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THE GAULT DECISION AND PROBATION SERVICES

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In *In re Gault*,[1] the Supreme Court removed some of the myths which have shrouded the operation of juvenile courts for several decades. The hue and cry from a few quarters notwithstanding, this decision will neither frustrate the purpose nor destroy the concept of the juvenile court. It will, however, require changes in court practices and procedures and may also necessitate legislative revision. It is also hoped that it will promote the development of court rules, which are seriously lacking in the juvenile courts. There is ample evidence that the decision has stimulated dispassionate analysis of an institution which has had and will continue to have a profound impact on the lives of millions of children and families. Hopefully this analysis will generate the action which has long been needed to improve our juvenile courts.

In *Gault*, six basic issues were presented: right to notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of the proceedings, and right to appellate review. The Court narrowed the application of its findings by cautioning that "we are not here concerned with the procedures of constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post adjudicative or dispositional process."[2] Mr. Justice Fortas then referred to a footnote discussing the use of preliminary conferences and consent decrees to dispose of cases short of adjudication.[3] Such functions, as a rule, are discharged at what is referred to as the intake stage in the juvenile court process.[4] In other words, the Court directed its attention to the six issues as they relate to the adjudicative hearing, *i.e.*, the hearing to determine the validity of the allegations in the petition.[5]

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1. 387 U.S. 1 (1967).
2. *Id.* at 13.
3. Id. at 31 n.48.
4. Sheridan, *Juvenile Court Intake*, 2 J. FAMILY L. 139-156 (1962); Waalkes, *Juvenile Court Intake—A Unique and Valuable Tool*, 10 CRIME & DELINQUENCY 117-123 (1964); Wallace & Brennan, *Intake and the Family Court*, 12 BUFF. L. REV. 422-451 (1963).
5. Part II of the decision dealing with the background and history of the juvenile court and the cases cited may provide indications as to the direction of future decisions. See Dorsen & Rezneck, *Gault and the Future of Juvenile Law*, 1 FAMILY L.Q. 1-46 (1967); Neigher, *The Gault Decision: Due Process and the Juvenile Courts*, 31 FED. PROBATION 8-18 (1967).

See Generally CHILDREN'S BUREAU, PUB. NO. 437, STANDARDS FOR JUVENILE AND

The Article discusses *Gault* with reference to its impact upon probation practices. The extent and nature of its impact will be affected by the nature of the role probation services play in the juvenile court process, which varies from court to court in a given jurisdiction. Therefore, what the writer considers to be the primary and appropriate functions of probation officers at various stages of juvenile court proceedings will be set forth. These are: (a) assisting with intake, which is pre-judicial in nature and essentially a screening process in the form of a brief review to determine what action on the complaint, if any, is nesessary for the protection of the child or the community; (b) after a petition has been filed, making a predispositional study of the child and family and the preparation of recommendations based upon the study for use by the court at the dispositional hearing; (c) presenting the findings of the study to the court in the dispositional hearing; and (d) providing casework, groupwork, or other therapeutic services or help for children who have been placed on probation or placed under the supervision of the probation officer by court order.

These functions limit the probation officer's role to pre-judicial and dispositional aspects of juvenile court procedure, both of which the court specifically exempted from its concern in this case. Consequently one might expect the findings in *Gault* to have little impact upon probation practices. However, action necessary to implement some of the court's findings in the areas of notice, right to counsel, and self-incrimination will need to be taken prior to the adjudication hearing and, therefore, may have a significant impact upon the activities of the probation officer.[6]

FAMILY COURTS (1965) [hereinafter cited as STANDARDS: CHILDREN'S BUREAU, PROPOSED FAMILY COURT ACT [hereinafter cited as PROPOSED ACT]: UNIFORM JUVENILE COURT ACT (Third Tentative Draft) [hereinafter cited as UNIFORM ACT].

6. A youngster's right to confrontation and cross-examination in the adjudicative hearing should have no effect upon probation practices. It has been recommended that these rights, with some modification, should also be available to the youngster in the disposition hearing with reference to the persons who conduct studies and examinations; this would include probation officers. *See* STANDARD JUVENILE COURT ACT § 19 (comment) and STANDARD FAMILY COURT ACT § 19 (comment) [hereinafter cited as STANDARD ACTS] for the Children's Bureau recommended procedure. These acts were prepared by the National Council on Crime and Delinquency in cooperation with the Children's Bureau and the National Council of Juvenile Court Judges in 1959.

The comment provides that:

> [i]n the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value; provided that the maker of such a written report, stuyd or examination shall be subject to both direct and cross-examination when he is reasonably available. . . .

