New Jersey Family Lawyer

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CHAIR'S COLUMN

The Other Parts of the Family Part

by Lizanne Ceconi

I recently received a call from a news reporter asking me to predict any trends and changes in the family part over the next five to 10 years. An obvious answer is that we will be reviewing civil unions and domestic partnerships, since these matters really have not yet been litigated. I also predicted that New Jersey will see same-sex marriages because, no matter what the Legislature intended, the creation of a civil union is not equal to marriage.

What struck me most, however, is that I suspect there will be a proliferation of the non-dissolution calendar. The last few times I volunteered as an early settlement panelist, I noticed that several of the cases involved children born before the marriage began. The social stigma associated with children born out of wedlock is no longer as prevalent. In fact, we regularly pick up the paper and learn about some celebrity dating couple announcing a pregnancy where the parents-to-be will tell you it was planned and they are very excited.

The truth is, we know a fair amount about the practice of divorce law, but not much at all about all the other areas involved in the family part.

When I first started practicing law, people who weren't married and lived together were "shacking up," and it carried a scandalous connotation. Today, some parents condone their children's premarital cohabitation in the hopes that a divorce can be avoided down the road. Walking down the aisle is no longer a prerequisite for a couple to start their lives together.

Regardless of how you may feel about these social changes, they obviously have an impact on our family law practices. Most of you reading this article consider yourselves experts in the field of family law. At a minimum, you dedicate a majority of your practice in the field of family law. Yet, how much do we really know about the practice of family law? My guess is very little. The truth is, we know a fair amount about the practice of divorce law, but not much at all about all the other areas involved in the family part.

Family part judges handle juvenile matters, juvenile family crisis petitions, adoptions, Division of Youth and Family Services matters (including neglect and abuse), termination of parental rights, kinship legal guardianship, proceedings under the Child Placement Review Act, out-of-home placements and post-termination of parental rights placements. They also handle domestic violence, contempt charges concerning domestic violence and weapons forfeiture hearings. They also will hear the dissolution of domestic partnerships and civil unions. In addition to these types of matters, there is the FD, or non-dissolution calendar addressing paternity, custody and support issues typically for families who have not married. Hearing officer appeals, bench warrants for non-payment of support, Uniform Interstate Family Support Act and Uniform Child Custody and Jurisdiction and Enforcement Act are just some of the cases.

Continued on Page 123

Slate of Officers Selected

Pursuant to Article IV of the bylaws of the Family Law Section of the New Jersey State Bar Association, more specifically Section 1:

> The slate of officers shall be nominated by a Nominating Committee and said slate shall be published in the New Jersey Family Lawyer no later than six weeks prior to the Annual Meeting of the New Jersey State Bar Association. Additional nominations may be made by petition signed by twelve members of the Section in good standing. Said petition shall be submitted to the Chair of the Section no later than three weeks prior to the Annual Meeting of the New Jersey State Bar Association.

Continued on Page 123

New Jersey Family Lawyer *Volume 28 #5*

Table of Contents

NEW JERSEY STATE BAR ASSOCIATION
Your voice. Your vision. The State Bar.
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Chair's Column

Continued from Page 121

In the 2007 statewide court year, which ran from July 1, 2006, until June 30, 2007, there were over 37,000 new cases brought into the system, and about 120,000 reopened just in the non-dissolution calendar. Of the approximately 370,000 cases resolved last court term in the family part, only about 66,000 of them were dissolution cases, wherein 156,000 were non-dissolution cases. What the statistics do not tell us is how many of the non-dissolution cases involved attorneys. I'm told very few.

Will the rise of families with children and without marriage change our practices? For instance, the setting of support seems to follow different standards based on where the application is filed. As we all know too well, when we need a support order entered into in a matrimonial matter, the court will not grant any relief until the case information statement is filed. Clients often go into mental lockdown at the thought of completing that lengthy form. Yet, in non-dissolution cases, the courts provide a short form for income and expenses, and determine child support in a summary fashion pursuant to Rule 5:5-3. Sometimes, there's a hearing officer involved, and sometimes not.

How often do non-dissolution cases require the filing of a case information statement after the preliminary child support order has been entered? Do people in the matrimonial courts receive larger support awards? Is justice being served using different forms and standards?

Are New Jersey's children being treated differently depending on whether their parents married? Or is a difference in treatment dependent on whether litigants hire attorneys or represent themselves? Do all counties provide custody mediation in the non-dissolution cases? In some counties that same custody mediation may not be available in the matrimonial matter.

The determination of custody in the non-dissolution docket seems far less complicated than in the matrimonial courts. The courts are often deciding custody matters based solely on probation investigations. Custody actions in the dissolution cases are outrageously expensive involving at least one mental health expert. Does the matrimonial client get a more thorough analysis of the children's best interests?

More interesting is that each county appears to handle its non-dissolution calendar differently. Should there be uniformity in how these cases are resolved, or do we take into consideration each county's staffing and set procedures accordingly? For instance, some counties have fabulous and effective in-house custody mediators, while others are better to farm out the work because of insufficient staffing. Will there be a two-tiered system of justice in the family part based on whether a party retains legal counsel?

None of the questions raised is meant to suggest that justice is not being served in the non-dissolution court. In fact, it is commendable—and, frankly, quite amazing—that over 150,000 family units a year in New Jersey have cases being resolved in the family part.

Practically speaking, there are many cases in the non-dissolution calendar that attorneys do not want to handle. Many times, a case will come into the office where the advice to a prospective client is to go to court *pro se,* because the proceedings will be more relaxed and the relief sought easier to obtain. If an attorney appears in some of these cases, there is a greater suspicion of an ulterior motive in bringing the application and therefore, a tougher standard gets applied.

Many non-dissolution cases begin with an application under a summary proceeding. As a result, no answer is required by the defendant, and the matter is generally listed for a hearing date. This summary proceeding often involves issues of support or custody without the requirement of first filing a complaint with the court, followed by a motion with time constraints set by the Rules of Court. Are we, as attorneys, unnecessarily creating legal fees by taking on these cases? Are the clients really better off representing themselves? The answers to those questions really depend on the nature of the case and level of contention involved.

Of course, the bottom line is that a litigant should always have the right to have counsel. We just want to make sure that having representation does not inhibit or jeopardize their rights.

The future is now. It is time to address these issues on a larger scale. With the exception of the dissolution and non-dissolution dockets, all other family part dockets carry legal requirements for resolutions and hearing dates. In juvenile, there are constitutional rights that must be met. In domestic violence and children in court, there are statutory requirements for hearings and resolution of cases. It becomes increasingly clear that family part judges have to prioritize these matters in the hopes

Slate of Officers

Continued from Page 121

On Feb. 13, 2008, the members of the Family Law Section's Nominating Committee met and deliberated on the 2008-2009 slate of officers. Their recommendations are as follows:

Edward O'Donnell	Chair
Charles F. Vuotto Jr.	Chair Elect
Thomas Snyder	1st Vice-Chair
Andrea White-O'Brien	2nd Vice-Chair
Patrick Judge Jr.	Secretary

Pursuant to Article IV, Section 3:

Election of officers shall be conducted by voice vote or by show of hands or by secret ballot, and each office shall be filled by that person receiving the majority vote of members of the Section present at the Annual Meeting. ■

of complying with the set time mandates. Our dissolution calendar is less than 20 percent of the entire Family Division docket.

In the smaller rural counties, family part judges are hearing all of the family part cases. There simply are not enough judges to divide up the caseload. How can we then expect that our dissolution cases should have any priority? With this extraordinary number of matters, how many counties are actually adhering to Rule 5:8-6, which requires custody hearings to be set no later than six months after the last responsive pleadings?

The entire family part system needs to be examined. It is not just a question of appointing more judges to the family part. That would help, but these judges also need appropriate staffing and court personnel to shepherd these cases properly through the system. My last column talked about our need for more family part judges, but candidly was focused on the dissolution calendar. Examining the number of all the other types of family part cases, it is clear that our matrimonial practices are but a small piece of the equation that needs to be addressed.

My thanks to those who have contributed to this issue dedicated to the non-matrimonial cases in the family part. It is a humbling reminder that our practices are important, but not necessarily the most important part of the system.

Several years ago, I met Marion Wright Edelman, founder and then-president of the Children's Defense Fund. She asked me whether I thought divorce was the main cause of the poverty level among children in our country. I disagreed with her premise, reminding her that in our divorce cases we can usually find a parent who is obligated to support the children and enforce those rights. I told her it's those *other* cases that really need to be looked at to ensure the support of children. Let's remind ourselves of that the next time we are waiting for our case to be heard. ■

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FROM THE EDITOR-IN CHIEF

The Chosen Few: The Indentured Servants

by Mark H. Sobel

Family lawyers spend the majority of their professional life in *negotiations*. While we all certainly spend a lot of time doing that, I have come to the conclusion that we are not very good at it. We may think we have effectuated a successful negotiation through the nuanced utilization of a specific term, or the ability to have an escape clause in a particular agreement, or by expanding to 17 pages all of the conditions, situations and potential draconian problems that would not constitute a change of circumstances under *Lepis*. However, in the larger context of negotiations we have ultimately failed ourselves.

We certainly are the worst advocates for ourselves. Why are family lawyers the selected few who are required to work on compelling cases for free, and with no realistic possibility of receiving payment for our efforts? How is it that family practitioners were specially selected for this unique honor? Why is it that individuals seeking divorces, resolution of family conflicts or other matters under the supervision of the family part have the unusual benefit of being able to avoid payment to their attorneys? This system is inequitable and is a detriment to the practice of family law in our state.

Individuals seeking representation of family practitioners search out those counselors they believe can provide them responsible legal services at a fair agreed-upon cost. Our Rules of Court require these relationships to be set forth in a written retainer, which specifically sets forth the requirements of payment, including the hourly rate for payments, the timing of payments and the fact that the party seeking such services is contractually obligated to make the payments. The same Rules of Court provide that once certain threshold dates (early settlement panel, trial date, etc.,) arrive, counsel must remain as the attorney in charge of the matter and complete the matter, regardless of the fact that they have not been paid and will never be paid.

This is not an anecdotal complaint for an isolated problem. It is a universal, systemic problem within our practice. Virtually every family practitioner has experienced this at some point in their career. It is not something that is isolated to a specific economic strata, specific family dispute, specific geographic area, or specific sex. It is pervasive and ongoing, and increasing each and every day. It needs to be addressed at the highest levels, because the failure to address it renders our entire system less fair, less equitable, and less able to deliver to its constituency the required services needed.

There have been a variety of attempts to ease this burden on family practitioners. The inclusion in Rule 5:3-5, establishing that attorneys' fees may be ordered *pendente lite* and may include "a fee based upon an evaluation of perspective services likely to be performed," as well as providing that upon good cause "the parties sell, mortgage or otherwise encumber or pledge marital assets to the extent the Court deems necessary to permit both parties to fund the litigation," sounds great and is well intentioned. However, it has not changed the ultimate landscape. The fact remains that the playing field, despite all of the law regarding *pendente lite* applications, is still far from even. The fact remains that it is difficult, if not impossible, to obtain a *pendente lite* fee award that can realistically meet the economic needs of representation. The fact remains that it is only in a miniscule amount of cases the courts are actually requiring the sale of assets or the mortgaging of assets for the payment of fees. It is a system that is broken and needs to be fixed.

To effectuate a cure requires a multi-faceted approach, and an ultimate change in the culture of thinking on this issue. First and foremost, the courts should be the family lawyer's refuge rather than enemy on this issue. Why it has become, as it often is, an adversarial proceeding with the court to secure legal fees is something I have difficulty understanding. It simply should not exist as the culture of our court system that it is acceptable that a client does not pay his or her lawyer, who is diligently working on the file. No one else in the legal system is placed in that position. Everyone working within the court system gets paid, as well they should. Importantly, all court-appointed experts are paid. In fact, as all family practitioners know, for some reason the payment of court-appointed experts, and for that matter other experts, seems to take a priority over the payment to attorneys actually representing the

individuals in that litigation.

One reason for this is the call that all family practitioners have received at some time in their career, when one of their experts states on the eve before a hearing that, if they do not receive a check in x amount, they will not be there the next day testifying. Lawyers cannot do that. Experts can and do. It is inequitable, and needs to be addressed.

Addressing the issue requires the commitment from the highest level that applications for legal fees should be routinely granted. If there needs to be an allocation at the end of the case pursuant to M*allamo,* it can and should be done. What courts should not do is turn the attorney representing a litigant into one of the creditors in that case. It should be standard operating procedure, in the absence of liquidity, that the court will order the mortgaging of assets, refinancing of assets, securing of loans, etc. This procedure results in nothing more than assuring that the professionals who are working on those individuals' cases, following their directions, are being paid.

It should be prohibited that any motion requesting legal fees be reserved until final hearing. Lawyers should know at the outset if the application is denied, and make appropriate decisions predicated upon that. Every practitioner in the state knows that a court's denial without prejudice or reserving until final hearing an application for fees, is simply a loss. Given the sharp demarcation lines for lawyers to seek withdrawal from cases, such applications should not be allowed to languish without a clear and emphatic determination, so counsel can make appropriate judgments.

I am mystified that the court does not require precise enforcement of the contracts attorneys and clients enter into as prescribed by our Rules of Court. These contracts specifically set forth the rights and responsibilities of the attorneys and the clients. The courts should compel litigants to adhere to the agreement and pay their attorneys' fees. If this sounds like a plea for lawyers to get paid, while in many respects it is, it is not just a plea for that alone.

What family practitioners and the trial judges in the trenches with them know all too well, is that when fees are no longer ordered to be paid, and assets are no longer required to be leveraged, clients are extremely sophisticated and clearly understand that they have retained their attorney as an indentured servant through the duration of the case. At that point the dynamics of the relationship are fundamentally altered. It is a seismic shift with systemic ramifications. Clients now become empowered to make greater and greater demands on lawyers, and may require their indentured servant to file more and more bizarre applications. Lawyers, not receiving payment, understand that the failure to do what they believe is improper strategically could subject them to the claim that they are simply refusing to do that because they are no longer being paid, and the concomitant lawsuit to follow. Clients also begin to take more and more resolute positions, unwilling to yield on any points, because they are no longer paying for legal fees attributable to the refusal to negotiate fairly and make reasonable compromise.

The byproduct is bad for the entire system, as it requires the utilization of more of the already scarce judicial resources to handle these particular cases. It is these cases involving normally resolvable issues in which the clients no longer have a stake to seek a fair resolution that disproportionately overburden our system. The litigant now has the ability to compel his or her attorney to file repeated applications by way of motions and orders to show cause, or ultimately proceed to trial. It is thus not just a problem for lawyers. It is a problem for the entire system, because if clients are made to realize they are going to be required to be financially responsible for their decisions, their decisions will become more responsible. Conversely, as they become less responsible financially for their decisions, those decisions become less responsible.

While the most unfortunate result of the current situation is that litigants are not having their matters proceed through the system as quickly as possible, there are other less-apparent adverse effects. Lawyers are turning away clients because they know they cannot rely upon the system to make sure they receive fair compensation. Clients are becoming adversarial with their own lawyers, preventing any meaningful consensual resolution of cases. We can avoid or ameliorate these problems if the system forces the litigants to understand that their decisions have financial ramifications for which they must bear the responsibility.

We can accomplish this change through procedural initiatives, educational initiatives, and enforcement of the basic agreements entered between clients and their counsel. Attorneys are entitled to receive compensation for their efforts. In the area of family practice, the realization rate of their work efforts never come close to approaching 100 or 90 percent, or probably 80 percent. That should not be a cost of doing business in this area.

