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Legislation—Child Protection Proceedings Under Article 10 of the New York Family Court Act

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certified mail will be delivered to the addressee. As with any method of substituted service, cases will arise in which the issue will be whether the defendant has received actual notice. The proposed mailing provision recognizes the possibility of non-delivery and provides for it by allowing the defendant to invoke section 317 if he meets the requisite requirements.[53]

Since the proposed mailing procedure is arguably constitutional, the primary issue is whether it would achieve the desired goals of service as well as, or better than, the new CPLR section 308(2). Certainly such a procedure would help reduce the incidence of "sewer service" since it eliminates the necessity of personally serving the defendant. At the same time it eliminates the cost of hiring a process server; the recently adopted CPLR section 308(2) does not. Furthermore, a return receipt is more reliable proof of service than an affidavit from the process server. Unlike return receipts, affidavits are highly susceptible to attack. The use of return receipts would tend to reduce the frequency of affidavit battles between the parties. It was just this abuse that the new CPLR section 308 (2) hoped to curtail.[54]

The 193rd session of the New York State Legislature enacted a major change in the service of process procedures. The new section 308(2) may reduce difficulties which arose under the former in-hand service provision; it does not, however, tend to solve the problems of excessive cost and affidavit abuse. A close watch should be kept on the operation of the new California provision and, at the same time, attention should be directed toward the practical workings of the new CPLR section. If old problems remain, the Legislature should give serious consideration to a procedure allowing mailed service of process in the first instance.

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LEGISLATION — CHILD PROTECTION PROCEEDINGS UNDER ARTICLE 10 OF THE NEW YORK FAMILY COURT ACT

Recently the New York Legislature has taken a fresh approach to a most shocking and tragic problem: child abuse and neglect. The New York Family Court Act, enacted in 1962, contemplated the problem of child neglect through specific legislation,[1] but made no separate provisions for the handling of child abuse. Consequently, throughout the statute's early

53. N.Y. CIV. PRAC. LAW § 317 (McKinney Supp. 1969). This provision allows the defendant to reopen a judgment and defend the action if the court finds that he did not receive notice and has a meritorious defense.

54. *See* note 15 *supra* and accompanying text.

1. N.Y. FAMILY CT. ACT art. 3 (McKinney 1963) (repealed 1970) [hereinafter cited as 1963 ACT].

years, situations of abuse were petitioned to the court under the guise of neglect.[2] In 1969, a separate and distinct child abuse article was added to the original legislation.[3] Almost immediately the New York City Bar Association recommended its repeal. The Association stated that the legislation not only added little to the Family Court's power to protect children from abusing parents, a feat already being accomplished under Article 3, but created problems in the areas of constitutional law and judicial administration.[4] Revised Article 10 of the Family Court Act, "Child Protective Proceedings,"[5] the subject of this note, is a consolidation and revision of all previous legislation pertaining to child abuse and neglect.

Child Abuse and the Use of Drugs

Section 1046(a) (iii) of Article 10[6] provides that proof of a person's repeated use of drugs shall be prima facie evidence that such a person's child is neglected. Previously, an adjudication of narcotic drug addiction constituted a presumption that such a person's child was abused.[7] The mandated dispositional result of the presumption of abuse was removal of the child from his home.[8] This presumption of abuse and the consequential removal presented a constitutional issue of violation of due process. If the former law were strictly followed, mandatory removal could be enforced against a parent who had been adjudicated a narcotic addict, but who later had been found, by the Narcotic Addiction Control Commission, to have been rehabilitated.[9] Moreover, proof that one parent was addicted would be sufficient cause for a finding of abuse and removal, even though the other parent was capable of providing for the child. The new legislation has lessened the chance of creating such a constitutional issue by eliminating

2. The child neglect article has been construed as encompassing physical abuse. *See, e.g., In re* S, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. 1965).

