New York’s Child Abuse Laws Inadequacies in the Present Statutory Structure

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Recommended Citation
Available at: http://scholarship.law.cornell.edu/clr/vol55/iss2/8

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Mistreatment of children is not a new phenomenon, but public and legislative concern for the victims of parental abuse has become significant only recently. In response to the growing awareness of the seriousness of this problem, a large volume of recent state legislation attempts to afford some protection to children whose safety is in danger. The primary focus of legislation has been on reporting incidents of child abuse, reflecting the conviction that no program of child protection can succeed unless there is first a means of discovering cases in which abuse may be present. No less important, however, is the judicial and social machinery that comes into play once the discovery is made to bring about a result in the best interests of all parties.

New York, like other states, has enacted reporting legislation. Until mid-1969 the role of the New York courts in cases of child mistreatment was defined solely by a "neglected child" statute, article 3 of the Family Court Act. Under this statute a "neglect proceeding" can be brought in the Family Court, where the court can grant a variety of remedies. In June 1969, however, a child abuse law aimed explicitly at children suffering serious physical harm became effective. The act created a new child abuse proceeding in the Family Court, distinct from the neglect proceeding. It did not repeal, modify, or make any reference to the article 3 neglect proceeding but added a new article 10 to the Family Court Act, apparently with the intention that the two should somehow coexist. Their coexistence leaves serious

3 Paulsen, supra note 1, at 710.
5 N.Y. Family Ct. Act art. 3 (McKinney 1963). "Neglected child" statutes are a common means of handling child abuse cases. See Paulsen, supra note 1, at 693-94.
6 Criminal sanctions for "endangering the welfare of a child" are provided by N.Y. Penal Law § 260.10 (McKinney 1967), but they are not generally considered an adequate solution to the problem. See Paulsen, The Law and Abused Children, in The Battered Child, supra note 1, at 176.
CHILD ABUSE LAWS

uncertainties as to the role each is to play in serving their common purpose, the protection of children.

I

THE STATUTORY SCHEME

Article 3 of the Family Court Act was enacted in 1962 as part of the consolidation of the Children's Court and the Domestic Relations Court into the Family Court. The purpose of the neglect proceeding is to protect children who receive inadequate parental care, suffer harm from improper guardianship, or are deserted, and the definition of "neglected child" is accordingly broad. The physically abused child is not specifically included in this definition but is treated by the courts as falling within its general language.

Article 3 empowers the Family Court to adjudicate cases of alleged neglect and dispose of them in several ways. A proceeding is initiated by filing a petition alleging that the child is "neglected" within the terms of the article. Before or after filing, the court, and in extreme cases a peace officer, can remove the child from his home if there is imminent danger to the child's safety. The court can issue a warrant to compel attendance and production of the child. After a fact-finding hearing and a dispositional hearing the court, if it finds neglect, can suspend judgment, discharge the child to the custody

7 Governor's Memorandum of Approval of Laws of 1962, in N.Y. FAMILY CT. ACT at xxiii (McKinney 1963).
8 N.Y. FAMILY CT. ACT § 311 (McKinney 1963):
This article is designed to provide a due process of law for determining whether a child is neglected and for so regulating a neglected child's home or, if necessary, removing him from his home that his needs are properly cared for. This act is not intended to diminish the jurisdiction formerly exercised by the children's court or the domestic relations court with respect to neglected children.
9 Id. § 312. Section 312(b) includes in the definition of "neglected" child one "who suffers or is likely to suffer serious harm from the improper guardianship, including lack of moral supervision or guidance, of his parents or other person legally responsible for his care and requires the aid of the court . . . ." Physical abuse has been treated as being covered by this definition. See, e.g., In re Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250 (Family Ct. 1966); In re S, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Family Ct. 1965).
259 N.Y.S.2d 164 (Family Ct. 1965).
10 N.Y. FAMILY CT. ACT § 331 (McKinney 1963). Section 332 states who may originate the proceeding.
11 Id. § 322 (before filing of petition); id. § 327 (after filing).
12 Id. § 321 (with parental consent); id. § 324 (without parental consent).
13 Id. § 337.
14 Id. § 344 (McKinney Supp. 1969).
15 Id. § 345 (McKinney 1963).
of his parents or other suitable persons, or place the child.\textsuperscript{16} In addition the court can issue an order of protection setting forth particular conditions to be followed.\textsuperscript{17} The court has sufficient flexibility to protect the child while still giving due consideration to preserving the family unit.\textsuperscript{18}

