CASE LAW APPROACH TO FAMILY POLICY

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The impact of national and state policies and decisions on the daily activities of a rural court and all it touches and concerns can be seen clearly in the microcosm that is Cheboygan County, Michigan.

The jurisdiction of a Michigan probate court is two-fold. First there is the traditional probate jurisdiction, handling estates, mental health codes, guardian- and conservatorships and care of the developmentally disabled. Second, there is the very special juvenile division. In other states, this jurisdiction is sometimes shared by a family court. But in Michigan it is the juvenile division of the probate court that has jurisdiction regarding children.

This is a civil, not a criminal, court. This becomes important particularly when we consider child abuse and neglect which, in the juvenile system, are dealt with in child protection proceedings. Here, child protection matters are heard by family or juvenile judges who can influence the action of parents, order services, place a child at home under agency supervision or remove the child from the home.

Since probate court is not a criminal court, we are not concerned with punishing offenders but with civil protection of the child. This is important in understanding why things happen in juvenile court the way they do.

Probate court is traditionally there to address the needs of children and, incidentally, families. Courts have long articulated the fundamental right of parents to rear their children. To terminate those parental rights is the most profound action a juvenile or family court can undertake in virtually every state of the Union, and that usually only after long periods of time and many hearings. This is often fraught with great concern and adherence to the considerable legal responsibilities that must be fulfilled before parental rights are terminated. We are impacted daily by various federal and state enactments that really begin to measure what it means to terminate parental rights. In other words, to destroy one family while, hopefully, providing a child with another.

Author Pearl Buck said, "Children are our national treasure and

with what measure we mete to them in their childhood, they will mete to our nation during their lifetime." The wisdom in her statement has become increasingly apparent.

Children have not always been considered a national treasure. Criminal cases involving child abuse in the United States date back to the mid-1600s when criminal action was taken against parents for cruelty, desertion and permanent injury. But after such criminal action was taken against parents, their children were often committed to public almshouses or bound out in involuntary servitude where further harm could result.

Many of our attitudes about children have changed dramatically. In 1875, the first documented case of a civil cause of action for child protection occurred in New York City. This landmark case involved a child named Mary Ellen, cruelly abused and used by her guardian stepmother. Efforts to intervene were unsuccessful because there was no access to any judicial forum. But the director of the Society for the Prevention of Cruelty to Animals, determined to help, took the case to court under animal protection laws and won. As a result of this case, our nation was made aware of the need for child protection laws. Jacob Riis, a reporter for *The New York Times*, believed he had been present at the birth of children's rights.

The juvenile court system began in Illinois in 1899 and some thirty years later forty-six states had juvenile courts. Reform movements led to the establishment of the first juvenile institutions and to a new awareness of the responsibility of the state for the ultimate protection of children.

In 1944 the United States Supreme Court first recognized a broad state responsibility in the area of child protective intervention in the case of Prince v. Massachusetts. Justice Rutledge upheld a state's child labor law, saying the family itself is not beyond regulation in the public interest and the state has a wide range of power for limiting parental freedom and authority in things affecting a child's welfare. Courts used the doctrine of state intervention as the "super parent," *parens patriae*, and ordered placement under the theory of "best interests," actually a child custody concept. These doctrines did not, however, address the range of maltreatment problems or the range of children's needs.

This changed in 1962 when an article describing the "battered child syndrome" appeared in the *Journal of the American Medical Association*. This stimulated public awareness of the economic costs to society and the devastation to children socially and psychologically.

By 1968, all states had reporting laws. The reporting laws and welfare codes allow protective services and law enforcement to investigate and intervene in family relationships; Juvenile Court laws authorize the courts' involvement. These laws, permitting state

intrusion into the family, are balanced by Constitutional principles pertaining to family integrity and due process rights. That type of intervention continued with an enormous emphasis on foster care which was very much supported by governmental programs.