Our judiciary should not allow a system to remain in place that enables litigants to avoid payment; requires attorneys to engage in further legal services without remuneration; and clogs the court system with unreasonable litigants, having no current financial stake in that outcome. We will do a service not only to ourselves but also to the entire system if we make alterations so everyone, including legal counsel charged with the responsibility to prosecute the case, receives full compensation for their efforts. ■

FROM THE EDITOR-IN-CHIEF *EMERITUS*

Our New Motion Rules

by Lee M. Hymerling

This will be the first of two articles dealing with amendments to the New Jersey Court Rules, which address family part practice that became effective on Sept. 1. This column will discuss the amendments to Rule 5:5-4, dealing with the timing and filing of motions.

As is well known, before this rule amendment, all pre-judgment motions were required to have been filed 16 days in advance, with the response due eight days in advance and the final response due four days in advance. All post-judgment motions, other than those brought pursuant to Rule 1:10-3, and motions involving the status of a child filed more than 45 days after the entry of a written judgment, were required to be served 29 days in advance, with opposing certifications and cross motions due 15 days prior to the return date and final responses due eight days before the return date. Under the amended rule, all family part motions, both pre- and post-judgment, will be required to be served not later than 24 days before the return date, *i.e.*, filed on a Tuesday prior to a Friday motion day, 24 days later. All opposing affidavits, cross motions or objections will now be required to be filed not later than 15 days before the return date. For example, a response must be served and filed on a Thursday for a motion day falling on a Friday, 15 days later, with final responses filed not later than eight days before the return date.

Additionally, the amendments to Rule 5:5-4 also require that two copies of all motions, cross motions, certification and briefs shall be served.

There are several reasons why we who practice family law and those who judge our motions, should embrace these rule changes. No longer will there be a situation in which late on a Wednesday afternoon we are served with an omnibus motion, spanning 15 pages of certifications together with enumerable attachments, having only a scant eight days to respond. The ninth day will give at least a brief respite.

As significant, a moving party will no longer have but four days to file that party's response to what may be a multifaceted cross motion. That response will now be due seven days later, on a Thursday, eight days before the return date.

Just as extending the dates should assist counsel, as importantly, the amendment will aide the bench. Assuming for the moment that by and large judges prefer to read their motions when all papers are in, judges and their law clerks will now have eight days to prepare rather than the four days contemplated by the prior rules. In reality, many judges began to review their motions for the following week before the last response was filed. This practice should now be unnecessary, because the full motion file should be presented to the court eight days ahead of time, and, most significantly, before the weekend prior to the motion hearing. Although judicial law clerks might now find reviewing motions to be a weekend assignment, one cannot doubt that hearing eight days prior to the motion hearing should facilitate what has become the daunting task of preparing for 10, 20 or even more motions each or every other Friday.

Salutary though these rule changes might be, they will only succeed if we, as members of the bar, cooperate. Too often, some of us have taken advantage of the rules by submitting our papers late. With the additional time now permitted for response and replies, there is no reason why we should not be expected to respect the rules and our colleagues by taking advantage of those before whom we appear. We now assume that there will be automatic adjournments. The new time limits were in part adopted because of the pressures imposed upon all of us and upon those who sit on the bench. To now assume that even with the longer timeframes involved, automatic adjournments will necessarily be permitted, is an assumption that we should not make. While adjournments by consent should generally be granted, there should not be automatic first adjournments when opposition is presented, particularly in those counties in which motions are not heard weekly. Litigants have the right to have their motions heard promptly, and the nature of the motion should be considered in determining whether particularly a two-week adjournment will be allowed.

The rule changes do not specifically address the salutary but nonmandatory practice of judges issuing tentative decisions. It is hoped that the extra time accorded to judges to consider motions will encourage additional judges to

Continued on Page 139

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Children in the Shadows

by Hon. Robert A. Fall

This article will generally discuss the path traveled by children who have been identified by the New Jersey Division of Youth and Family Services (DYFS) as having been subjected to acts of abuse or neglect by their parents or guardians, which have ultimately led to the filing of a guardianship action by DYFS against their parents seeking the termination of parental rights. These children live in the shadows of society. Because it will provide some context to that discussion, this article also will set forth the significant federal intervention and regulation of the operation of state child protection agencies and state court systems.

According to statistics compiled in the 2000 United States Census, child protection agencies throughout our country received more than 2,000,000 reports of alleged child abuse or neglect each year.[1] More recently, in approving the Child and Family Services Improvement Act of 2006 on Sept. 28, 2006, Congress found that for federal fiscal year 2004, child protective staff nationwide reported investigating an estimated 3,000,000 allegations of child maltreatment, and determined that 872,000 children had been abused or neglected by their parents or other caregivers.[2] Additionally, nationwide in 2004 there were almost 1,500 deaths of children due to parental or caretaker abuse and neglect.[3] Moreover, federal Child Welfare Services and the Promoting Safe and Stable Families Programs "provide states about $700,000,000 per year, the largest source of targeted federal funding in the child protection system, for services to ensure that children are not abused or neglected and, whenever possible, help children remain safely with their families."[4]

In calendar year 2004, DYFS received 42,618 child abuse or neglect referrals and 37,177 family problems referrals.[5] These figures represent a referral rate of 37.4 for every 1,000 children living in New Jersey.[6] DYFS workers substantiated 7,964 (18.7 percent) of the 42,618 child abuse or neglect referrals.[7]

In the court year July 1, 2005, through June 30, 2006, there were 4,728 Title 9 child abuse and neglect complaints and 1,029 Title 30 guardianship, termination of parental rights complaints filed statewide by DYFS.[8]

This article will generally familiarize readers with the long, arduous legal path traveled by children who have been subjected to abuse and neglect, where the best interests of a child may ultimately dictate the termination of parental rights, with the prospect of adoption in order to achieve the type of proper care, development, and permanency that is every child's right. This article is not, however, meant to be a comprehensive study of our child protection system, which would require a treatise of several hundred pages. The purpose is to generally familiarize the reader with our child protection system and the enormous governmental and private efforts underway to address the needs of children who have been subjected to abuse or neglect. It is the story of the children in the shadows, the child development universe that runs parallel to our own. It is a universe that most family law practitioners are never exposed to; yet, from a societal point of view, protection of children from harm is, and should be, one of our highest priorities.

There is an abundance of research and information documenting the significant developmental risks to children who have been subjected to acts of abuse or neglect by their parents or guardians.[9] The development of a child's brain involves the complex and constant interaction between the genes we inherit and environment to which we are exposed.[10] In general, "genes are responsible for the basic wiring plan—for forming all of the cells (neurons) and general connections between different brain regions—while experience is responsible for fine-tuning those connections, helping each child adapt to the particular environment (geographical, cultural, family, school, peer-group) to which he [or she] belongs."[11] Therefore, the role of a parent or guardian during the early stages of a child's brain development is critical to the healthy development of that child.[12] Suffice it to say, all judges and attor-

neys handling child abuse and neglect and guardianship cases should become familiar with and understand the basics of healthy child development and the negative effects of child abuse and neglect. In that regard, an excellent publication that should be mandatory reading for all judges and practitioners in this area, available for free on www.zerotothree.org, is *Ensuring the Healthy Development of Infants in Foster Care: A Guide for Judges, Advocates and Child Welfare Professionals*, by Sheryl Dicker and Elysa Gordon.

Initially, of course, it is axiomatic that the rights of parents to enjoy a relationship with their children is of constitutional dimension.[13] Parents have a constitutionally protected, fundamental liberty interest in raising their biological children.[14] The U.S. and New Jersey Constitutions protect the inviolability of the family unit.[15]

"The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[16] As is true of so many other legal presumptions, "experience and reality may rebut what the law accepts as a starting point...."[17] The incidence of child abuse and neglect cases attests to the fact that some parents may act against the interests of their children.[18]

However, government "is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[19] The state as *parens patriae* may act to protect children from serious physical and emotional harm. This may require a partial or complete severance of the parent-child relationship. However, "[f]ew forms of state action are both so severe and so irreversible."[20] Therefore, there is a delicate judicial balance to be struck between the rights of parents to raise their own children and the obligation of our government to protect children—its most vulnerable citizens—from child abuse and neglect perpetrated by parents and guardians against their own children.

These children in the shadows, who have been subjected to abuse or neglect by their own parents or guardians, and have been removed from the home and placed in foster care or relative placement for their own protection, pose a significant challenge to our society. Their lives and, more importantly, their proper and healthy physical and emotional development, hang in limbo, awaiting permanency in the form of either return to parents who have been rehabilitated or the application of other judicial remedies, such as termination of the parental rights of their parents and placement for adoption; placement in long-term foster care; or kinship legal guardianship involving a form of permanent placement with a relative or family friend. These are our neediest citizens.

Alarmed by the increasing number of abused or neglected children languishing in foster care without permanent placement, Congress enacted the Adoption and Safe Families Act of 1997 (ASFA).[21] In order to qualify for continued federal funding of state child protection agencies, ASFA required states to tighten their standards in a manner designed to provide permanency for foster-placed children more expeditiously.[22] The legislative history of ASFA reflects an intent to avoid unnecessary and lengthy stays in the foster care system, and to promote stability and permanence by requiring timely decision-making by courts to determine whether the child can safely be returned to his or her family, or whether they should be moved into safe and stable adoptive homes or other permanent family arrangements.[23] To effectuate that intent, ASFA imposed many requirements on states for processing abuse and neglect cases of both a procedural and substantive nature.

As an example of the changes required, prior to the enactment of ASFA New Jersey required the Division of Youth and Family Services (DYFS) to meet the more demanding standard of exerting "diligent efforts" in attempting family reunification for children removed from their homes based on allegations of abuse or neglect, prior to seeking termination of parental rights in an effort to effect permanency. To comply with ASFA, the New Jersey Legislature amended N.J.S.A. 30:4C-15.1(a)(3) to conform to the lesser federal standard of requiring DYFS to exert "reasonable efforts" to reunify families prior to seeking termination.[24]

ASFA also required states to enact legislation permitting child welfare agencies to bypass the reasonable efforts criterion where a parent has subjected the child to "aggravated circumstances of abuse, neglect, cruelty or abandonment." New Jersey complied by enacting N.J.S.A. 30:4C-11.3(a).[25]

ASFA encouraged states to increase the number of adoptions of children in their foster-care system by providing a $4,000 incentive payment ($6,000 for special-needs children) for each adoption above the number of adoptions completed during the previous year.[26]

ASFA further required states to amend their laws to require child protection agencies to move toward termination of parental rights where a child has been in foster-care placement for at least 15 of the past 22 months, with certain limited exceptions.[27] The New Jersey Legislature complied by enacting amendments to N.J.S.A. 30:4C-15(f). AFSA also required states to enact provisions requiring permanency hearings "no later than 12 months after the date the child is considered to have entered foster care...which hearing shall determine the permanency plan for the child that includes whether...the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or [the child will be] referred for legal guardianship, or...placed in another planned permanent living arrangement[.]"[28] Again, New Jersey complied by enactment of N.J.S.A. 9:6-8.54a(2)(requir-

There are...many public and private organizations that advocate for children in our state, and provide significant resources designed to protect children from the adverse effects of child abuse and neglect.

ing the court in a Title 9 proceeding to conduct a permanency hearing no later than 30 days after placement where the court has determined that reasonable efforts to reunify the child with the parent or guardian are not required, or no later than 12 months after placement where reasonable efforts are required); N.J.S.A. 9:6-8.54a(3) (requiring periodic reviews of the permanency plan as deemed appropriate); and N.J.S.A. 30:4C-61.2 (requiring permanency hearings in Title 30 cases); *see also* Rule 5:12-4(h) (requiring permanency hearings).

It must be noted that there has been significant criticism of ASFA citing, *inter alia*, its failure to define "reasonable efforts," its disregard of age-based differences among children, and its failure to reform system financing resulting in the reduction of services available to parents for the exertion of reasonable efforts.[29]

The federal monitoring of state court child protection systems is accomplished through the Court Improvement Program (CIP), which was established by the Omnibus Budget Reconciliation Act (OBRA) of 1993.[30] Specifically, OBRA provided federal funding to state courts to assess and improve their child protection court proceedings. The CIP's implementation has been guided by the federal Children's Bureau of the Administration on Children, Youth and Families, within the U.S. Department of Health and Human Services, with assistance from, *inter alia*, the American Bar Association's National Child Welfare Resource Center on Legal and Judicial Issues; the National Council of Juvenile and Family Court Judges; and the National Center on State Courts. CIP funds are awarded annually to the highest court of each state by the Children's Bureau.

The CIP has been implemented in the context of other federal efforts aimed at improving judicial oversight of child protection and dependency cases, most notably ASFA. As noted, ASFA limits the amount of time a child can spend in out-of-home care, and led to the development of outcome measures designed to ensure timely permanency, safety and well-being of abused and neglected children. The premise of the CIP is that permanency outcomes are most directly related to court reform. State courts are now required to ensure that their CIP reform efforts are in line with the program improvement plans resulting from these federal mandates.

The most recent measure of New Jersey's compliance with the CIP goals, "Final Report of New Jersey State Court Improvement Program Reassessment," June 2005, was conducted by the National Center for State Courts. This 119-page document, plus exhibits, outlines New Jersey CIP efforts to comply with ASFA and other national and federal standards and guidelines, and provides a comprehensive examination and analysis of our court system. In general, it is a positive report, containing 59 specific recommendations for improvement.

The Children's Bureau is charged with examining and assessing the child protection agency systems in each state. It conducted a child and family services review (CFSR) in New Jersey for the period Oct. 1, 2002 through March 22, 2004, assessing the performance of DYFS on seven child welfare outcomes pertaining to child safety, permanency and well-being. The bureau's final report of the CFSR was issued on May 21, 2004. The report was critical of DYFS, finding that New Jersey was not in substantial conformity with any of the seven child welfare outcomes.

There are, however, many public and private organizations that advocate for children in our state, and provide significant resources designed to protect children from the adverse effects of child abuse and neglect. The most time-tested advocate for children in New Jersey is the Association for Children of New Jersey (ACNJ), a nonprofit organization devoted to the rights of children. ACNJ conducted the first CIP review of New Jersey's child protection system in 1995 and 1996. ACNJ advocates for children's rights, conducts many programs, and issues many excellent publications, including *A Basic Guide to the New Jersey Court Process for Resource Families*, June 2007.

Additionally, the New Jersey Task Force on Child Abuse and Neglect was established by P.L. 1996, c. 119, eff. Dec. 31, 1996, to study and develop recommendations regarding the most effective means of improving the quality and scope of child protective services provided or supported by state government. A detailed child abuse and neglect prevention plan was issued by that task force on March 22, 2002, and is being implemented by both private and public entities.[31]

Turning to our statutory scheme, N.J.S.A. 9:6-8.10 requires that "any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse" must inform DYFS immediately. DYFS is required to investigate reports of abuse and neglect, and determine whether continuing a child in the care and custody of parents or guardian presents an imminent danger to the child's life, safety or health,[32] and is required to take appropriate action to safeguard the child or children from further injury.