New article 10 of the Family Court Act is more limited in scope; its stated purpose\textsuperscript{19} is to protect children who have suffered serious physical abuse.\textsuperscript{20} A child abuse proceeding bears' substantial resemblance to a neglect proceeding, although article 10 provides less certainty in its operational aspects. The article creates a special "child abuse part" of Family Court to handle such cases.\textsuperscript{21} A proceeding is commenced by filing a petition,\textsuperscript{22} and involves a hearing to determine the validity of the allegations.\textsuperscript{23} If the court finds that all the allegations

\textsuperscript{16} Id. §§ 352(a), (c); id. § 352(b) (McKinney Supp. 1969). See also id. § 353 (McKinney 1963) (suspended judgment), id. § 354 (discharge), and id. § 355 (placement). The court can dismiss the petition even if it finds neglect if it also finds that its aid is not required. Id. § 351.

\textsuperscript{17} Id. § 356 (McKinney 1963). See note 43 infra.

\textsuperscript{18} Placement of the child is not always the best solution. If the court finds that the child needs protection but his home life can still be preserved, it can resort to suspended judgment or discharge and orders of protection to safeguard the child while leaving the family intact. N.Y. FAMILY CT. ACT §§ 352, 353, 354, 356 (McKinney 1963).

\textsuperscript{19} Id. § 1011 (McKinney Supp. 1969):
This article is designed to establish proceedings for the protection of children under sixteen years of age who have had serious physical injury inflicted upon them by other than accidental means. It is intended by the addition of this article to assure that the lives of innocent children are safeguarded from further injury and possible death and that the legal rights of such children are fully protected.

\textsuperscript{20} Section 1012 defines an abused child as a child under the age of sixteen years who has had serious physical or mental injury inflicted upon him by other than accidental means or who is in the care and custody of a parent or other person who has been adjudicated a narcotic addict.

The reference to "mental injury" makes the definition somewhat confusing in light of § 1011's statement of purpose. See note 19 supra.

\textsuperscript{21} N.Y. FAMILY CT. ACT § 1013(1) (McKinney Supp. 1969):
Such part shall be held separate from all other proceedings of the court, and shall have jurisdiction of all proceedings originating in or transferred to such court relating to abused children, and shall be charged with the immediate protection of such child.

\textsuperscript{22} Although § 1014 enumerates the persons who may originate a proceeding, and § 1015, § 1019, and § 1022 refer to the filing of a petition, article 10 contains no provision dealing directly with the petition or its filing comparable to article 3's clear statement in § 331.

\textsuperscript{23} N.Y. FAMILY CT. ACT § 1017 (McKinney Supp. 1969). This section incorporates parts 3 and 4 of N.Y. FAMILY CT. ACT article 8 (McKinney 1963) (family offenses proceedings), dealing with hearings and orders, "[t]o the extent that the same may apply or be made applicable in order to fully effectuate the purposes of this article . . . ." Id. § 1017 (McKinney Supp. 1969).
tions of the petition are established, the court must order removal of the child from his home.\textsuperscript{24}

II

PROBLEMS OF COEXISTENCE

Because all types of child mistreatment, including physical abuse, were formerly handled under article 3, some doubt arises as to how articles 3 and 10 are now to operate. A number of inconsistencies between the articles make it quite unlikely that both could be used in the same case. For example, the child abuse proceeding is to be conducted by the special child abuse part of Family Court, while the neglect proceeding is not so limited. Since the child abuse part is to be held independently of all other proceedings and is to have jurisdiction over all proceedings relating to abused children, it is reasonable to conclude that article 10 alone should control such proceedings.\textsuperscript{25}

\textsuperscript{24} Id. § 1022. The legislation adds a number of innovations other than the new proceeding to New York law. Section 1015 requires service of a specially marked summons on the child's parent or guardian within 24 hours and, if this fails, directs the court to issue a warrant. Section 1016 provides that the child is to be represented at all stages of the proceeding by a police attorney in New York City, or the district attorney or assistant district attorney elsewhere. Section 1018 provides that hospitals, social services districts, and other agencies must make all records, photographs, or other evidence available to the court on request, and § 1023 requires that all records regarding child abuse be forwarded to the child abuse part of the Family Court within 24 hours of receipt. Section 1019 allows temporary removal when the child is residing with a narcotics addict. Section 1020 provides for compulsory medical examination of the child. Section 1024 requires court clerks to obtain social security numbers for children involved.