In the 1970s, judicial decisions began to stress the importance of permanency and the effects of prolonged foster care. Many cases showed instances in which children had been in foster care for five, six, even seven years before actions were instituted to terminate parental rights, a situation called "foster care drift." The "solution" of removal and prolonged foster care was soon to be addressed. Judicial projects, such as the benchbook prepared by the National Council of Family Court and Juvenile Judges, addressed the importance of permanency for foster care children. Congress heard five years of testimony on foster care and adoption and, in 1980, passed the Adoption Assistance and Child Welfare Act to achieve permanence for children and for families at risk of separation.

This not only responded to the national predicament of "foster care drift," but recognized the importance of the family in our society. A 1976 Michigan case, Reist v. Bay Circuit Judge, referred to other high court cases in Nebraska, Maine and New York, which all essentially found that the family entity is the core element upon which modern civilization is based.

Traditionally, the integrity of the family unit has been zealously guarded by the courts. The fundamental nature of parental rights as a liberty protected by the due process clause of the Fourteenth Amendment has been given expression by the courts. That is why, in child custody cases, indigent parents are provided attorneys and court transcripts at public expense.

As a result of the Adoption Assistance and Child Welfare Act, family preservation became part of our national welfare policy. States are provided financial incentives to encourage better monitoring of children in foster care. In order to secure the blessings of the federal government, states must submit a plan to make reasonable efforts to prevent children from being removed from their homes and a judge must rule that reasonable efforts have been made to prevent or eliminate the need to remove a child from its home. The state plan must have assurance that services are provided to facilitate the return of the child to its own home or to find another permanent home. The states followed with permanency planning legislation. Some state laws allow the courts to order the provision of services. The Michigan legislation creates a real calendar of events in the life of a child in foster care. There are hearings every ninety-one days and at the end of one year a determination must be made on permanency.

State courts also have the responsibility to make judicial findings that the agency has made reasonable efforts to prevent placement and reasonable efforts to reunify the family. However, the courts are

given no guidelines as to what constitutes reasonable efforts. The federal government does not define it and this creates problems for those states that do not permit judges to order specific services for a child if they deem them necessary.

In Michigan, litigation is presently occurring because one of our juvenile judges did order services in the alternative. The Michigan Department of Social Services said this cannot be ordered, only recommended in generalities and if specific services are ordered, they will not pay for them. This places our courts in a unique position because the judge is truly assessing and evaluating the reasonable efforts that have been made to prevent removal and/or facilitate reunification as required by federal and state law. If the judge finds such efforts were not made, the federal contribution may not be forthcoming and the care of the child and attendant costs become the responsibility of the funding unit. In Michigan the "funding unit" each judge would look to would be counties such as our little Cheboygan County. This makes it difficult for both the judge and the county to achieve the outcome they seek. The Michigan decision is on appeal from an administrative judge's finding that the courts have no authority to specify services.

In one particularly interesting recent case, the matter of Artist M. et al., on appeal from the U.S. Court of Appeals, Seventh Circuit, it was held that, under the Adoption Assistance and Child Welfare Act, the plaintiff child's class action could be maintained for alleged deprivation of the child's federal statutory rights and, in addition, could pursue an individual cause of action against the Michigan Department of Social Services because the "reasonable efforts" clause creates an individually enforceable right to such "reasonable efforts."

Our literature and public pronouncements of policy seem to favor family strengthening and preservation and we must, then, do all we can to keep the family whole.

Policy and law have placed great responsibility upon courts involved in child protection matters and, in order to follow the law, it presupposes the funding and services will be available for the goal of family preservation and of permanency. I have mentioned funding dangers. If you live in a part of this country where services are limited, as they are in rural northern Michigan, a fair amount of innovation is often required. Ira Swartz of the University of Michigan recently indicated that 50 percent of poor children live in rural areas. In effect, this means that after all those "reasonable efforts" the resources may not be there.