The authority of DYFS to bring an emergent application seeking the involuntary removal of a child from his or her place of residency is exclusively derived from two separate statutory schemes.[33] The provisions in Title 9 govern the adjudication of abuse and neglect cases, while the provisions in Title 30 set forth the procedures for the permanent removal of

children from their parents.[34]

In Title 9 proceedings, DYFS bears the burden of establishing that the parent or parents have committed an act or acts of child abuse or neglect, as broadly defined in N.J.S.A. 9:6-8.21(c) by a preponderance of the evidence. In Title 30 proceedings, DYFS must establish, by clear and convincing evidence, that the statutory criteria set forth in N.J.S.A. 30:4C-15 or 30:4C-15.1(a) for termination of parental rights exist. These statutes do not prohibit DYFS from bringing a Title 30 proceeding while a Title 9 proceeding is pending, nor does the filing of a Title 30 action require a prior determination of abuse or neglect.[35]

Upon substantiating the commission of acts of child abuse or neglect, DYFS may immediately remove the child from the home and place the child either with an appropriate available relative or in foster care, without a court order.[36] Moreover, DYFS is authorized to remove any other child in the home if it is deemed necessary to avoid imminent danger to the life or health of that child. DYFS also is authorized to arrange for immediate medical screening and treatment of any removed child.[37]

Upon removal of a child from the home pursuant to this authority, DYFS must apply to the family part, upon notice to the parents or guardian, within two court days seeking temporary care and custody of the child, by presenting a verified complaint outlining the alleged abuse and neglect.[38] Upon the filing of the complaint, the parents or guardian, if indigent, are represented by the office of the public defender,[39] and the child must be represented by the office of the law guardian to help protect the child's interests and to express the child's wishes to the court.[40]

Recently, in *New Jersey Div. of Youth and Family Servs. v. B.H.*,[41] the court ruled that the defendant parents in child abuse and neglect and guardianship cases have a fundamental right to the effective assistance of counsel.[42] The court stated that the test for measuring the claim by a parent of ineffective assistance of counsel is the same two-prong showing in criminal cases, articulated in *Strickland v. Washington*,[43] namely: 1) a showing that counsel's performance was deficient as measured by an objective standard of reasonableness, and 2) that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial, a trial whose result is thus unreliable. Stated differently, it must be found there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.[44]

This approach was confirmed by our Supreme Court in *New Jersey Div. of Youth and Family Servs. v. B.R.*,[45] with the Court requiring that ineffective-assistance-of-counsel claims be raised on direct appeal, rather than in a post-judgment application.[46]

Note that pursuant to Rule 5:8C, whenever the welfare of a child is at issue, the court may appoint a volunteer court-appointed special advocate (CASA), who then acts on the court's behalf to undertake certain activities in furtherance of the child's interests. Any such CASA shall be a volunteer associated with a court-authorized or court-operated CASA program. The Administrative Office of the Court has promulgated guidelines for the CASA program and its volunteers, and most vicinages have CASA volunteers available to assist the court.

Rule 5:12-1(a) requires DYFS to bring the complaint for removal as a summary proceeding pursuant to Rule 4:67. Procedurally, Rule 4:67-2(a) requires that the court conduct a hearing at the time the order to show cause and verified complaint are presented and, if satisfied with the sufficiency of the application, order the defendant(s) to show cause why final judgment should not be rendered for the relief sought.[47] A judge may not order temporary removal (or continued removal) of a child from the home unless the court finds that the three conditions set forth in N.J.S.A. 9:6-8.28(a) have been established by a preponderance of the evidence:

> (1) the parent or other person legally responsible for the child's care was informed of an intent to apply for any order under this section;
>
> (2) the child appears so to suffer from the abuse or neglect of his parent or guardian that his immediate removal is necessary to avoid imminent danger to the child's life, safety or health; and
>
> (3) there is not enough time to hold a preliminary hearing.

These findings must be made on the record and supported by specific evidence relied upon by the judge. This evidence can consist of documentary evidence, for example police reports, hospital records, school records, professional reports. The evidence also can consist of the testimony of a DYFS worker, which may include hearsay statements as long as the judge is satisfied that the evidence adduced provides a sufficiently reliable basis upon which to make the required findings.[48]

Although Title 30 provides a separate basis for an emergent application to seek the involuntary removal of a child from a parent or guardian (where termination of parental rights is being sought), most often DYFS initially proceeds under the authority of a Title 9 action, with a Title 30 action to follow if it determines that its reasonable efforts at reunification have failed and the child remains in an out-of-home placement for a period of 15 of the last 22 months.

However, it must be noted that the requirements for involuntary removal under Title 30 also balance the procedural due process rights of the parent or guardian against the need to take immediate action to protect the health and safety of the child.[49]

N.J.S.A. 30:4C-12 requires DYFS to investigate complaints of child abuse or neglect. In a Title 30 action, prior to seeking legal custody of a

child, DYFS must show, by clear and convincing evidence, that reasonable efforts were undertaken to keep the family intact,[50] unless DYFS otherwise establishes by clear and convincing evidence that the parent or guardian has subjected the child to aggravated circumstances consisting of extreme forms of violence that place the child's health or safety at risk, such that DYFS need not establish such reasonable efforts.

In a Title 9 proceeding, following an order of temporary removal, the family part must hold a hearing on the next court day to determine whether the child's interests require continued removal and protection to avoid ongoing risk to the child's life, safety or health, pending final disposition of the complaint.[51] All relevant reports of DYFS, expert reports or other documents upon which DYFS intends to rely, shall be provided to the court and to counsel on the first return date of the order to show cause, or as soon as practicable after they become available.[52]

The family part then conducts a case management conference no later than 30 days from the return date of the order to show cause, and shall enter any necessary order pertaining to the safety and well-being of the child.[53] A fact-finding hearing shall also be ordered to determine whether the child is an abused or neglected child as defined in the statute.[54] Without question, the judge's determination will have a profound impact on the lives of families embroiled in this type of a crisis.

Judicial findings based on unspecified allegations, hearsay statements, unidentified documents and unsworn colloquy from attorneys and other participants erodes the foundation of the twin pillars upon which the statute rests: 1) that no child should be exposed to the dangers of abuse or neglect at the hands of their parent or guardian; and, commensurately, 2) that no parent should lose custody of his or her child without just cause.[55]

Upon completion of the fact-finding hearing that results in a determination, by a preponderance of the credible evidence, that child abuse or neglect has been perpetrated by the parents or guardian, a dispositional hearing pursuant to N.J.S.A. 9:6-8.45 may commence immediately to determine whether to release the child to the custody of the parents or guardian; continue out-of-home placement; require therapeutic services for the person found to have abused or neglected the child; or otherwise enter an order of protection.[56]

The criteria for sustaining or dismissing a Title 9 abuse or neglect complaint are set forth in N.J.S.A. 9:6-8.50, which requires the judge to make specific findings, state the grounds for such findings and base those findings on competent reliable evidence.[57] Testimonial evidence must be presented through witnesses who are under oath and subject to cross-examination.[58] It must be noted that even a stipulation in an abuse or neglect case must stand the scrutiny of having a factual basis to support it.[59]

If the court makes a finding of abuse or neglect, the court must then determine whether a preliminary order pursuant to N.J.S.A. 9:6-8.31, determining the placement status of the child and ordering the application of required services for the child and family, is required prior to the final order of disposition. The adjudication at a fact-finding hearing that the defendant(s) have perpetrated acts of abuse or neglect upon the child is interlocutory in nature and cannot be appealed prior to a dispositional order without leave of court.[60]

In *New Jersey Div. of Youth and Family Servs. v. S.S.*,[61] the court considered the interesting issue of whether a battered wife can be found to have abused her child pursuant to N.J.S.A. 9:6-8.21(c), because the child was present and at times in her arms, unharmed, when the mother was attacked by the child's father during an act of domestic violence, and the mother chose to remain in the violent relationship. The court reversed the family part's finding that such conduct constituted child abuse because there was no evidence adduced that emotional harm had been sustained by the child as a result of simply witnessing the domestic violence, or that the child was emotionally endangered by the failure of the mother to obtain a domestic violence restraining order against the father.[62] The court emphasized that the focus of the family part's inquiry in such circumstances must center upon the question of whether the mother caused injury to the child and, if not, whether the mother is likely to do so in the future.[63] The court declined to take judicial notice that domestic violence begets emotional distress or other psychic injury in child witnesses, finding that abuse cannot be assumed.[64]

This approach is consistent with the elongated battle over that same issue that began with U.S. District Court Judge Jack Weinstein's conclusion that the practice, by the city of New York child protection agency, of removal of bystander children from the custody of their battered mothers, without a finding of harm to the children, constituted a violation of both the mothers' and the children's constitutional procedural and substantive due process rights.[65]

The Second Circuit, in *Nicholson v. Scoppetta*,[66] concluded that the policy of avoidance of unnecessary constitutional adjudication, where state law is uncertain, dictated the certification to the state of the question of whether the definition of a "neglected child" under New York law includes instances in which the sole allegation of neglect is that the parent allowed the child to witness domestic violence against the caretaker.[67] In *Nicholson v. Scoppetta*,[68] the court ruled, under New York law, that although domestic violence may be a permissible basis to make a finding of neglect, not every child exposed to domestic violence is at risk of

impairment.

Another area of interest in Title 9 cases is the extent to which DYFS is entitled to the release of information concerning the alleged perpetrator of abuse or neglect from the county prosecutor's office. In *New Jersey Division of Youth and Family Servs. v. Robert M.,*[69] the court ruled that the statutory scheme and administrative regulations of DYFS envisioned cooperation between that agency and law enforcement, as well as the prosecutor's obligation to work collaboratively with DYFS. In *New Jersey Div. Of Youth and Family Services v. H.B.*,[70] the court ruled that the family part had erred in denying the application by DYFS to compel the county prosecutor to turn over the Megan's Law file it maintained concerning the alleged child abuser.

The issue of cooperation between the prosecutor's office and DYFS concerning mutual disclosure of information, where the same act alleged to constitute the basis for a Title 9 proceeding also forms the basis of a criminal investigation, was recently addressed, at least partially, by the Supreme Court's adoption of Rule 5:12-6 on June 15, 2007, effective Sept. 1, 2007. Rule 5:12-6(a) requires coordination between the Law Division and family part of the issue of the extent of visitation or contact, if any, between the alleged perpetrator and the child. Rule 5:12-6(b) provides for a non-binding conferencing procedure, on notice to all counsel, by a judge designated by the assignment judge when there is an issue between DYFS and the county prosecutor on the extent of sharing of information concerning a criminal investigation of the incident that forms the basis of the Title 9 proceeding.

The dispositional hearing, which may immediately follow the fact-finding hearing, is one where the court determines what order should be made in light of the finding of abuse or neglect.[71] As with the fact-finding hearing, only material and relevant evidence may be admitted. N.J.S.A. 9:6-8.51(a) outlines the available dispositions, which could include suspending the judgment; releasing the child to the custody of his or her parents or guardians; placing the child with a relative or suitable person; placing the defendant(s) on probation; and requiring therapeutic services for the defendant(s). The purpose of the dispositional hearing is to allow an inquiry into the surroundings, conditions and capacities of the persons involved in the proceedings in order to fashion an appropriate order of disposition. Moreover, cases where a child has been removed from the home must be given priority, and any adjournments should be for as short a time as possible.[72]

It should be noted that N.J.S.A. 9:6-8.54(a) requires the court to make a specific finding that DYFS has made reasonable efforts to prevent placement before placing a child in the custody of a relative, unless "reasonable efforts" are not statutorily required pursuant to N.J.S.A. 30:4C-11.2 or N.J.S.A. 30:4C-11.3.

N.J.S.A. 30:4C-15 outlines the circumstances under which DYFS is required to file a guardianship complaint in the family part seeking to terminate parental rights. They include when a court has entered a finding against the parent or parents of abuse, abandonment, neglect or cruelty pursuant to Chapter 6 of Title 9;[73] where the best interests of a child under the care or custody of DYFS require that the child be placed under guardianship;[74] where, notwithstanding reasonable efforts exerted by DYFS, the parent or parents have failed to remove the circumstances that led to the removal or placement of the child, although physically and financially able to do so, for a period of one year;[75] when the parent or parents have abandoned the child;[76] or where the parent has been found to have committed certain criminal acts involving the child or another child of the parent.[77]

As noted above, a complaint for guardianship seeking termination of parental rights must be filed when any one of these enumerated circumstances has been established, but no later than when the child has been in an out-of-home placement for 15 of the most recent 22 months. DYFS is not required to file a guardianship complaint if the child is being cared for by a relative and a permanent plan can be achieved without necessitating termination of parental rights; there is a documented compelling reason for determining that the filing of a guardianship complaint would not be in the best interests of the child; or DYFS has not provided reunification services to the family it deems necessary within the time period in its case plan.[78]

DYFS almost always initiates a guardianship complaint pursuant to N.J.S.A. 30:4C-15(c), contending that the "best interests" of the child dictate that parental rights be terminated and that the child be placed under the guardianship of DYFS for all purposes, including placement for adoption. When the child's biological parents resist termination of parental rights, the court's function is to decide whether the parent can raise the child without causing harm.[79]

The cornerstone of that inquiry is not whether the parents are fit, but whether they can become fit to assume the parental role within time to meet the child's needs. "The…analysis entails strict standards to protect the statutory and constitutional rights of the natural parents." The burden rests on DYFS "to demonstrate by clear and convincing evidence" that risk of "serious and lasting [future] harm to the child" is sufficiently great as to require severance of parental ties.[80]

The balance between fundamental parental rights and the state's *parens patriae* responsibility is achieved through application of the statutory best interests of the child standard set forth in N.J.S.A. 30:4C-

15.1a.[81] Under that standard, parental rights may be severed when:

> (1) The child's health and development have been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his foster parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.[82]

These standards are neither discrete nor separate. They overlap to provide a composite picture of what may be necessary to advance the best interests of the children.[83] The considerations involved in determining parental unfitness are "extremely fact sensitive," and require particularized evidence that addresses the specific circumstances of the specific case.[84]

Transferring guardianship to the state terminates all parental rights of the natural parents, permanently cutting off the relationship between the children and their biological parents, and is a prerequisite to having a child adopted.[85] Generally, these cases focus on past abuse and neglect, and on the likelihood of it continuing, *i.e.,* whether the parents can raise their children without causing them future harm.[86]

The first prong of the four-prong test contained in N.J.S.A. 30:4C-15.1(a) focuses on whether there is harm to the child as a result of the parental relationship to the extent that it threatens the child's health and will likely have continuing deleterious effects on the child if the parent-child relationship continues.[87] Recently, in *New Jersey Div. of Youth and Family Servs. v. G.L.*,[88] the Court emphasized that N.J.S.A. 30:4C-15.1(a) is conduct-based, and a court's finding that the determination by the mother that continuing a relationship with the father threatened the child must be based on facts established by clear and convincing evidence, not speculation.

In *G.L.,* there was nothing to suggest that the mother was not an able parent, or that she had conducted herself in a way that did not secure the safety of the child.[89] Stated differently, guilt by association is not sufficient; it is one's conduct that is measured against the statutory standard. As noted, DYFS bears the burden of establishing each prong by clear and convincing evidence.

The second prong is aimed at determining whether the parent has cured and overcome the initial harm inflicted, and is able to continue the parental relationship without recurring harms to the child.[90] Alternatively, DYFS may show that the parent is unable to provide a safe and stable home for the child, and that the delay in securing permanency for the child continues or adds to the harm.[91] The key issue in this best interests evaluation is not whether the biological parents are fit but rather whether they can cease causing harm to their child.[92]

The third element DYFS must establish by clear and convincing evidence is that it has undertaken reasonable efforts (assuming they were not otherwise excused pursuant to N.J.S.A. 30:4C-15.2 or -15.3) to provide services to the parents to help then correct the circumstances that led to the child's placement outside the home, and that the court has considered alternatives to termination of parental rights. The question of whether reasonable efforts have been undertaken will vary depending upon the circumstances of the removal.[93]

The final prong requires DYFS to show that the termination of parental rights will not do more harm than good. Basically, DYFS must establish whether, after considering and balancing the relationship between the child and the parent, and that between the child and the foster or placement parents, the child will suffer a greater harm from the termination of the child's ties with the biological parents than from the permanent disruption of the child's relationship with the foster or placement parents.[94] Obviously, this fourth prong is related to the first and second prongs, where the focus is on parental harm to the child.[95] Thus, the child's need for stability and permanency emerges as the central thrust in guardianship cases.[96]

In *New Jersey Div. of Youth and Family Servs. v. M.M.*,[97] in analyzing this fourth prong, the Court noted "that reunification becomes increasingly difficult with the passage of time because a child may develop bonds with his or her foster family and gain a sense of permanency[,]" and that "DYFS should communicate a sense of urgency to parents who are attempting to regain custody of their children and that they should present relevant evidence [of their parenting plan] as soon as possible."[98]

A final order terminating parental rights and placing the children in the care, custody and guardianship of DYFS, if sustained on appeal, places children in circumstances where they can be adopted. Assuming a successful adoption or placement, these children *can* emerge from the shadows. However, it is a long, arduous process, and far from perfect in an imperfect world.