3. N.Y. FAMILY CT. ACT art. 10 (McKinney 1969) (repealed 1970) [hereinafter cited as 1969 ACT].

4. *See* Committee Report, *The Enactment of The Abused Child Law and Committee Findings As To Defects in The Law*, 24 RECORD OF N.Y.C.B.A. 347, 348 (1969):

> The Committee upon its study of the law finds it bad because it suffers from numerous defects in draftmanship, because parts of it raise constitutional problems, because it unduly interferes with the judiciary by imposing through statutory mandate a special part of the Family Court, because without providing the necessary additional funds it imposes burdens on the Family Court and its staff, on the police commissioner of the city of New York and on the district attorneys outside of the city of New York, because of its interjection of the police and the district attorneys into what should be civil proceedings in a civil court, and because of its unwise repudiation of the use of law guardians to represent children.

5. N.Y. FAMILY CT. ACT art. 10 (McKinney 1970) [hereinafter cited as 1970 ACT].

6. 1970 ACT § 1046(a) (iii).

7. 1969 ACT § 1012.

8. *Id.* § 1022.

9. N.Y. MENTAL HYGIENE LAW § 208(4) (b) (McKinney 1970).

mandatory removal. In a situation involving drug use by parents, the court now has the same dispositional options as in any other neglect case.[10]

Nevertheless the practical effect of the statutory change is dubious. Since a judge still sits as fact-finder in these proceedings, the change may be more in form than substance. Under the presumption rule, if the addicted parent offered no rebuttal evidence that the child was not abused, the judge was obligated to make a determination of abuse. Now, under the prima facie evidence rule, the parent has the *option* of offering rebuttal evidence and the judge's determination is limited to a finding of neglect. Since the nature of the rebuttal evidence will be of non-neglect rather than non-addiction, it is both possible if not probable that a judge, considering the over-all judicial treatment of drug use today, may make a determination of neglect notwithstanding the sufficiency of rebuttal evidence introduced. In this regard the change might be more significant if a jury acted as fact-finder.

A Relaxation of the Evidentiary Requirements

Under previous legislation, material and relevant evidence was admissible in a dispositional hearing, and competent, material and relevant evidence was admissible in a fact-finding hearing.[11] Requirements for the admissibility of evidence under the new Article 10 have been relaxed, resulting in the abrogation of some traditional rules of evidence. For example, proof of abuse of one child is now admissible in a hearing held to determine abuse of another child of the same parent-respondent.[12] Moreover, prior statements of a child, relating to abuse or neglect, are now expressly admissible.[13] Under the previous statute there would be some question as to the materiality and relevance of these statements. It should be noted, however, that such statements, if uncorroborated, are not alone sufficient to warrant a fact-finding of abuse or neglect.[14]

In defense of the relaxed evidentiary provisions it is submitted that the Family Court is an unusual part of the judiciary. It is simply what its name implies: a court for the settlement of familial problems. Hence, common sense should dictate who ought to be protected and how this protection should be accomplished. The goal of child protection is unique; it entails considering the welfare of the child while simultaneously considering the rights of the parent. Thus, to justify the relaxation of rules of evidence it must be determined that the need for information outweighs

10. 1970 Act § 1052.
11. 1969 Act § 346.
12. 1970 Act § 1046(a) (i).
13. *Id.* § 1046(a) (vi).
14. *Id.*

certain parental rights. In the area of child protection the legislature has undoubtedly made such a determination.

Definitional Considerations

Another change effectuated by the new legislation is a redefinition of the terms "neglected"[15] and "abused"[16] child. The repealed Article 3 defined "neglected child" as one whose parent failed to provide adequate physical care and a level of guardianship and moral care which would protect a child from serious harm.[17] Presently a "neglected child" is one whose parent does not exercise proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted upon the child substantial harm.[18] Article 10 previously defined "abused child" as one who had had serious mental or physical injury inflicted upon him[19] by other than accidental means or whose parent or custodian had been adjudicated a narcotic addict.[20] Now an "abused child" is one whose parent inflicts or allows to be inflicted upon the child non-accidental physical injury or creates or allows to be created substantial risk thereof.[21]

The present distinction between abused and neglected children appears to be unnecessary. Before the promulgation of the instant legislation the dichotomy served a purpose: since removal of the child was mandatory upon a finding of abuse, abused children were theoretically handled one way[22] and neglected children another.[23] Today, however, the judge has the same dispositional options for both classifications.[24] Consequently, the dichotomy adds nothing to the child protection goal of the legislation. It is submitted that the legislature should re-examine its reasons for retaining two classifications, and, perhaps, consolidate the dual categorization into a "harmed child" classification.