In our county of 25,000, we presently have two counselors, limited mental health services and one special counseling agency funded for substance abuse. There are no counselors for sexually abused children or their abusers. We have to find services outside the county

and that often means removing the child from the community. This, despite a strong belief that the more we can do within to bring the child and family together using available therapy/services, the more the family is strengthened. We cannot strengthen families when we separate them to receive services or when there is no available temporary foster care.

And I think this is perhaps more a matter of human resources than financial. I don't know the statistics, the numbers of young students entering the various helping professions. We certainly are not seeing many. This, again, means people who want to give expression to the higher purposes of family reunification and strengthening often find much has to be generated by the community itself.

In our community we are just establishing a family resource center. It was established in response to the enormous needs children and families have for services, heretofore unavailable. Fortunately, we have a very strong county extension office which has agreed to share the services of the extension home economist. In the juvenile court, where she has been given the title of Director of Special Services, the extension home economist has established marvelous programs for both adults and children in the rural parts of Cheboygan County. Such programs may be readily available in urban areas, but are often totally unavailable in rural America where so many impoverished people live. Her efforts are generating a great deal of interest in the Department of Social Services and have created a healthy increase in the linkages between the Department of Social Services and the court. Even some of the juvenile court attorneys are beginning to respond to the perceived needs of the growing number of really impoverished people who cannot begin to face or solve family problems. Let me cite an example.

Recently, a couple and their three children who live, literally, in the back woods were separated based on neglect, a primary reason for intervention. The house this couple and their children called home did not have plumbing and some of the other things the Health Department considers basic to a child's safety today. It was impossible for the Department of Social Services to spend the $1,849.00 necessary to bring their home up to code so the family could live together. But the parents, poorly educated, could comprehend neither why no one would lend them the money to make the necessary improvements nor why the man from whom they had purchased the house had never given them a deed. We requested their court appointed attorney find out why these people had never received a deed. Land matters can be very tough and unrecorded land matters can be horrible. But last week the attorney came into my chambers ecstatic. He had located the owner and obtained the deed. Now, having the deed, we have to raise the money. That's a little more difficult. But the assistant prosecuting attorney, hired solely for juvenile court because our county considers it to be a very important

place, suggested organizing a "work bee" to bring this family's home up to code. I have a feeling he may well do it.

Often, however, cases don't have such happy outcomes. Case service plans, for example, often build impossibility into the timeliness in order to follow the letter of the law. Parents may be required to have individual counseling on Monday, group counseling on Tuesday, family counseling on Wednesday, meet with the Homemaker on Thursday and attend substance abuse counseling on Friday. And these people may lack transportation. So one is disinclined to approve a case service plan that is so busy. There is a great inclination to say, "Let's be realistic." I think in the desire to dot every "i" and cross every "t," decisions can be made to require a compliance without thinking what that really means. Under our present system, after a year has elapsed, if the family doesn't rectify matters that brought them in front of the court, a decision must be made regarding permanency. Permanency is highly prioritized and based upon the assumption that children need a stable and predictable life, but in rural areas, great stress is placed upon individuals and the system by unrealistic expectations coupled with a lack of individuals to provide many of the services stipulated by the case plan as a requisite to reunification.

The funding mechanism and the financial realities of counties that cannot assume the financial burden if federal funding is withdrawn also create situations that encourage findings of "reasonable efforts."

Blocking the courts from giving specific guidelines, definitions or suggestions, having legal expectations for families, tying the judges hands and not providing human services with the resources they need under the law to do their job add to the problems.

The community, however, is united in its belief in the values of family and in child protection. The court has been revitalized by the partnership with the Cooperative Extension Service. Maya Angelou, writing about family preservation, said, "At our best level of achievement, we work to keep the family alive." Sometimes those words sustain a person at the end of a day fraught with total frustration. And that belief did recently inspire one young Michigan attorney to say, "They're going to get their kids back. I'm going to make sure there is a place for them to live."