However, many children who are subjected to child abuse and neglect by their parents, and are removed from the home, do not get the ultimate benefit of adoption. They may not be adoptable because they have special needs or may be too old. Rather, they secure perma-

nency of sorts through placement in long-term foster care, or through a kinship legal guardianship pursuant to N.J.S.A. 3B:12A-1 to -7, effective Jan. 1, 2002, where the court can appoint as guardian a person who has a kinship relationship (defined as a family friend or a person with a biological or family relationship with the child)[99] with the child and has been providing care and support for the child while the child has been residing in the caregiver's home for either the last 12 consecutive months or 15 of the last 22 months.[100]

The kinship legal guardian then has the same rights and responsibilities as a birth parent, but the biological parental relationship is not terminated and visitation with the biological parents may be permitted if court ordered.[101] In effect, a kinship legal guardianship is a statutorily created new relationship designed to seek another alternative permanent placement option where adoption is neither feasible nor likely.[102]

Finally, it should be noted that there is a parallel court proceeding occurring whenever a child is placed outside the home by DYFS, pursuant to voluntary placement or a court order. The Child Placement Review Act[103] (CPRA), requires that DYFS file a notice of placement in the family part within five calendar days of the child's placement outside the home pursuant to a voluntary agreement or court order. Within 15 days of receipt of that notice, the family part enters an order directing DYFS to submit a placement plan for the child, which is reviewed by a child placement review board.[104]

The assignment judge of each county must appoint one or more child placement review boards, consisting of five members on each board, in accordance with N.J.S.A. 30:4C-57. These boards act on behalf of the family part in reviewing the case of every child placed outside the home, reviewing those placements within 45 days of the initial placement, with periodic reviews at least every 12 months thereafter. Specific criteria for those reviews is set forth in N.J.S.A. 30:4C-58(a-j).

Essentially, these boards serve as the court's watchdogs over the activities of DYFS, the parents or legal guardian with respect to a child's placement, to assure the permanency plan is appropriate; that appropriate services are being provided to the child and the child's temporary caretaker; that the wishes of the child are being considered; whether any ordered visitation is occurring; and whether reasonable efforts, if required, are being exerted toward family reunification.

Notices of the reviews by the child placement review boards are sent to DYFS, the child, the parents or legal guardian, the temporary caretaker, any agencies that have an interest in the welfare of the child, and all counsel.[105] The board then submits a report to the family part of its findings and recommendations within 10 days after completion of its review.[106] The court can then schedule a summary hearing, on notice to all parties, counsel and the board, to review those findings and recommendations or enter an appropriate order concerning the child's placement.[107]

These boards can be very effective in advocating for the child's best interests by reviewing and determining the appropriateness of the permanency plan and its effectuation. Although it varies from vicinage to vicinage, some courts take full advantage of the board's activities and conduct regular summary hearings. It also should be noted that until permanency is achieved the family part does not lose jurisdiction over the child and family in terms of periodic reviews of the permanency plan when it grants the termination of parental rights pursuant to N.J.S.A. 30:4C-15.1(a).[108]

N.J.S.A. 30:4C-62 establishes a Child Placement Advisory Council, consisting of one member from each child placement review board, to review policies and procedures; to advise the Supreme Court concerning rules governing the practices of the review boards and training needs, and to issue an annual report to the Court, governor and Legislature on the effectiveness of the Child Placement Review Act.

In summary, Congress and the states make an enormous financial and human resources commitment each year in an attempt to address complex issues of child abuse and neglect, family reunification, parental rights, and permanency for children in an effort to assist those children who live in the shadows of uncertainty, while at the same time balancing the rights of parents. The success of this struggle will, to some degree, dictate the future shape and nature of our society. The intentions of those devoted to this worthwhile struggle are sincere, and ultimately, it is the continuous obligation of the courts to assure its success while balancing the rights of all concerned. ■

ENDNOTES

1. U.S. Census 2000, Category 366, "Child Abuse and Neglect Cases Reported and Investigated."
2. *See* P.L. 109-288, sec. 2(1).
3. Children's Rights, www.childrensrights.org, "Child Abuse and Neglect."
4. *Id*. at sec. 2(2).
5. *See* "Child Abuse and Neglect in New Jersey," Statistical Report for Calendar Year 2004, New Jersey Department of Children and Families, ES-1 (September 2006).
6. *Ibid*.
7. *Ibid*.
8. *See* 2005-2006 Annual Report of the N.J. Judiciary, p. 25.
9. *See, e.g.,* www.zerotothree.org, "Child Abuse," the website of the National Center for Infants, Toddlers and Families, located in Washington, D.C.
10. www.zerotothree.org, *supra,* "General Brain Development,"

page 2.

11. *Ibid*.
12. *See also*, Claire Lerner, Amy Laura Dumbro and Stefanie Powers, Learning & Growing Together: *Understanding and Supporting Your Child's Development*, (2001); Theresa Hawley, Ph.D., *Starting Smart, How Early Experiences Affect Brain Development, The Ounce of Prevention Fund and ZERO TO THREE*, Second Edition (2000).
13. *In re Guardianship of K.H.O.*, 161 N.J. 337, 346 (1999) (*citing Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)); *In re Adoption of Children by G.P.B., Jr.,* 161 N.J. 396, 403-04 (1999); *New Jersey Div. of Youth and Family Servs. v. A.W.,* 103 N.J. 591 (1986)).
14. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, (1982).
15. *Stanley, supra*, 405 U.S. at 651, 92 S. Ct. at 121-13; *A.W., supra*, 103 N.J. at 599.
16. *Parham v. J.R.,* 442 U.S. 584, 602, 99 S. Ct. 2493, 2504, (1979).
17. *Id*. at 602, 99 S. Ct. at 2504.
18. *Ibid*.
19. *Id.* at 603, 99 S. Ct. at 2504, (*citing Wisconsin v. Yoder*, 406 U.S. 205, 230, 92 S. Ct. 1526, 1540, 33 (1972)).
20. *Santosky, supra*, 455 U.S. at 759, 102 S. Ct. at 1398.
21. Pub. L. No. 105-09, 111 Stat. 2115 (1997), codified in various sections of 42 U.S.C.
22. *See* H.R. Rep. 105-77, at 7 (1997), reprinted in 1997 U.S.C.C.A.N. 1, 2739-40.
23. *New Jersey Div. of Youth and Family Servs. v. M.F.,* 357 N.J. Super. 515, 525 (App. Div. 2003).
24. L. 1997, c. 175 §18, eff. July 31, 1997.
25. *See New Jersey Div. of Youth and Family Servs. v. A.R.G.*, 361 N.J. Super. 46, 77 (App. Div. 2003) (articulating a standard, approved ultimately by the Supreme Court, for determining whether a parent has subjected a child to "aggravated circumstances"), *aff'd in part, remanded in part*, 179 N.J. 264, 284 (2004).
26. 42 U.S.C. § 673b; H.R. Rep. 105-77, at 7 (1997), reprinted in 1997 U.S.C.C.A.N. 1, 2739-40.
27. 42 U.S.C. § 675(5)(E).
28. 42 U.S.C. § 675(5)(C).
29. Robert M. Gordon, "Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997," 83 *Minn. L.Rev*. 637, 657-673, 700-701 (February 1999); *see also* Richard Wexler, "Take the Child and Run: Tales From the Age of ASFA," 36 *New England L. Rev.* 129, 130-146 (Fall 2001) (arguing that "ASFA is a federal law helping to turn the nation's child welfare systems into the ultimate middle-class entitlement. Step right up and take a poor person's child for your very own[,]" by confusing poverty with neglect, and asserting that a system promoting family preservation is safer than foster care).
30. Pub. L. 103-66.
31. *See* www.state.nj.us, Department of Children and Families.
32. N.J.S.A. 9:6-8.11, -8.18; N.J.S.A. 30:4C-11, -12.
33. *See* N.J.S.A. 9:6-8.21 to -8.73; N.J.S.A. 30:4C-11 to -14.
34. *See New Jersey Div. of Youth and Family Servs. v. A.C.,* 389 N.J. Super. 97, 108 (App. Div. 2006); *New Jersey Div. of Youth and Family Servs. v. J.Y.,* 352 N.J. Super. 245, 258-59 (App. Div. 2002).
35. *New Jersey Div. of Youth and Family Servs. v. K.M.*, 136 N.J. 546, 555-56 (1996).
36. *See* N.J.S.A. 9:6-8.29 (emergency removal without consent of parents or guardian); N.J.S.A. 9:6-8.27 (temporary removal with consent of parents or guardian).
37. N.J.S.A. 9:6-8.30c.
38. N.J.S.A. 9:6-8.30c; R. 5:12-1.
39. N.J.S.A. 9:6-8.30a.
40. N.J.S.A. 9:6-8.23.
41. 391 N.J. Super. 322 (App. Div.), *certif. denied*, 192 N.J. 296 (2007).
42. *Id*. at 344-46.
43. 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).
44. *B.H., supra*, 391 N.J. Super. at 347-48.
45. 192 N.J. 301 (2007).
46. *Id*. at 311.
47. *J.Y., supra*, 352 N.J. Super. at 259.
48. *Id.; see also* N.J.S.A. 9:6-8.46.
49. *J.Y., supra*, 352 N.J. Super. at 260.
50. N.J.S.A. 30:4C-11.1.
51. N.J.S.A. 9:6-8.31a, -8.31b.
52. R. 5:12-3.
53. R. 5:12-4(a).
54. N.J.S.A. 9:6-8.44.
55. *J.Y., supra*, 352 N.J. Super. at 264-65; *see also A.C., supra*, 389 N.J. Super. At 105-06.
56. *See* N.J.S.A. 9:6-8.51a.
57. *See* N.J.S.A. 9:6-8.46; R. 5:12-4(d).
58. N.J.R.E. 611.
59. *J.Y., supra*, 352 N.J. Super. at 266.
60. *New Jersey Div. of Youth and Family Servs. v. L.A.,* 357 N.J. Super. 155, 164-65 (App. Div. 2003).
61. 372 N.J. Super. 13, 15 (App. Div. 2004), *certif. denied*, 182 N.J. 426 (2005).
62. *Id*. at 22-23.
63. *Id*. at 24.
64. *Id.* at 25. *See also New Jersey Div. of Youth and Family Servs. v. D.F.,* 377 N.J. Super. 59 (App. Div. 2005) (ruling that it was improper for DYFS to place the mother's name on its central registry of persons who have been identified as having committed acts of child abuse or neglect where the father's acts of domestic violence caused no harm to the child and DYFS did not

perceive a threat to the child sufficient to warrant filing of a protective services complaint).
65. *Nicholson v. Williams,* 203 F. Supp.2d 182 (E.D.N.Y. 2002).
66. 344 F.3d 154, 158 (2d Cir. 2003).
67. *Ibid.*
68. 820 N.E. 2d 840, 849 (N.Y. Court of Appeals 2004).
69. 347 N.J. Super. 44, 63 (App. Div.), *certif. denied*, 174 N.J. 39 (2002).
70. 375 N.J. Super. 148, 178-81 (App. Div.).
71. N.J.S.A. 9:6-8.45.
72. N.J.S.A. 30:4C-15(a).
73. N.J.S.A. 30:4C-15(c).
74. N.J.S.A. 30:4C-15(d).
75. N.J.S.A. 30:4C-15(e).
76. N.J.S.A. 30:4C-15(f).
77. N.J.S.A. 9:6-8.49.
78. N.J.S.A. 30:4C-15-3.
79. *In re Guardianship of J.C.*, 129 N.J. 1, 10 (1992).
80. *Ibid*.
81. *K.H.O., supra*, 161 N.J. at 347.
82. N.J.S.A. 30:4C-15-1(a).
83. *K.H.O., supra*, 161 N.J. at 348.
84. *Ibid*. (*quoting In re Adoption of Children by L.A.S.*, 134 N.J. 127, 139 (1993)).
85. *In re Guardianship of J.C.*, 129 N.J. 1, 5 (1992).
86. *New Jersey Div. of Youth and Family Servs. v. F.H.*, 389 N.J. Super. 576, 609 (App. Div.), *certif. denied*, ___ N.J. ___ (May 29, 2007).
87. *K.H.O., supra,* 161 N.J. at 348, 352.
88. 191 N.J. 596, 608 (2007).
89. *Ibid*.
90. *K.H.O., supra*, 161 N.J. at 348.
91. *Ibid*.
92. *J.C., supra*, 129 N.J. at 10.
93. *New Jersey Div. of Youth and Family Servs. v. A.G.*, 344 N.J. Super. 418, 437 (App. Div. 2001), *certif. denied*, 171 N.J. 44 (2002).
94. *K.H.O., supra,* 161 N.J. at 355.
95. *In re Guardianship of DMH*, 161 N.J. 365, 384 (1999).
96. *K.H.O., supra*, 161 N.J. at 357.
97. 189 N.J. 261, 291 (2007).
98. N.J.S.A. 3B:12A-2.
99. *Id*. at 292.
100. *See also* R. 5:9A.
101. N.J.S.A. 3B:12A-4.
102. N.J.S.A. 30:4C-50 to -65.
103. N.J.S.A. 3B:12A-1(c); *see New Jersey Div. of Youth and Family Servs. v. P.P.* , 180 N.J. 494, 508 (2004).
104. R. 5:13-5.
105. N.J.S.A. 30:4C-59.
106. N.J.S.A. 30:4C-60.
107. N.J.S.A. 30:4C-61.
108. *In re E.M.B.*, 348 N.J. Super. 31 (App. Div. 2002).

Hon. Robert A. Fall, J.A.D. *(retired) served eight years on the Appellate Division and 12 years in the family part, including a time as the presiding judge of the family part. After retirement, he became affiliated with Benchmark Resolution Services, LLC, in Point Pleasant.*

New Motion Rules

Continued from Page 128

issue tentatives. I suggest if there is any doubt of the efficacy of this practice, they should come to Burlington County, or to the other counties in which tentatives have become commonplace, to see how well tentatives work and how much they serve the public's interest. Although some might advocate making tentatives mandatory, better that the practice expand by the example set by those vicinages in which they are now commonplace.

Every rule change will have not only its proponents but also its detractors. Extending motion times, however, should improve the system, should aid those who reply to motions served upon them, and should give more time for judges to carefully reflect upon the relief sought. ■

Domestic Violence and the Unfortunate Byproduct of Police-Conducted Pretextual Searches for Contraband

by Steven R. Enis and John E. Hogan

In 1991, the state of New Jersey enacted the Prevention of Domestic Violence Act of 1991[1] to address the serious threat to thousands of people in this state who annually suffer from the physical and mental abuse unique to the domestic environment. In crafting a statutory scheme that would provide a meaningful remedy to victims of domestic violence, by way of supplement to the existing criminal code, the Legislature deemed it appropriate and necessary to compel law enforcement officers to arrest and charge suspects in domestic violence investigations where the responding officers are able to verify, through specific statutorily enumerated indicia, that there is probable cause to conclude that an act of domestic violence had occurred.[2] Thus, under certain circumstances, the act leaves the responding officers or complaining victim with no discretion to avert a complaint (although the complaining victim could elect not to file for a domestic violence restraining order by signing a victim notification form).