In addition to adding article 10, chapter 264 adds to N.Y. Soc. Services Law § 383-a (McKinney Supp. 1969) by extending the mandatory reporting duty beyond the medical profession to social services workers and school officials. New § 383-c empowers doctors to take temporary custody of abused children. A separate act (N.Y. Laws 1969, ch. 763) adds to § 383-a the provision that a person in charge of a hospital can retain custody of a child reported to be abused until the next regular session of that part of the Family Court in which an article 3 neglect proceeding may be commenced. It requires that a social services official commence such an action.

The legislature enacted chapter 264 in rapid fashion, in a heated atmosphere of public opinion aroused by the case of Roxanne Felumero, a little girl removed from her New York City home after a neglect proceeding in 1966. In December 1968, she was returned to her mother, after which a second neglect proceeding was commenced. The proceeding dragged on until March 24, when the child was found dead in the East River, allegedly killed by her stepfather. Controversy ensued over the inefficient handling of the case. The Judiciary Relations Committee of the Appellate Division, First Department, investigated and issued a comprehensive report, with criticisms and recommendations. The report was published in four parts in 161 N.Y.L.J., June 30, 1969, at 1, col. 4; 162 N.Y.L.J., July 1, 1969, at 1, col. 4; \textit{id.}, July 2, 1969, at 1, col. 4; \textit{id.}, July 3, 1969, at 1, col. 4.

In the neglect proceeding the child is to be represented by a law guardian appointed by the court if the court so orders, whereas under article 10 the abused child is to be represented by a police attorney or assistant district attorney assigned to the child abuse part. Again, this procedural difference makes concurrent operation unwieldy. A proceeding would have to be under either one article or the other to permit representation by a single attorney unless courts ignore the statutory distinction and allow representation by either type of attorney under each article.

Another point of difference lies in the degree of flexibility allowed the judge who finds all the allegations of the petition established. In a neglect proceeding, the judge has alternatives ranging from suspending judgment to removing and placing the child. In an article 10 proceeding, however, if the judge finds abuse, he must order removal and placement. If concurrent operation were granted, the judge would be free to choose any of the options offered by article 3, nullifying the mandatory removal provision of article 10. Finally, to provide for hearings and orders other than removal in the event physical abuse is not found, article 10 incorporates by reference parts of article 8, dealing with family offenses (assaults between members of a family), rather than the hearing and order provisions of article 3. In view of this legislative scheme it is highly unlikely that concurrent application of articles 3 and 10 was contemplated.

If articles 3 and 10 are independent of each other, as indicated by the lack of any attempt in the latter to coordinate them, serious uncertainty arises. Article 3 covers broadly what article 10 now covers specifically. It is not clear whether article 3's coverage is altered by the recent statute. One interpretation is that article 10 is a specialized proceeding falling within article 3's broad coverage; under this view

26 Id. § 343 (McKinney 1963). Section 249, in reference to article 3, states that the court shall appoint a law guardian to represent the child if so requested by child or parent and if counsel is not otherwise available to the child and that the court may make such an appointment on its own motion.
27 Id. § 1016 (McKinney Supp. 1969).
28 Id. § 952 (McKinney 1963).
29 Id. § 1022 (McKinney Supp. 1969).
30 Id. § 1017. This section incorporates the hearing and order provisions of article 8 "[t]o the extent that the same may apply or be made applicable in order to fully effectuate the purposes of this article . . . ." Id. Although this section does not explicitly state that these orders are available only if physical abuse is not found, such a conclusion is a necessary corollary of the mandate of § 1022, which states that if the court finds physical abuse it "shall enter an order directing the removal of such child from his home."
31 See note 9 supra.
an article 10 proceeding would be able to benefit from the provisions of article 3 as well as from its own.

Article 10, however, probably narrows the coverage of article 3 by preempting the field of physical abuse. It is unlikely that a case clearly involving serious physical abuse will now be handled under the neglect provisions, since article 10 provides that the new child abuse part is to have jurisdiction of all cases relating to abused children. Article 3 covers all other forms of parental mistreatment. From another viewpoint, article 10 may repeal by implication that part of article 3’s coverage relating to physical abuse. Either way, article 3’s coverage would be narrowed by the coverage assumed by article 10.