The Role of the District Attorney

The role of the district attorney has been altered so that in all abuse cases he is now a "necessary party to the proceedings."[25] Formerly, he represented the child in all stages of the proceedings,[26] a designation which is

15. 1970 Act § 1012 (f).
16. *Id.* § 1012 (e).
17. 1963 Act § 312.
18. 1970 Act § 1012 (f).
19. To compound the criticism of the 1969 Act, this draftmanship can be said to leave open the possibility that a child could be abused by one other than his parent or guardian.
20. 1969 Act § 1012.
21. 1970 Act § 1012 (e).
22. 1969 Act § 1022. Although the dichotomy did not materialize due to the short life of this section, it is reasonable to assume the inevitability of such a result.
23. 1963 Act § 352.
24. 1970 Act § 1052.
25. *Id.* § 254 (b).
26. 1969 Act § 1016.

not synonymous with "necessary party." While under prior law the district attorney could originate proceedings, he is now further empowered by express authorization to subpoena evidence or records relating to abuse or neglect,[27] to make a motion for adjournment in a fact-finding or dispositional hearing,[28] and to make a motion for staying, modifying, setting aside or vacating orders.[29] While the legislation specifies what the district attorney can do, it does not effectively clarify the concept of being a "necessary party." A possible interpretation is that the district attorney is the prosecutor with the subject child being the state's complainant, but if this is so, how do we explain the child's being represented by a law guardian[30] who is other than the district attorney? Yet, one should not have to engage in conjecture in order to understand the statute. It is submitted that the legislature should examine the underlying reasons for including a district attorney in a Family Court proceeding and clarify his role, if, in fact, his presence is warranted.

Examination of Parents Reconsidered

Previous abuse legislation provided that a parent who was accused of abusing his child might be subjected to a mental examination simply on the basis of the allegation.[31] The new article has abolished this practice. This innovation eliminates an area which could have developed constitutional questions involving the search and seizure provisions of the fourth amendment. While the Family Court is directly proscribed from ordering mental examinations, it still has the indirect power to order them. If the court believes that a parent of an abused child is mentally deficient, it may transfer the proceeding to a criminal court[32] which may order the examination.[33]

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27. 1970 ACT § 1038.
28. *Id.* § 1048(a).
29. *Id.* § 1061.
30. *Id.* § 242.
31. 1969 ACT § 1021.
32. 1970 ACT § 1014.
33. N.Y. CODE CRIM. PROC. § 658 (McKinney 1958):
If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor that there is a reasonable ground for believing that such defendant is in such [a] state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, or if the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity.

Conclusion

The relaxed evidentiary provisions help to solve one of the primary problems found in abuse cases. Previously, in the absence of a reliable admission by a parent as to his or her guilt, it was virtually impossible to establish proof of abuse to a reasonable degree of certainty.[34] Abuse can now be shown by admitting into evidence previously excluded information.

The definitions have been set forth in such a manner that they increase the circumstances in which the Family Court may intervene to aid children. Practically speaking, intervention by the Family Court is now possible in situations of potential harm as well as actual harm. Moreover, the elimination of mandatory removal and mental examinations and the reconsideration of the drug use-child abuse dilemma have erased many of the constitutional questions raised by previous legislation.

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34. *See* Dembitz, *Child Abuse and the Law—Fact and Fiction*, 24 RECORD OF N.Y.C.B.A. 613 (1969).