The desired effect of this provision was to document and prosecute countless, verifiable domestic violence cases that might otherwise have gone uncharged due to reluctant victims, clever suspects, or the improper exercise of discretion by law enforcement.

Our laws now recognize that there are often forces at play that may hinder a victim's ability to pursue charges, or may dissuade police from making an arrest. Of course, police remain authorized, in their discretion, to arrest and charge alleged perpetrators absent those factors enumerated in the statute. Moreover, the act further empowers victims to seek restraining orders to prevent further unwanted victim contact.

Domestic violence investigations conducted pursuant to the act do not necessarily end at the arrest of the suspect and issuance of a criminal complaint and temporary restraining order. Subsequent amendments to the statute have extended law enforcement responsibilities with regard to the seizure of property. The Prevention of Domestic Violence Act directs law enforcement officers to "seize any weapon that is contraband, evidence or an instrumentality of a crime,"[3] and inquire about and seize weapons that would expose the victim to a risk of serious bodily injury. In addition, should a temporary restraining order be obtained, the court issuing the restraining order may issue an order compelling law enforcement to search for and seize any weapons possessed by the defendant, at any location where the court has cause to believe weapons are located.[4]

All weapons seized pursuant to the foregoing provisions must be turned over to the county prosecutor's office, and upon notice to the defendant within 45 days of the seizure, the weapons may be forfeited along with the firearms purchaser identification card; thereby preventing the defendant from possessing firearms in the future.[5] Notably, even where restraining orders and criminal complaints are dismissed, either voluntarily by the alleged victim or at the conclusion of a plenary hearing, a prosecutor's office may nevertheless succeed in a forfeiture action depending on the attendant circumstances and traits of the defendant.

While the Prevention of Domestic Violence Act serves an important and essential purpose in the protection of previously averse victims, not all who rely on its profound protections are righteous in their motivations. In *Bresocnik v. Gallegos*,[6] the Appellate Division addressed the trivialization of the Prevention of Domestic Violence Act, stating: "the law is not designed to interdict all forms of unpleasant exchanges between parties. The law has serious consequences to the personal and professional lives of those who are found guilty."[7] The court further explained that: "the law is not a primer for social etiquette and should not be used as a sword to wield against every unpleasant encounter or annoying interaction that occurs between household members, spouse, parents or those who have had a dating relationship."[8]

One of those serious consequences is the right of an officer to search for weapons and contraband. This issue has raised concerns

of late, due to a decision finding that police improperly invoked the authority to search for contraband under circumstances clearly going beyond the provisions of the act. In *State v. Dispoto*,[9] the Supreme Court of New Jersey suppressed contraband seized as a result of an improperly obtained domestic violence restraining order. The Court held that: "the remedial protections afforded under the [New Jersey Prevention of Domestic Violence Act] are intended for the benefit of victims of domestic violence and are not meant to serve as a pretext for obtaining information to advance a criminal investigation."[10]

In *Dispoto*, New Jersey State Police received information from a previously untested informant that the defendant was involved in illegal narcotics trafficking and organized crime. The informant further relayed that the defendant had asked the informant if he knew anyone who would kill his wife. Police took no steps to corroborate the informant's claims, and, significantly, failed to warn the defendant's wife that she might be in danger. In fact, the informant's next conversation with the defendant actually revealed that the defendant no longer had any interest in killing his estranged wife. Investigators concluded that there was insufficient evidence to support a continued criminal investigation for murder-for-hire, but, nevertheless, proceeded to the defendant's wife's home and advised her that her husband, from whom she had been separated for two years, "was attempting to hire someone to kill her."[11] Investigators made no mention of the second statement indicating a change in the defendant's interest—clearly attempting to influence the purported victim's belief that she may be in immediate danger. In fact, state investigators encouraged the defendant's wife to pursue a restraining order, and even accompanied her to the local police department.

A temporary restraining order was issued based upon the informant's claims and two earlier reports of domestic violence. Moreover, the state investigator further sought and obtained authority to conduct a search for weapons in accordance with the Prevention of Domestic Violence Act. The defendant was served with the temporary restraining order and a domestic violence search warrant later in the evening.

The search warrant was employed to search the defendant's office where contraband was located in an employee's desk.The defendant was then taken to his residence, and, pursuant to the domestic violence search warrant, he surrendered a revolver he had illegally obtained. The defendant was immediately placed under arrest; however, the investigators continued the weapons search, ultimately leading to the seizure of two pounds of marijuana.

Following indictment, the defendant sought a suppression of the weapon and narcotics charges on the ground that there was insufficient legal grounds to justify the domestic violence search warrant. The Law Division granted the defendant's motion to suppress, and the state appealed. The Appellate Division affirmed the Law Division's suppression order.[12] The state petitioned for certification, which was granted.[13]

Upon reviewing the manner in which the law enforcement officers employed the tools afforded under the Prevention of Domestic Violence Act, through a manipulation of the purported victim, the Court concluded there was simply no evidence to support a conclusion that an act of domestic violence had occurred. The Court observed that the purported basis for the domestic violence claim—an alleged threat to kill—lacked sufficient probable cause to sustain a charge of terroristic threats in light of the contradictory claims by the informant and lack of corroboration of the threat. The Court noted that, pursuant to N.J.S.A. 2C:12-3(a), a person is guilty if he or she threatens to commit any crime of violence with the purpose to terrorize another.[14] Furthermore, pursuant to N.J.S.A. 2C:12-3(b), a person is guilty if he or she threatens to kill another with the purpose of putting him or her in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and likelihood that it will be carried out. Neither of the aforementioned standards was satisfied.

Finally, in rejecting the investigator's methods, the Court explained:

> [p]ermeating the series of events that transpired is the sense that the domestic violence search warrant was being used by law enforcement representatives to uncover evidence of criminal behavior unrelated to defendant's alleged acts of domestic violence.
>
> Thus, although there is in this record no apparent harm that was visited on defendant as a result of the immediate protective temporary restraining order thrown around [his wife], the invalid domestic violence search warrant with which defendant rightly complied at the time may not be used as a bootstrap mechanism to obtain evidence to sustain issuance of a criminal search warrant. The evidence that was produced through defendant's compliance with the domestic violence search warrant consequently constituted fruits of the poisonous tree and must be suppressed.[15]

While it is apparent that our highest court has expressed disapproval for the employment of our domestic violence laws in the manner set forth in *Dispoto*, it is disconcerting that our courts could be compelled to uphold similarly obtained search warrants where the allegations supporting the underlying domestic violence claims are slightly more substantial, yet equally as misleading. While the goal of law enforcement in the *Dispoto* case was no doubt the prosecution of illegal activity, the apparent misuse of the domestic

Continued on Page 150

COMMENTARY

An Open Question—Assembly Bill 2557 and Adoption in New Jersey

by Amanda S. Trigg and Jeffrey B. Hodge

Senate Bill S-1087, passed by the Senate on Dec. 4, 2006, and proposed Assembly Bill A-2557, presently before the Human Services Committee, deal with the issue of open adoption in New Jersey. In brief, the legislation would allow access to an adopted person's original birth certificate, thereby providing the identity of the individual's biological parents, upon a request by an adult adopted person, the adult descendants of a deceased adopted person, or the adoptive parents of a minor adopted person. However, disclosure would not be automatic; a birth parent could submit a notarized request for non-disclosure, or could make such request in person. Consent to disclosure would be presumed, however, absent a non-disclosure request. A valid non-disclosure request would not eliminate an adopted person's access to all information regarding birth parents, since its implementation would require a birth parent to provide certain family history information, which would be available. By allowing for identification of birth parents by adopted individuals, A-2557 would facilitate communication between them. In the event of a non-disclosure request, A-2557 would provide a mechanism for the transfer of information from one generation to the next.

It may be more than curiosity that fuels interest in one's biological family. Specifically, proponents of opening adoption records argue that every individual, whether adopted or not, requires access to family medical history. Numerous medical conditions have a genetic component and, as such, knowledge of family medical history alerts a person to potential health problems and informs medical diagnosis and treatment. As adopted children reach adulthood, this information may become increasingly important.

Supporters of opening adoption records also argue that adopted children have a right to information about their religious and cultural history that can only be obtained from their birth parents. Since membership in certain ethnic populations may predispose individuals to particular genetic diseases, such information can be medically relevant. For many, knowledge that they are linked by birth to a larger religious or cultural group may itself be profoundly significant.

Ignorance of one's personal history also may raise certain uncomfortable possibilities, say open-adoption advocates. They assert, for example, that an open-records system can free adopted persons from concerns regarding incest. While the chances that inadvertent incest would occur appear remote, the possibility certainly exists if family history remains unknown and the most basic of questions unanswered.

By examining the opening of adoption records in other U.S. states, such as Alabama, New Hampshire, and Oregon, and in other countries, such as Israel and Scotland, proponents of open adoption have argued that the benefits of these laws, in the form of increased adoption rates and decreased abortion rates, are evident.

A common argument in the debate on whether to open adoption records is that many of the benefits can be secured through less forceful means, *e.g.* through a mutual consent registry. This type of registry allows adopted persons and birth parents to register and provide information voluntarily. In this way, only those who are willing to forego their privacy are involved. However, the effectiveness of this type of solution has been challenged. Of concern are those individuals who would welcome contact, but, in the absence of any mechanism to prompt action, fail to take the necessary steps to register, or are unable to register. For example, a birth parent may live out of state and be unaware of the registry, or be ill, deceased, or incarcerated. Essentially, there are many potential reasons why a person may fail to register that are unrelated to a wish for privacy or a desire to permanently sever all ties with a child.

The cornerstone of arguments advanced in opposition to open adoption records is that it is destructive to privacy interests. The decision to place a child with adoptive parents is a personal and, typically, difficult one. Opponents of open adoption suggest that some percentage of expectant mothers, fearing a breach of privacy, will forego adoption and instead turn to the anonymity of abortion.

While A-2557 does provide a

mechanism for birth parents to maintain their anonymity, opponents point out that it does so by requiring these individuals to take affirmative steps. In order to limit the information available to children, under A-2557 a request for non-disclosure must be made by way of a notarized writing or in person. Additionally, even if a non-disclosure request is made, the requesting birth parent must then submit, within 60 days, a family history form covering the medical, cultural, and social history of the birth parent. If the birth parent fails to submit this form, the request for non-disclosure is deemed void.

Opponents of A-2557 argue that these requirements are too burdensome and difficult to understand, particularly for those who may have trouble with the language or who reside out of state. Birth parents who are unfamiliar with the law may not realize that steps need to be taken to maintain their privacy. Further, as the bill applies to persons who have already placed their children up for adoption, and to those who now reside outside New Jersey, there is a significant likelihood that many individuals will be unaware that the law has been passed, thereby missing the opportunity to request non-disclosure.

It has been argued that open adoption fails to consider adequately the psychological aspect of adoption, specifically the need birth parents may feel to separate themselves from the trauma of giving up a child and move on with their lives. Opponents of A-2557 have suggested that birth parents whose identifying information is available may have greater difficulty putting the adoption behind them due to the lingering possibility that they may be contacted by the adopted child, or by the adoptive parents.

The absence of a sunset clause in the bill has been identified by opponents as another area of concern. While there is a provision in the bill for preparation of a report by the commissioner of health and senior services, in consultation with the commissioner of human services, providing data on how A-2557 was used and by whom, opponents challenge whether this is sufficient to determine if it has had a positive impact.

It has been suggested that A-2557 would conflict with New Jersey's Safe Haven Infant Protection Act,[1] which allows for the anonymous surrender of infants younger than 30 days old without fear of abandonment charges against the parents. The act provides that a child may be left either by the parents, or by someone acting for the parents, at specified locations, specifically a hospital emergency room or a police station, without need to divulge any identifying information. Provided there is no evidence that the child has been abused, anonymity is complete. Consequently, access to an original birth certificate of a child surrendered under the act would be irrelevant to the question of anonymity as it would have no information identifying the birth parents.

Even without an actual conflict between the Safe Haven Infant Protection Act and open-adoption legislation, there is concern that the act would be misused. The anonymity and immediacy of giving up a child under the act might appeal to those who wish to avoid the ongoing, and more burdensome, requirements of A-2557. The act thus becomes a loophole to avoid the requirements of open adoption. It is also possible, of course, that individuals with incomplete or incorrect knowledge regarding the act, and any enacted open adoption legislation, could mistakenly believe their ability to remain anonymous had been lost. This might cause erosion to the benefits afforded by the act.

Sometimes overlooked in the debate on open adoption is consideration of what "open" actually means. While the phrase "open adoption" may imply a binary state, either open or closed, the characteristic of openness is more accurately seen as occupying a spectrum, with degrees of openness. Without an understanding of this concept, opponents argue, it is easy to develop a distorted picture of the wishes of the majority of birthmothers. For example, a birth mother might wish to be an active participant in the placement of a child with adoptive parents. This may take the form of assisting in the review of applications and even meeting with adoptive parents prior to placement. In some cases, birth mothers attempt to secure agreements from prospective adoptive parents to provide the birth mother with ongoing information, such as photographs and continuing updates. A birth mother may be open to the possibility of meeting with a child placed with adoptive parents after the child has reached adulthood.

A common argument in the debate on whether to open adoption records is that many of the benefits can be secured through less forceful means, *e.g.* through a mutual consent registry.

Opponents of open adoption maintain that such involvement by the birth mother is distinct from total openness. Even a birth mother who meets with prospective parents, and seeks updates on the child's progress and well-being, may be reluctant to exchange identifying information with adoptive parents, or to have personal contact with either them or the child after placement.

Opponents of mandatory openness argue that supporters of open adoption records intentionally obscure the issue of the degree of openness. By so doing, advocates of open adoption are able to enlist the support of individuals who favor some level of openness, though not necessarily to the extent contem-

Continued on Page 154

Don't Wait Up—Issues in Juvenile Justice

by Charisa A. Smith

It is 10:30 p.m. on a warm Friday night in July, and countless parents in America are facing the same dilemma, wondering where their teenager is and what on earth he or she is getting into. At around 3:47 a.m., a knock echoes on the door of one New Jersey home. The Marshalls have been eagerly awaiting the arrival of their son, and he is standing at the doorstep at long last, looking disheveled and sheepish. Perhaps the sheepishness is due to the stern-looking police officer standing next to him. The Marshalls now pose the age-old question to their son, Ben: "What were you doing cruising Hamilton's streets at that time of night with four of your friends, and why on earth did you think it was OK to drag race with another car at the stoplight?"

Ben's answer may surprise you. Essentially, Ben and his friends were caught in the heat of the moment, and dared the driver of their car to play a deadly game. When Ben's parents ask what he was thinking, Ben replies, "I don't know..."

It turns out that new scientific advances can now confirm what scores of auto insurance companies, criminologists, and parents see as common sense, namely that teenagers are more likely to thrill-seek, act impulsively, be influenced by peer pressure, and seek short-term satisfaction simply because of their developmental stage.

EVER WONDER WHY?

It turns out that new scientific advances can now confirm what scores of auto insurance companies, criminologists, and parents see as common sense, namely that teenagers are more likely to thrill-seek, act impulsively, be influenced by peer pressure, and seek short-term satisfaction simply because of their developmental stage. Lucky for the Marshalls in the scenario above, the officer agreed to escort Ben home rather than booking and holding him in juvenile detention. New research on juvenile psychosocial and neurological development comes at a time when some states are beginning to question their shift toward a more punitive juvenile justice system with correctional-style facilities and, as in New Jersey's case, the trial of juveniles as adults.