This might seem a neat solution to the overlap of articles 3 and 10; in fact it compounds the difficulties. It makes the powers and processes of the two proceedings mutually exclusive and raises the problem of the borderline case. Cases coming before the Family Court must be classified as neglect proceedings under article 3 or abuse proceedings under article 10. In situations that can reasonably be classified either way, the decision may prevent the attainment of the best judicial solution.

A second area of uncertainty concerns the powers and procedures for temporarily removing the child from his home, pending final determination of his case, when his safety is seriously endangered. Article 3 contains comprehensive provisions for temporary removal both before and after the filing of a petition. Article 10, on the other hand,
is conspicuously devoid of any provisions dealing with temporary re-
moval except for one dealing with children living with narcotic ad-
dicts.\textsuperscript{37} The result is a serious gap in the protection article 10 purports
to offer abused children. The legislature could not reasonably have
intended to deny the court the power of temporary removal in phys-
ical abuse cases when that power was fully available under the neglect
article, and a source of that power must be found.\textsuperscript{38} To find any au-
thority for the exercise of such power, however, the court must look
to article 3, raising again the problems of applying articles 3 and 10
concurrently. Perhaps in practice judges will ignore the statutory di-
chantomy and integrate the two articles into an efficient child protec-
tive system, but this does not seem to be the most sensible or the most
effective way to approach the problem. Integration by judicial inter-
pretation necessarily proceeds on a case-by-case basis; in the interim
the need for temporary removal powers remains unsatisfied.

A third area of doubt arising from the coexistence of the two
articles concerns the disposition of a case after hearing. Under either
article, after the hearings are completed and it has been determined
whether a child is neglected or abused, the judge is empowered to
issue orders as the final disposition of the case. Articles 3 and 10 differ
in the variety of such orders available, and again it is article 10 that
contains a gap.

Under article 3 the judge can dismiss the petition if no neglect is
found,\textsuperscript{39} suspend judgment,\textsuperscript{40} discharge the child to the custody of his
parents or other suitable persons,\textsuperscript{41} or place the child outside his
home.\textsuperscript{42} In addition to any of the above orders, he can issue an order
of protection.\textsuperscript{43} Under article 10 the judge must remove and place the

\textsuperscript{37} N.Y. FAMILY CT. ACT § 1019 (McKinney Supp. 1969).
\textsuperscript{38} Some language of article 10 indicates that a power of temporary removal is
needed. \textit{See} \textit{id.} § 1011, \textit{quoted in note 19 supra}, and \textit{id.} § 1013, which states that the
child abuse part "shall be charged with the immediate protection of such child." But
§ 1011 and § 1013 seem inadequate to confer the power upon the court, since under
article 3 the power is authorized not by a general grant but by a number of specific,
detailed provisions.
\textsuperscript{39} N.Y. FAMILY CT. ACT § 351 (McKinney 1963).
\textsuperscript{40} \textit{Id.} §§ 352(a), 353.
\textsuperscript{41} \textit{Id.} §§ 352(b), 354.
\textsuperscript{42} \textit{Id.} §§ 352(c), 355.
\textsuperscript{43} \textit{Id.} § 356. An order of protection can set forth certain conditions to be followed
by a child's parent or guardian, or spouse of the parent or guardian, for a specified
child if he finds serious physical abuse. The judge is left no discretion in dealing with cases where abuse is found but removal does not appear necessary. Where no abuse is found, the judge can dismiss the petition, suspend judgment, place the respondent on probation, or make an order of protection, but he can only return the child to his home or place him in the home of a relative.

If in a child abuse proceeding the judge finds no physical abuse, but finds that the child has been seriously mistreated in some other way, he should not be denied the authority to remove and place the child if this seems the only adequate solution. Removal might be appropriate in a case where there has been no physical abuse as yet but the pattern of mistreatment is such that there is likelihood of serious physical abuse in the future. If the judge were free to reach into article 3, he would have the power. But if the judge were intended to have this freedom, it is unlikely that the legislature would have incorporated provisions of article 8, rather than those of article 3, into article 10.

CONCLUSION

In view of the uncertainties generated by the coexistence of articles 3 and 10, it is questionable whether article 10 contributes substantially to child protection. Many of article 10's provisions might be valuable tools in protecting against child abuse. But until they are more effectively coordinated with those of article 3, article 10 is something less than a solution to the problem of child abuse.

Jack L. Smith