:

	<u>DEPENDENT PETITIONS</u>	<u>NEGLECT PETITIONS</u>
1965	4095	651
1966	3264	1403
1967	3038	1207
1968	1170	1795
1969	221	2974
1970	287	3008
1971	603	2651
1972	216	2284
1973	139	2513
1974	116	3064

Statistics procured from Cook County Juvenile Court: 1100 South Hamilton; Chicago, Illinois 60612.

The reasons for this are not clear. It is conceivable that the growing attention paid by the media to child abuse cases has made the filing of neglect petitions fashionable.

However, the distinction is not that significant. In many cases courts have willingly heard dependency petitions based on facts more closely akin to statutory neglect, and vice-versa. See, e.g., *People v. Shine*, 271 Ill. App. 479 (1933) (neglect petition brought on the basis of lack of parental care and support). Cf. *People ex rel. Ryan v. Sempek*, 12 Ill. 2d 581, 147 N.E.2d 295 (1958). The important factor is that where a petition on its face alleges facts which raise serious questions of parental misconduct and irresponsibility, the State, under the doctrine of *parens patriae*, will intervene to determine whether the best interests of the child are being served.

After a hearing on the question of neglect or dependence, the court must make specific findings as to whether or not the minor is a person named in section 702-1 of the Act. If the court retains jurisdiction, it must additionally decree that the minor is a ward of the court. See ILL. REV. STAT. ch. 37, § 704-8 (1973). A finding of "wardship" renders the child subject to the dispositional powers of the court.

Only after determining that the minor should be a ward of the court can the court turn to a consideration of a dispositional scheme best suited to his needs. See ILL. REV. STAT. ch. 37, § 705-1 (1973). In *In re Garmon*, 4 Ill. App. 3d 391, 280 N.E.2d 19 (1972), the court, briefly describing the alternatives in a neglect case, noted:

In the case of a neglected child, the alternatives range from continuing the child in the custody of the parents under Section 5-2(c) . . . to the placing of the child with the Children and Family Services with the power to consent to adoption under Sections 5-7 and 5-9.

Id. at 394, 280 N.E.2d at 21.

At best, the testimony presented by the State established that two social workers with limited contact with the mother of a minor did not believe her to be a fit and proper person to raise the child

We cannot conceive of how the allegations of the petition could have been established in a case . . . where it is clear from the record that the parent never had custody of the child.⁸¹

Therefore, although termination proceedings may involve more drama than those involving the appointment of a guardian, it does not follow that the potential for deleterious psychological effects upon the child are any less significant in such cases. Rather, as demonstrated in *In re Nyce*, the danger proceeds from a statutory scheme which permits the requisite jurisdictional facts to be established too easily, and which has the effect of postponing review of dispositional orders until the damage has occurred.

In addition, because the Act utilizes shifting standards of proof, the court may not consider facts bearing upon the probable disposition of the case at the adjudicatory stage, and it may be reversible error to do so. In fact, sections 704-6 and 705-1 have been viewed as requiring that adjudicatory and dispositional hearings be kept separate and distinct from one another.

Thus, in *People v. Brady*⁸² the testimony and written reports of social workers of the Department of Children and Family Services tended to establish the unfitness of the parents, but because the trial judge had decided both the minor's status and the disposition of his case at a single hearing, it could not be viewed as a strictly dispositional one. Consequently, because the trial judge had improperly considered certain reports containing hearsay information at the adjudicatory stage, the appellate court reversed his orders.⁸³

81. 131 Ill. App. 2d at 486-87, 268 N.E.2d at 237.

82. 7 Ill. App. 3d 404, 287 N.E.2d 537 (1972).

83. Thus, in order to avoid the exclusion of investigatory reports or other evidence of a "dispositional" type, as well as a possible reversal of the court order on the ground that it is against the manifest weight of the evidence, it seems apparent that the adjudicatory hearing must somehow be held separately from the hearing involving the creation of a dispositional scheme, or at least be separately labelled for the record. However, it is less clear whether notice of subsequent judicial determinations is due the parent, guardian or custodian, *after* an adjudication and finding of the requisite jurisdictional facts. As the Illinois Supreme Court noted in *People ex rel. Houghland v. Leonard*, 415 Ill. 135, 112 N.E.2d 697 (1953):

Upon a finding that the child is dependent, neglected, or delinquent and the appointment of a guardian over the person of the child, the guardianship under the act continues until the court otherwise directs. . . . The statute, however, makes no provision with respect to further notice to the parents during the continuing jurisdiction of the court over the child.
Id. at 146, 112 N.E.2d at 702-03 (citation omitted).

CONCLUSION

It may be seen that the evidence provisions of the Juvenile Court Act inhibit the application of the juvenile laws to the "best interests" of the child, not only by employing shifting standards of proof in neglect and dependent cases, but also by rejecting facts which do not fall within the purview of these standards. One remedy might be to require clear and convincing evidence of the minor's status at the adjudicatory stage, where only a preponderance of the evidence is now required. This would have the effect of forcing the State to prove, at the earliest possible time, not only that the child was a neglected or dependent minor, but also that the parents were unlikely to develop the qualities necessary to reassume full responsibility for the child's care. If the State were unable to demonstrate the likelihood of the parent's unfitness, the court might permit the child to remain with his parents, issuing such protective orders as it deemed necessary to ensure the minor's well-being. On the other hand, if unfitness were revealed at this earlier stage, a permanent termination of the child-parent relationship could be anticipated, and a dispositional scheme developed. More importantly, the suggested alteration of the present standards of proof would help eliminate unnecessary disruptions of the child's relationships with adults, while ensuring that the length of proceedings would not shatter the minor's ability to tolerate uncertainty in his life. In this way, these two recognized principles of child care and development would begin to operate on our present juvenile laws pending the legislature's reconsideration of the *parens patriae* concept and the role of the child's "best interests" in neglect and dependent cases. The steadily increasing number of cases finding their way into our juvenile courts demand that the search for remedial solutions be commenced without further delay.

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