While this research has had various policy implications in states across the country, it must be considered from several different perspectives, due to the danger of stereotyping youth, stifling their development, and making knee-jerk policy arguments.

THE LEGAL LANDSCAPE: MORE PUNITIVE TREATMENT OF JUVENILE OFFENDERS

In 2000, New Jersey joined many other states in choosing a shift toward a more punitive treatment of juvenile offenders. At that time, New Jersey dispensed with certain distinctions between juvenile and adult court procedures and sentences. For offenders 16 and over, who are charged with the most serious offenses under N.J.S.A. 2A:4A-26, there would no longer be a rehabilitation hearing. The practice of "prosecutorial" waiver gave county prosecutors the waiver decision-making authority previously entrusted to judges in certain cases.[1] For some younger and less serious offenders, the evidence of his or her rehabilitation could still be presented. However, New Jersey greatly expanded its existing discretionary and presumptive waiver provisions applicable to juveniles of at least 14.

Like at least 31 other states, such as Connecticut and Florida,[2] New Jersey's changes in its juvenile justice system in 2000 ran counter to the founding, rehabilitative premise of the original juvenile justice system. Rather than implementing "social work and psychological approaches to delinquency" in courtrooms where youths' "amenability to treatment" was the yardstick,[3] New Jersey removed the rehabilitative focus as previously mentioned. Further, the myriad of protections the juvenile court setting had provided were now lost for juveniles tried in adult court. For example, the court records of waived juveniles are not confidential, and these youth are subject to media and public scrutiny.

Transfers of juveniles to adult criminal courts have been possible since the onset of juvenile courts, but have recently become more common. Roughly 200,000 youth are criminally charged as adults

each year in the U.S. In New York and North Carolina, youth age 16 and older can automatically be tried as adults regardless of their offense.[4] Eighteen states have expanded their transfer laws in some way from 1998 through 2002.[5]

In *Kent v. U.S.*,[6] the court emphasized that "special rights and immunities" are given to a youth in the juvenile system, making it "critically important" that transfer processes be scrutinized by judges.[7] However, the practice of prosecutorial discretion in New Jersey allows judges only limited discretion to find probable cause for commission of a criminal act for older, more serious offenders.

NEW DEVELOPMENTS IN PSYCHOSOCIAL AND NEUROLOGICAL RESEARCH ON ADOLESCENTS

The question remains whether the punitive policy shifts are in tune with the reality of adolescent development. New research suggests that the 200,000 juveniles tried in criminal court each year may not necessarily resemble adults simply because their crimes may be serious. In fact, several scholars suggest there are marked differences between the decision-making capabilities and brain maturation of juveniles and adults.

A leading group of researchers in this field is from the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. The network's research was cited in *Roper v. Simmons*,[8] a Supreme Court opinion outlawing the death penalty for offenders who were younger than 18 when they committed their crimes. The decision in *Roper* centered on the issue of culpability. The research conducted by the network and other scholars, such as Dr. Abigail Baird of Vassar, points to factors dealing with an offender's state of mind at the time of the offense, including factors that would mitigate the degree of responsibility, such as impaired decision-making capacity.[9]

The network's issue brief, *Less Guilty by Reason of Adolescence*, acknowledges that adolescents' cognitive abilities closely resemble the cognitive abilities of adults. However, the characteristics that undergird decision making, and that are relevant to mitigation in a criminal context, such as impulsivity and risk processing, future orientation, sensation seeking, and resistance to peer pressure, change over the course of adolescence, and are linked to brain maturation. The characteristics undergirding decision making can be collectively called "psychosocial capabilities."[10]

The network has performed experiments with close to 1,000 "ethnically and socioeconomically diverse" subjects between the ages of 10 and 30, "from the general population in five regions." A series of puzzle-solving experiments, car-driving tasks, and long-term and short-term rewards choice-making experiments have shown that out of the 1,000 subjects studied, adolescents exhibit more "short-sighted decision-making…poor impulse control…[and] vulnerability to peer pressure."[11]

Dr. Robert Johnson, director of adolescent and young adult medicine at UMDNJ-New Jersey Medical School, affirms these findings. He adds that, "Juveniles don't consider punishment before a criminal act. They haven't developed consequential thinking yet. Adults use knowledge of what could happen if they do something. That frequently is a deterrent."[12]

As the above scenario illustrates, the existence of these adolescent traits may be simple, commonsense knowledge to most parents across the country. Dr. Baird, who frequently writes on the issue of adolescent development, points out that widespread knowledge about adolescents' differences from adults is precisely the reason why people under age 18 have never served on juries. As Baird puts it, "psychological research, brain pictures, and another angle confirm what we already know—children are children."[13]

Dr. Laurence Steinberg, the network's director, and Laura H. Carnell, professor of psychology at Temple University, use four main points to summarize the emerging neuro-scientific (as opposed to psychosocial) research that "lines up well"[14] with the network's psychosocial research:

1. Brain development continues longer than people previously thought. There is structural maturation into an individual's mid-20s.
2. There is a temporal gap between the changes in the brain system that makes people emotionally aroused and impulsive, and the changes in the system that give it regulation. The first system develops around puberty, while the second system develops more gradually and much later.
3. The connection between the brain system responsible for emotional arousal, sensation-seeking, and excitation, and the one that regulates impulses, is still developing in late adolescence. Since development is not complete until the mid-20s, an individual's ability to coordinate thoughts and feelings is still developing during adolescence.[15]
4. Further, emerging evidence shows that hormonal changes during puberty affect the adolescent brain in ways that make juveniles more sensitive to the reactions of those around them, and thus more susceptible to the influence of peers.[16] Steinberg even notes that teens perceive anger and hostility in human faces more readily than other age groups.[17]

DISTINGUISHING BETWEEN COMPETENCE TO STAND TRIAL AND CULPABILITY

Those involved with the juvenile criminal justice system should not automatically conflate the factors contributing to a juvenile's maturity

and culpability with a juvenile's competence to stand trial. Research by the network also shows that a significant number of youthful offenders, particularly those under age 15, are not capable of competently assisting in their own trials due to developmental immaturity. These researchers firmly assert that the standard governing competence or incompetence to stand trial does not accurately reflect which juveniles should or should not be held as responsible as adults for their offenses.[18]

USE OF NEW PSYCHOSOCIAL AND NEUROLOGICAL RESEARCH ON ADOLESCENTS TO SHAPE JUVENILE JUSTICE POLICY

Research on adolescent psychosocial capabilities and brain maturation has increasingly been utilized to turn the tide away from more punitive, less rehabilitative treatment of juveniles in the justice system. This research is only one of a plethora of tactics advocates use to change the law. Other methods include the technique of cultivating an organized citizenry and policy-making constituency, citing lower recidivism rates for youth who remain in the juvenile system, noting dropping juvenile crime rates, and arguing that public safety demands more rehabilitation for youngsters who will most likely re-integrate into society while still young. However, the use of this research has proven effective in many jurisdictions.

For example, advocates in Illinois raised awareness of adolescent psychosocial and neuro-scientific research in order to change a statutory scheme that tried all 15-, 16-, and 17-year-old drug offenders as adults. Betsy Clarke, of the Illinois Juvenile Justice Initiative, notes that the International Convention on the Rights of the Child requires age 18 to be the minimum cutoff age for trying youth as adults, and Afghanistan sets the age at 21. She adds that there has been no negative impact on public safety since the change in Illinois law occurred.[19]

The new Illinois legislation, Senate Bill 283, was signed into law as Public Act 094-0574 on Aug. 15, 2005. Legislators were guided by a bipartisan legislative task force, which included study of the network's research. The bill passed the Illinois General Assembly unanimously, and was supported by a wide array of state and national organizations. The legislative change came after an outcry from youth advocates, the public, and others over the disparate racial impact of the previous transfer scheme requiring low-level juvenile drug offenders to be tried as adults. Advocates for change also criticized the previous transfer, because it failed to focus on the serious, violent offenders who critics thought were most in need of criminal sanctions.

Now, Illinois law lays out clear factors that the court must consider before transferring a juvenile to the adult criminal justice system for prosecution. In deciding whether to transfer juvenile offenders, the court must consider: whether there is evidence that the offense was committed in an aggressive and premeditated manner; the juvenile's age; the seriousness of the offense; abuse and neglect, physical health, educational health, and mental health histories of the juvenile; which system has appropriate facilities for treatment or rehabilitation; the offender's history of services and willingness to participate in treatment; whether public safety requires criminal sentencing; whether the victim(s) suffer serious bodily harm; whether the juvenile is likely to be rehabilitated before the expiration of juvenile court jurisdiction; and, whether a deadly weapon was used.

In proceedings to determine transfer, the court must also apply the rules of evidence. Finally, greater weight is given to the seriousness of the offense and the juvenile's record of delinquency.[20]

Clarke states that the number of transferred youths has dropped by about two-thirds, and that the number of youth in detention is down as well. Clarke anticipates the cost savings to the state must be "huge," because there are fewer juveniles crowding adult facilities, awaiting trial.[21] After three years, Illinois' Statistical Analysis Center will assess the effects of the new law and report to the General Assembly.[22]

Wendy Henderson, a policy analyst with the Wisconsin Council on Children and Families, comments that the new adolescent psychosocial and neuro-scientific research guides leaders down the path toward treating juveniles as youth (as opposed to adults), because it shows that juveniles are still developing and are more amenable to treatment. Child advocates in Wisconsin have begun to use this research in their court cases. On March 8, 2007, the Wisconsin Joint Legislative Audit Committee unanimously recommended an audit on the effects of criminal court jurisdiction on all Wisconsin 17-year-olds. The audit report, which will examine the cost of returning 17-year-olds to juvenile court jurisdiction was issued in February 2008, and can be found at www.wccf.org.

Henderson notes that while treating 17-year-olds in the juvenile system may present increased costs up front, the benefit is that the youthful offenders treated in the juvenile system will be less likely to commit future crimes then their counterparts who were subjected to the adult system. Youth treated in the juvenile system, Henderson points out, will live more productive lives when given educational services and rehabilitative options.[23] Dr. Johnson supports this notion that the educational services provided by the juvenile system are crucial for decreasing crime. He notes, "There is a clear inverse relationship between literacy and the potential for criminal activity or delinquency."[24]

In Connecticut, using the new research on adolescents has helped

legislators and advocacy organizations change the *status quo*. A multi-disciplinary group of citizens and policymakers began attempting to change Connecticut's juvenile court jurisdictional age maximum of 15 early in the present decade. Ultimately, new psychosocial and neuro-scientific research played an important role in persuading legislators to change the law.

Abby Anderson, executive director of the Connecticut Juvenile Justice Alliance, explains that her coalition created a fact sheet on brain development and a legislative briefing book incorporating the new science. Connecticut advocates reiterated the facts used in *Roper* to argue that trying juveniles as adults is not sound policy, since the state would not be treating youth in a fair or age-appropriate manner. According to Anderson, "Punitive treatment of juveniles without rehabilitation is counterproductive if policy-makers want to prevent crimes from re-occurring."

Anderson considers Dr. Baird's presentation to the Connecticut General Assembly in 2006 to be a crucial moment in the history of Connecticut policymaking. Baird's presentation "had a profound impact on Connecticut's legislature," in Anderson's opinion. The presentation was televised, and legislators such as Rep. Toni Walker and Sen. John Kissel raised her arguments in their floor speeches. Baird appealed to the legislators' own understandings of youth, noting that many of them were probably raising teens and could identify places where the research was on point. She went on to present the new scientific research to a large group of public defenders in the state.

As a result of the combined research, advocacy, and legislative efforts in Connecticut, SB 1196 passed the Connecticut Senate in the late spring of 2007, raising the jurisdictional age of Connecticut's juvenile court to 17.[25] Connecticut State Representative Toni Walker comments of the change in juvenile jurisdiction age:

> For youth, it gives the opportunity to grow and develop without being penalized from acting out as children…Insurance companies even know a child isn't developed until [age] 25…In Connecticut, if we're going to sustain a workforce in global markets, and incarcerate all our children, we eliminate what could potentially be our future in Connecticut. By raising the age, we allow the state to learn how to work with adolescents, training them for the workforce.[26]

A SLIPPERY SLOPE?

Scientists, attorneys, child advocates, and others are nevertheless aware that juvenile brain research may create a slippery slope for youth rights, and for society in general. Individuals working with youth leaders note that it is a hard sell to convince youngsters to promote research that labels the leaders themselves as poor decision makers. Anderson points out that this problem can be addressed by explaining to youth leaders that the research "doesn't mean all kids make bad decisions at all times or that they are incapable of being leaders. . ."[27] Clarke adds that the research simply "does not mean that juveniles don't have anything to do in society." In fact, Clarke states, youth "can be valued members of society."[28]

Nevertheless, youth rights arguments may be compromised by the new research in public discussions about parental consent for abortion, voting rights, alcoholic beverage drinking rights, military enlistment age, lifeguard duty age limits, and countless other subjects. As researchers increasingly confirm that adolescents' decision-making capabilities are still developing and their brains are still maturing, some individuals are already making the logical leap that youth just cannot be trusted with mature responsibilities. Some policymakers improperly argue that the research provides a greater rationale for treating youth harshly for criminal justice purposes. These individuals claim that youth cannot control themselves without strict discipline to keep them in line.

The Center on Juvenile and Criminal Justice's senior researcher, Mike Males, penned a *New York Times* opposition editorial strongly criticizing the research.[29] In an interview, Males asserted that scientists studying these matters are "using19th Century prejudices and thinking." To Males, a former sociology professor at the University of California at Santa Cruz, arguments attributing juveniles' impulsivity and increased risk-taking to their brain physiology are reminiscent of old Social Darwinist claims about racial minority groups.[30]

In Males' view, "[Researchers] have to rule out competing explanations…Another explanation is poverty. Youth are two to three times more likely to live in poverty than middle aged adults."[31] Males is a major contributor on Youthfacts.org, a website "dedicated to providing factual information on youth issues such as crime, violence, sex, drugs, drinking, social behaviors, education, civic engagement, attitudes, media, and whatever the latest teen terror *du jour* arises."[32] Males' July 2007 article on Youthfacts.org compares teenage death rates from guns and traffic crashes through the lens of poverty, and finds:

> As poverty rates rise, the two biggest causes of teenage death skyrocket. The poorest teens suffer traffic death rates three to five times higher, gun death rates five to six times higher, and gun murder rates 16 times higher than teens living in the richest counties…[Even though] richer teens drive many more miles (roughly twice as many per year) and are more likely to live in homes where firearms are present than are poorer adolescents…the risks are due to the very different contexts in which teenagers

> encounter guns and driving depending on their differing socioeconomic statuses.

Essentially, Males argues, "If biodeterminist notions about adolescents are valid, they should apply to all teens—yet middle class and more affluent American adolescents and European youth display very low rates of risky behaviors of the types commentators stereotype as characteristic of teenagers."[33] Males added in his interview that he is "not saying that this [the poverty – teen-risk-taking connection] is the last word."[34]

YOUTH ARE PEOPLE TOO

Despite competing explanations for *typical* teenage behavior, such as socioeconomic status, which could overshadow the age/brain/risky behavior connection, cultural currents proffering the idea of *teenage rebellion* and parental angst have echoed throughout American history and across socioeconomic lines. Films, literature, and other media have long capitalized upon the common understanding that teen hormones rage, teens feel particularly misunderstood, and youth is the time to make mistakes one can learn from. Many adolescent psychologists and psychiatrists also agree with and affirm the emerging teen psychosocial and neuro-scientific research findings. One point of consensus rests in the notion that regardless of some level of less-than-adult maturity, adolescents must be given continued opportunities to make choices so they will ultimately grow into responsible adults.

Mary Ann Scali, deputy director of the National Juvenile Defender Center, asserts, "One of the most important things we can do is model decision-making processes for youth. Not making all the decisions for them. So we engage them in the decision-making about their own lives. In defense work, there is an attorney–youth client relationship. Research makes us better able to work with [adolescents]."[35] Baird notes, "Anyone seeking to restrict children's rights could use this work [recent research] but that would give us less qualified adults. We don't let kids make low-cost mistakes anymore…That doesn't prepare them for reality."[36]

In the opinion of Jason Ziedenberg, executive director of the Justice Policy Institute, there are two ways to view juvenile delinquency: a) Most youth naturally desist from delinquency regardless of the treatment they are given; or, b) Some youth need mental health and substance abuse treatment to improve their behavior, so we should target the resources at them. Ziedenberg emphasizes that, "When juvenile justice advocates talk about youth through the treatment frame, we're overstating it. We use a paternalism that isn't necessary."[37]

Balance is the key. There are scores of responsible youth, while there are others who act less-than-responsibly. Both must be given the opportunity to change and rehabilitate.

Dr. Steinberg, of the network, asserts that while science on brain development should certainly inform public policy, it should not dictate. He explains, "We have age cutoffs for different privileges and responsibilities for all sorts of reasons," and many such cutoffs do not make scientific sense. For example, if we reason on the basis of science alone, driving at age 16 and voting at age 18, or buying cigarettes at age 18 and alcohol at age 21 would not make sense. However, society "draws lines for different reasons and purposes" which may be non-scientifically valid but otherwise sensible. Steinberg also notes, "We must strike a balance [about when to trust youth on the road] for kids with jobs, in school, etc. Not just on the basis of science."[38]

NEW SCIENCE ABOUT THE POLICY OF TRYING YOUTH AS ADULTS

In addition to new science about juvenile development and brain maturation, there are now more scientific studies about the impact of trying youth as adults. Dr. Johnson headed an analysis for the Task Force on Community Preventive Services to determine whether transfers to adult court reduce or prevent violent crimes by youth under age 18 "either by individual deterrence (reducing future violence by the individuals transferred) or general deterrence (reducing juvenile violence generally)."[39] The task force examined "all the research on the effect of juvenile transfers done in the last two decades, in various jurisdictions."

Dr. Johnson explained the study's results by noting:

> Not only did the practice [of transfer to adult court] not deter juvenile crime specifically, but it tended to make transferred youth worse. There was higher reincarceration than that among youth with similar crimes but in the juvenile justice system. To the extent corrections should rehabilitate, it failed miserably. The issue is if we want to be rehabilitative…[40]

The findings of the task force study are in line with the American Bar Association's (ABA) "firm policy regarding the transfer of juveniles into the adult justice system." The ABA "believes that underage defendants generally should not be placed in the adult system." This policy stems from a February 2002 resolution of the ABA House of Delegates, which includes the "pillars…1. that youth are developmentally different from adults, and these differences should be taken into account…[and] 6. that judges should consider the individual characteristics of the youth during sentencing."[41]

Several other agencies and organizations studying the practice of trying juveniles as adults have come to similar conclusions.[42] Regardless of the emerging science about adolescent psychosocial development, brain maturation, and the possible

effectiveness of juvenile transfer and waiver, scores of youth remain transferred to adult court each year.

CONCLUSION

Scientists doing research on juvenile brains and juvenile psychosocial capabilities admit that the science is in its beginning stages. If scientists, courts, policymakers, insurers, parents and others throughout the country are waiting for teenagers to shed all remnants of immature, risky behavior before their early 20s, don't wait up. ■

ENDNOTES

1. Milgram & Paw, *Analysis of Prosecutors' Data 2005.*
2. A total of *31* states made substantive changes to their laws governing the criminal prosecution and sentencing of juveniles during the five-year period from 1998 to 2002. (National Center for Juvenile Justice, "How have state laws governing criminal prosecution of juveniles changed in recent years?," *National Overviews* (as amended through the 2004 legislative session) at www.ncjj.org/stateprofiles/overviews/transfer9.asp.
3. An attitude of benevolent paternalism and hopes for rehabilitating delinquents of all ages inspired late nineteenth century reformers to create the juvenile courts. Adopting a "medical model" that stressed multidisciplinary evaluations and crime prevention, progressives in Chicago stressed "treatment" versus "pathology," and established the first juvenile court in 1899. The American Orthopsychiatry Association began as a means of understanding the causes and treatment of delinquency, and youth reform facilities focused on moral instruction and industrial education, in addition to discipline. Confinement was viewed as temporary, administrators acted as guardians in the spirit of *parens patrie,* and non-adversarial proceedings were differentiated from those in adult courts and jury trials (Davidson & Redner *et al., Alternative Treatments for Troubled Youth* at 4-5, (1990); Schetky *et al.*, eds., *Principles and Practice of Child and Forensic Psychiatry* at 3-4; *see* Krisberg & Austin, *Re-inventing Juvenile Justice* at 15-40; Schetky *et al.*, eds. at 360-61; Martin, The Delinquent and the Juvenile Court: Is there Still a Place for Rehabilitation?, 25 *Conn. L. Rev*. 57, 66-67, (1992) at 66 (describing the judges' terms, 1906-15 and 1916-32, respectively); *see* Fagan, *Juvenile Justice Policy and Law:Applying Recent Social Science Findings to Policy and Legislative Advocacy,* 183 Pli/Crim 395-402, (1999) at 402.
4. Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* at 6 (2007).
5. National Center for Juvenile Justice, *supra* note ii..
6. 383 U.S. 541 (1966).
7. *See* Martin, *supra* note iii (describing the rights and immunities scrutinized in *Kent* as the shield from publicity, the right to be jailed separately from adults, detainment only until age 21, and protection against use juvenile records in subsequent proceedings and public employment disqualifications). *See also* Beresford, "Is Lowering The Age at Which Juveniles Can be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-Sate Assessment of the Age at Which a Child Should be Held Responsible for his or her Actions Has Been Debated for Centuries," 37 *San Diego L. Rev.* 783 at 795; *see also Kent v U.S.,* 383 US 541 at 566-67 (1966).
8. 543 U.S. 551, (2005).
9. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Less Guilty by Reason of Adolescence* at 1-2 (Issue Brief 3 (2006)).
10. *Id.* at 2.
11. *Id.* at 2-3.
12. Phone interview with Dr. Robert Johnson, MD, FAAP, director of adolescent and young adult medicine at UMDNJ-New Jersey Medical School (Oct. 8, 2007).
13. Phone interview with Dr. Abigail Baird, Ph.D., professor of psychology at Vassar College (Oct. 16, 2007).
14. MacArthur Foundation, *supra* note vii at 3.
15. Phone interview with Laurence Steinberg, Ph.D., director, MacArthur Foundation Research and Distinguished University Professor and Laura H. Carnell, professor of psychology at Temple University (Oct. 2, 2007).
16. Gardner & Steinberg, "Peer influence on risk-taking, risk preference, and risky decision-making in adolescence and adulthood: An experimental study," *Developmental Psychology 41*, 625-635 (2005) (as cited in MacArthur Foundation, *supra* note vii at 4).
17. Steinberg, "Implications of Research in Adolescent Development for Juvenile Justice in New Jersey," (Address at the Trenton War Memorial, Feb. 17, 2006).
18. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Adolescent Legal Competence in Court* 1 (Issue Brief 1 (2006)).
19. Phone interview with Betsy Clarke, president, IL Juvenile

Justice Initiative (Oct. 1, 2007).

20. A conversation on Oct. 5, 2005, with Liz Kooy, research and policy consultant with the IL Juvenile Justice Initiative, revealed additional details about the recent Illinois policy change. Kooy stated that the earlier transfer scheme began in 1985, and that her organization and others began to study the actual population that was transferred to determine if transfer really served its purpose. Additionally, Kooy noted that Illinois has an inclusive blended sentencing scheme, which did not decrease the number of transfers but only widened the net, causing more offenders to receive criminal sentences. *See also,* "Illinois Law Gives Judges More Discretion Over Youth Charged as Adults" on the IL Juvenile Justice Initiative website (www.jjustice.org/template.cfm?page_id=4).
21. Interview with Betsy Clarke, *supra* note xvii.
22. Interview with Liz Kooy, *supra* note xviii.
23. Phone interview with Wendy Henderson, Policy Analyst at the WI Council on Children and Families (Oct. 1, 2007); and WI Council on Children and Families, *Justice for Wisconsin Youth* (2007) *at* www.wccf.org/proj_justice.php.
24. Phone interview with Dr. Robert Johnson, MD, FAAP, *supra* note x.
25. Phone interview with Abby Anderson, Executive Director, CT Juvenile Justice Alliance (Oct. 8, 2007).
26. Phone interview with CT state Representative Toni Walker (Oct. 16, 2007).
27. *Id.*
28. Interview with Betsy Clarke, *supra* note xvii.
29. Mike Males, Ph.D., "This is Your (Father's) Brain on Drugs," *New York Times*, Sept. 17, 2007.
30. Interview with Mike Males, Ph.D., senior researcher, Center on Juvenile and Criminal Justice (Oct. 10, 2007).
31. *Id.*
32. *About Us, at* www.youthfacts.org/aboutus.html.
33. Mike Males, *The "Teen Brain" Craze: New Science, or Ancient Politics?* (2007) at www.youthfacts.org/brain.html.
34. Interview with Mike Males, *supra* note xxviii.
35. Phone interview with Mary Ann Scali, deputy director, National Juvenile Defender Center (Oct. 16, 2007).
36. Phone interview with Dr. Abigail Baird, Ph.D.,*supra* note xi.
37. Phone interview with Jason Ziedenberg, executive director, Justice Policy Institute (Oct. 5, 2007).
38. Interview with Dr. Laurence Steinberg, Ph.D., *supra* note xiii.
39. Tonry, "Treating Juveniles as Adult Criminals," *Am J Prev Med* 2007; 32(4S).
40. Phone interview with Dr. Robert Johnson, MD, FAAP, *supra* note x.
41. Mathis, (American Bar Association), "Adult Justice System is the Wrong Answer for Most Juveniles," *Am J Prev Med* 2007, 32.
42. For more sources positing this assertion, *see* Campaign for Youth Justice, The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform at 6 (2007).

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Domestic Violence

Continued from Page 141

violence act, and deliberate ruse perpetrated on the victim, who was caused to endure needless fear over fallacious allegations, must not be allowed to diminish the claims of those victims who justly require the protections of the law.

Before the creation of the Prevention of Domestic Violence Act of 1991, our laws afforded law enforcement with tools to combat crime. It was the special needs arising out of domestic violence cases that justified the heightened protections afforded by the act. As indicated, the Prevention of Domestic Violence Act affords many laudable protections to victims, and has proven invaluable to the detection, documentation, prosecution and prevention of domestic violence; however, overzealous law enforcement and domestic violence victims should be dissuaded from eroding the purpose and justification for the Prevention of Domestic Violence Act, by using its protections as a means to accomplish other ends. ■

ENDNOTES

1. N.J.S.A. 2C:25-17, *et seq*.
2. N.J.S.A. 2C:25-21a.
3. N.J.S.A. 2C:25-21d(1).
4. N.J.S.A. 2C:25-26a; N.J.S.A. 2C:25-28j; and N.J.S.A. 2C:25-29b(16).
5. N.J.S.A. 2C:25-21d(3).
6. 367 N.J. Super. 178, 181 (App. Div. 2004).
7. *Id*.
8. *Id*.
9. 189 N.J. 108 (2007).
10. *Id*. at 120.
11. *Id*. at 115.
12. 383 N.J. Super. 205 (App. Div. 2006)
13. 186 N.J. 358 (2006)
14. 189 N.J., at 121
15. *Id*. at 123.

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The Penalty for Gun Use by Juvenile Offenders: Does Every Juvenile Have a Gun, and if so, What Can We do About it?

by Andrea P. McCoy Johnson

Violent crime represents one of the state's most significant public safety problems. While overall arrests and reported crimes have decreased from 2001 to 2006, statewide arrests for murder and weapons offenses have increased among adults and juveniles. In response to this trend, in October 2007 Governor Jon Corzine unveiled a strategy for safe streets and neighborhoods. The focus of the governor's three-part strategy is on gang violence, violent crime and recidivism. One component of the strategy is to strengthen gun laws by concentrating resources on the prosecution of individuals who illegally carry firearms and commit and threaten violence to others.

The success of the governor's plan will depend on its ability to reach both juvenile and adult offenders. Particularly with respect to young offenders, the plan's goal of breaking the cycle of recidivism may well depend on early and effective intervention. This, in turn, requires a clear understanding of the juvenile justice system and its own goal of rehabilitation, as well as deterrence.

PURPOSE OF THE JUVENILE JUSTICE ACT

The New Jersey Code of Juvenile Justice[1] governs New Jersey's approach to juvenile delinquency. The goals of the code are spelled out in N.J.S.A. 2A:4A-21, as follows:

- To preserve the unity of the family and provide for the care and protection of juveniles;
- To protect the public by deterring acts of juvenile delinquency and by supervising and rehabilitating juvenile offenders;
- To separate juveniles from the family environment only when necessary for their health, safety or welfare or in the interests of public safety;
- To provide any juvenile removed from the home, with the care and discipline equivalent to that which should have been given by the child's parents;
- To insure that children under the jurisdiction of the court are wards of the state, subject to the discipline and entitled to the protection of the state, which may intervene to safeguard the child from neglect or injury and to enforce legal obligations due and from the child; and
- To ensure that services and sanctions for juveniles provide for the protection of the community and the juvenile's accountability; for interaction between the juvenile offender, victim and community; and for and the development of the juvenile as a responsible and productive member of the community.

These goals are designed to maintain a balance between the juvenile offender's accountability and rehabilitation on the one hand, and public safety on the other.[2]

SENTENCING UNDER THE NEW JERSEY JUVENILE JUSTICE ACT

Discretionary Sentencing

Generally, New Jersey courts have considerable discretion in the disposition of juvenile matters.[3] A court may impose special conditions of probation.[4]

Exclusive jurisdiction over a juvenile charged with committing an act of delinquency is vested in the Chancery Division, family part.[5] The family part may, however, waive jurisdiction over a juvenile who is at least 14 years old, and refer the case to the Law Division or any other appropriate court.[6] Waiver of jurisdiction over a juvenile who is 14 years of age or older is initiated on motion of the prosecutor or by election of the juvenile. A juvenile under the age of 14 also has the option to have the matter transferred to the appropriate court and prosecuting authority, but only if the juvenile is charged with murder and is found to be competent.[7]

In determining the appropriate disposition for a juvenile adjudicated delinquent the family part must weigh the following factors under N.J.S.A. 2A:4A-43a:

- The nature and circumstances of the offense;
- The degree of injury to persons or damage to property caused by the juvenile's offense;
- The juvenile's age, previous

Although there is a statutory presumption of imprisonment for adult offenders who have committed first- and second-degree crimes, there is no similar presumption for juvenile offenders. On the other hand, there is no presumption against imprisonment.

record, prior social service received and out of home placement history;
- Whether the disposition supports provides for reasonable participation by the child's parent, guardian, or custodian, provided, however, that the failure of a parent or parents to cooperate in the disposition shall not be weighed against the juvenile in arriving;
- Whether the disposition recognizes and treats the unique physical, psychological and social characteristics and needs of the child;
- Whether the disposition contributes to the developmental needs of the child, including the academic and social needs of the child where the child has mental retardation or learning disabilities;
- Any other circumstances related to the offense and the juvenile's social history as deemed appropriate by the court;
- The impact of the offense on the victim or victims;
- The impact of the offense on the community;
- The threat to the safety of the public or any individual posed by the child.

Once a juvenile is adjudicated delinquent, the court's parameters are outlined in N.J.S.A. 2A: 4A-43(b). The family part may:

- Order the incarceration of the juvenile;
- Adjourn the disposition of the case for a period not to exceed 12 months;
- Release the juvenile to the supervision of his parent or guardian;
- Place the juvenile on probation for a period not to exceed three years;
- Transfer custody to a relative of other person determined by the court;
- Place the juvenile under the care and responsibility of the Department of Children and Families for the purpose receiving the services of the Division of Developmental Disabilities;
- Commit the juvenile to the Department of Children and Families under the responsibility of the Division of Child Behavioral Health Services on the ground that the juvenile is in need of involuntary commitment;
- Order the juvenile to pay a fine;
- Order the juvenile to make restitution;
- Order the juvenile to perform community services;
- Order the juvenile to participate in work, academic, vocational, or other programs;
- Order the juvenile to participate in counseling;
- Place the juvenile in a residential or non residential program for alcohol or narcotic abuse;
- Order the parent or guardian to participate in appropriate programs or services;
- Place the juvenile under the custody of the Juvenile Justice Commission;
- Postpone, suspend or revoke for a period not to exceed two years the driver's license, registration certificate or both of any juvenile who used a motor vehicle in the course of committing an act for which the juvenile was adjudicated;
- Order the juvenile to satisfy any other conditions reasonably related to the rehabilitation of the juvenile;
- Order the parent or guardian to make restitution to any person or entity who has suffered a loss as a result of an adjudicated offense
- Place the juvenile in an appropriate juvenile offender program.

Although there is a statutory presumption of imprisonment for adult offenders who have committed first- and second-degree crimes, there is no similar presumption for juvenile offenders. On the other hand, there is no presumption against imprisonment.[8] The sole exception is the presumption of non-incarceration for first offenders charged with an offense of the fourth degree or less.[9] Imprisonment cannot be ordered for any offense unless the family part finds that aggravating factors outweigh the mitigating factors.[10]

EFFECT OF MANDATORY SENTENCING IN AUTO THEFTS

Another important distinction between juvenile and adult sentencing lies in the area of mandatory sentencing. The only mandatory sentencing provision for juvenile offenders is contained in N.J.S.A. 2A:4A-43e. This statute, which was implemented in June 1993, was accompanied by the following statement of purpose:

> Under the present New Jersey Code of Juvenile Justice[11] sanctions for juveniles adjudicated delinquent are within the discretion of the court. This bill would establish the following mandatory disposition for juvenile's adjudicated delinquent for certain motor vehicle related offenses:
>
> - 60 days incarceration for any juvenile adjudicated for aggravated assault if an injury is caused as the result of joyriding or eluding a law enforcement officer; for eluding if the offense creates a risk of injury and for motor vehicle theft by a repeat offender;
> - 30 days incarceration for repeat offenders adjudicated delinquent for the unlawful taking of a motor

Based upon statistics reported in the New Jersey Uniform Crime Report (2006), it appears that mandatory incarceration provisions may have resulted in the reduction of motor vehicle thefts.

vehicle or for eluding which does not create a risk of injury;

- 60 days mandatory community service for first offenders adjudicated delinquent for motor vehicle theft, for the unlawful taking of a motor vehicle which creates a risk of injury and for eluding which does not create a risk of injury;
- 30 days mandatory community service for the unlawful taking of a motor vehicle which does not create a risk of injury.
- The minimum terms of incarceration required for motor vehicle theft required shall be imposed regardless of the aggravating and mitigating factors of N.J.S.A 2A: 4A- 44; however, the weight and balance of those factors shall determine the length of the term of incarceration appropriate if any beyond the mandatory minimum required.[12]

N.J.S.A. 2A:4A-43(e) was a response to the rising numbers of motor vehicle thefts in the state. As noted in an Aug. 24, 1993, article in *The New York Times*, "The legislation signed by Governor Jim Florio evolved from nearly 50 bills introduced by legislators eager to assure voters that they were dealing with an epidemic of car theft that, particularly in Newark was increasingly leading to deadly clashes between thieves and the police."To ensure that teeth would be given to the new legislation, it was made applicable to any juvenile with a previous adjudication of delinquency for the theft of a motor vehicle, regardless of whether or not that previous adjudication predates the passage of the act.[13]

Based upon statistics reported in the New Jersey Uniform Crime Report (2006), it appears that the mandatory incarceration provisions may have resulted in the reduction of motor vehicle thefts. In 2001, there were 37,651 motor vehicles stolen in New Jersey. That number decreased to 24,746 in 2006. Juveniles were arrested for committing 24 percent of the motor vehicle thefts cleared in 2001; in 2006 juveniles accounted for 21 percent of the motor vehicle theft arrest clearances. During that same period, in the Essex County Prosecutor's Office Juvenile Trial Unit, motor vehicle theft cases decreased from 683 in 2001 to 428 in 2006. The implication is that the decrease of motor vehicle thefts can be attributed to the imposition of mandatory incarceration pursuant to N.J.S.A. 2A:4A-43(e).

JUVENILES AND GUNS

While motor vehicle offenses have decreased, other types of offenses not addressed by the mandatory sentencing provisions are on the rise. The New Jersey Uniform Crime Reports of 2001 and 2006 indicate an increase in armed violent offenses. There were 2,501 aggravated assaults committed with guns in 2001, compared to 2,605 committed in 2006. Murders committed with guns also increased from 172 to 288 during the same time period. While motor vehicle thefts from 2001 to 2006 decreased, arrests for weapons offenses increased from 5,394, with juveniles accounting for 32 percent of the arrests, to 6,639, with juveniles accounting for 31 percent of the arrests.

In response to the increased possession and use of guns by juveniles, proponents of mandatory sentencing have introduced legislation that mirrors the Graves Act.[14] This statute provides parole ineligibility terms for adult offenders convicted of qualifying weapons offenses. Assembly bill A-2274 and companion bill S-1180, introduced Jan. 30, 2006, would impose mandatory minimum terms of incarceration on juveniles who use various types of guns to commit acts that, if committed by adults would constitute serious crimes. The bills would amend N.J.S.A. 2A:4A-43(e), and add Sections 5 and 6:

5. An order of incarceration which shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of an act which, if committed by an adult, would constitute a crime of the fourth degree, during which the juvenile shall be ineligible for parole, if the juvenile has been adjudicated delinquent for an act which, if committed by an adult, would constitute a crime under 2C:39-4a, possession of a firearm with intent to use it against the person of another, or an act which would constitute a crime under any of the following sections: 2C:11-3,2C:11-4, 2C:12-1b, 2C: 13-1, 2C:14-2a, 2C:14-3a, 2C:15-1, 2C:18-2, 2C:29-5, if the juvenile while in the course of committing or attempting to commit the act, including the immediate flight there from, used or was in possession of a firearm as defined in 2C:39-1f.
6. An order of incarceration which shall include the imposition of a minimum term fixed at 10 years for a crime of the first or second degree, five years for a crime of the third degree, or 18 months in the case of a fourth degree crime, if the juvenile has been adjudicated delinquent for an act which would constitute a crime under any of the following sections: 2C:11-3,2C:11-4, 2C:12-1b, 2C: 13-1, 2C:14-2a, 2C:14-3a, 2C:15-1, 2C:18-2, 2C:29-5, if the juvenile while in the course of committing or attempt-

> ing to commit the act, including the immediate flight there from, used or was in possession of a machine gun or assault firearm.

One of the aggravating factors outlined in N.J.S.A. 2A:44 is the need to deter juveniles and others from violating the law. Supporters of mandatory sentencing for juvenile weapon offenders view the threat of a mandatory sentence as a significant deterrence. They argue that laws need to be toughened so juveniles who commit armed and other serious offenses are not simply slapped on the wrist and returned to the streets. Based on the 35 percent reduction in auto thefts following the mandatory sentencing legislation, the argument is a forceful one.

SHOULD THERE BE MANDATORY SENTENCING FOR GUN-RELATED OFFENSES FOR JUVENILES?

Although the discussion of mandatory sentences reflects a change in the approach to the juvenile justice process, the time to recognize the need for such change may be overdue:

> Today, the juvenile process is different. A recent government report notes, "[j]uvenile delinquency, or 'youth crime' is recognized as a major social problem in our society. In New Jersey, as elsewhere, juveniles are responsible for a large share of the total amount of crime."[15]

Thus, mandatory sentencing provisions are simply a reflection of the reality that "punishment has now joined rehabilitation as a component of the State's core mission with respect to juveniles."[16] ■

ENDNOTES

1. N.J.S.A. 2A:4A 20 *et. seq*.
2. *See State in the Interest of D.B.S.*, 137 N.J. Super. 371 (App. Div. 1975), *certif. den*. 70 N.J. 144 (1976).
3. *State ex rel. D.A.*, 385 N.J. Super. 411 (App. Div.), *certif. den*. 188 N.J. 355 (2006).
4. *See State ex rel. D.A.*, *supra*, (requiring an adjudicated juvenile to notify the parents of any girls that he dated of the disposition of a charge); State v. H.B., 259_N.J. Super. 603 (Ch. Div. 1992) (imposition of curfews, school and grade requirements); *State in the Interest of M.C.,* 384 N.J. Super. 116 (App. Div. 2006)(imposition of a suspended sentence); *State in the Interest of M.C.,* 292 N.J. Super. 214 Ch. Div. 1995) (requiring a juvenile to make restitution to a victim for unreimbursed psychotherapy expenses incurred on behalf of the victim and her mother, as well as after-school care expenses to supervise the victim).
5. N.J.S.A. 2A:4A-24.
6. N.J.S.A. 2A:4A-26; N.J. Ct. R. 5:22-2.
7. N.J. Ct. R. 5:22-1.
8. *State in the Interest of J.R.,* 244 N.J. Super. 630 (App. Div. 1990).
9. N.J.S.A_2A:4A- 44(b)(1).
10. *State in the Interest of S.C.*, unreported opinion, 2005 WL 3772420 (App. Div. 2006); N.J.S.A. 2A:4A-44.
11. N.J.S.A. 2A:4A-20 *et seq*.
12. N.J.S.A 2A: 4a-43(f) [Senate judiciary statement].
13. *See State in the Interest of J.M.,* 273 N.J. Super. 593 (Ch. Div. 1994).
14. N.J.S.A. 2C: 43(6)(c).
15. *Juvenile Justice Master Plan*, New Jersey Juvenile Justice Commission, at 6 (April 1999).
16. *Id.*

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Assembly Bill 2557

Continued from Page 143

plated by the pending legislation. Further, neglecting the question of the degree of openness may result in skewed data, as even those opposed to open adoption may support some level of openness. For example, open adoption opponents have acknowledged the benefits of a birth mother's ability to feel more comfortable with her decision and with the adoptive parents if there is some pre-placement contact between those involved. Opponents stress, however, that while some openness is good, more is not necessarily better.

Even a cursory review of the arguments presented on either side of the open adoption debate reveals that many are speculative in nature. Regarding the emotionally charged issue of abortion, for example, one hears that open adoption will likely both increase and decrease such procedures. These claims are made in the absence of convincing data, as the number of factors possibly impacting such things as adoption rates and abortion rates within a target area make analysis of any individual factor difficult.

There are myriad reasons why birth parents make the difficult decision to place a child with adoptive parents. The relationships between parents and children post-placement are equally complex. Hopefully, with continuing debate, more definition will be brought to the difficult and critical concepts involved, and the valid concerns on both sides of the issue. ■

ENDNOTE

1. N.J.S.A. 30:4C-15.5.

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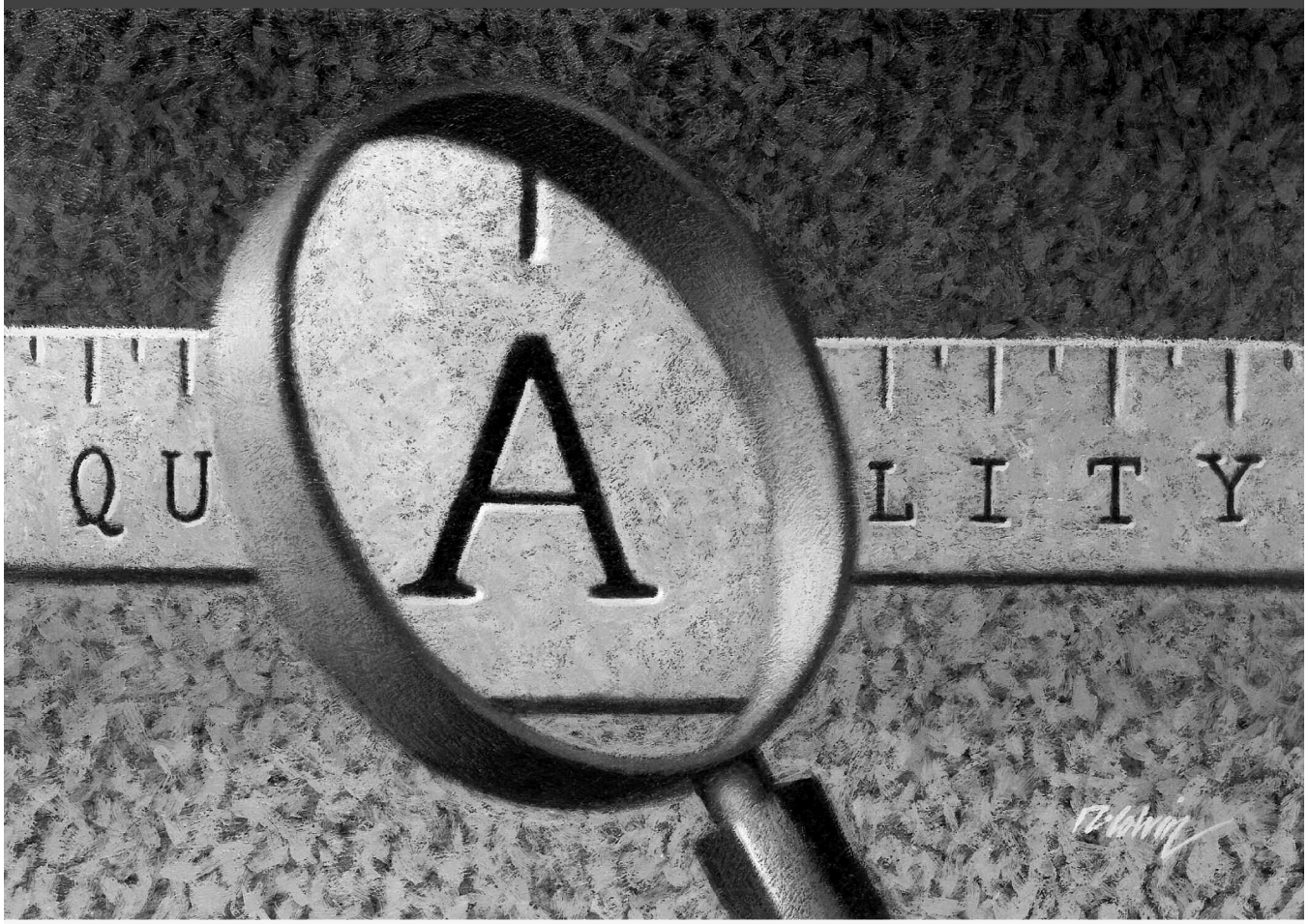

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