For provisions similar to the above, see Hawaii Family Court Act, No. 232, ch. 333, 1965 Hawaii Sess. Laws 360, *amending*, HAWAII REV. LAWS, ch. 333 (1955); UNIFORM ACT. If the right to confrontation is later applied to these circumstances, probation practices will affected.

Notice and Right to Counsel

The issue of right to counsel in the adjudicative hearing should not affect probation practice, since the probation officer should not be involved in this aspect of the juvenile court process.[7] Effective use of this right may be directly related, however, to the time when notice of the right to counsel is given to the child. It has been advocated that notice be given at the time of service of summons[8] or at the time the child is placed in detention, whichever occurs first,[9] or at the time of intake.[10] Although the timeliness of notice was not an issue in *Gault*, probation officers may eventually have responsibility for providing notice as part of the intake process.

It may well be, however, that attorneys will be increasingly involved in the intake phase and at the disposition hearing as well. This will have considerable impact upon probation practices, particularly in those courts where few if any attorneys have appeared in the past. The nature of the impact may be partly discerned from the attitudes of some probation officers who have complained that the presence of an attorney tends to create an adversary proceeding[11] and, as a result, conflict coupled with a feeling of mutual distrust develops between the probation officer and counsel. It has also been alleged that the lack of counsel for the state places the probation officer in the role of "prosecutor" in the eyes of the youngster and his family. Thus *Gault* may enable probation officers to assume their proper role. The increasing appearance of defense attorneys should provide a powerful incentive to the state to see that its interests are also protected by attorneys. If this is done, not only would probation officers be able to devote more time to their proper functions, but the harmful results of their presence in the adversary setting would be significantly reduced.

> While the Juvenile Court judge may, of course, receive ex parte analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from its staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

Kent v. United States, 383 U.S. 541, 565 (1966). Although *Kent* was decided on statutory grounds and related to a waiver proceeding, the principle stated above might well be considered applicable to the dispositional hearing in order to meet the essentials of due process and fair treatment. However, the right to confrontation and cross-examination in the disposition hearing was not considered by the Court in *Gault*.

7. An exception to this occurs when a youngster is before the court for a violation of probation, in which case the probation officer may have requested the hearing.

8. See UNIFORM ACT § 17.

10. *See* STANDARDS 55.

11. In the opinion of the writer, this element has always been present. The individual has a right to object to the state's interfering in his life and the state should be required to prove the necessity of such intervention. Obviously, an adversary situation arises, at least in the eyes of the child and his family.

The lawyer's role, however, must not be confused with that of the probation officer. Some advocate that the lawyer make social studies, make referrals to various community agencies for treatment, and provide continuing counseling of a social nature after disposition—*i.e.*, become the probation officer. The extension of the role of the lawyer into the non-legal phases of the juvenile court process is, however, neither practical nor desirable. Although an attorney should have general knowledge of the nature and adequacy of the treatment services available to his client, he will find that he has neither the time nor the competence to assume responsibility for providing them himself. However, in communities where services are lacking in availability or quality, he, as a citizen and interested professional, should actively seek improvement.

Privilege Against Self-Incrimination

The issue of privilege against self-incrimination arose in relation to admissions made by Gault to the judge in the adjudicative hearing. Any additional questioning by the probation officer and any admissions which may have been made to him did not, however, appear in the record. For this reason, the Court specifically pointed out it was not considering the status of out-of-court admissions made to the probation officer. Even if such admissions had appeared in the record, their validity should not be an issue in the adjudicative hearing since the probation officer and his report should have no role in this hearing. As an additional safeguard, it has been recommended[12] that use of any information secured by the probation officer during the pre-adjudicative process should be prohibited in any hearing prior to disposition in the juvenile court or conviction in a criminal court if the case is transferred.

Therefore, with the exception of the right to counsel, *Gault* clearly will have little if any impact on probation services as functionally defined in this paper. It is equally obvious from a reading of the facts in *Gault* that probation practices in Arizona are at considerable variance with the author's definition. This is true of numerous other courts with similar practices.

12. The UNIFORM ACT § 10, provides that:
No incriminating statement made by a patricipant while such counsel and advice is being given, offered or sought, or in the discussions or conferences incident thereto, shall be admitted in evidence over objections on any hearing prior to the hearing on disposition or, in a criminal proceeding against him, at any time prior to conviction.
The PROPOSED ACT §§ 14, 30, provides similar protections with respect to statements made and information secured during the intake and pre-disposition study. Also, see STANDARD: 59. "Futhermore, no statement made during a preliminary conference may be used later in a juvenile hearing to determine the allegation in the petition or prior to conviction if transferred to adult court." Similar provisions are also included in some of the more recent state juvenile court statutes.

The probation officer was deeply involved in the *Gault* case but as a probation officer in title only. He was in fact a policeman and a prosecuting official. He took the child into custody, initiated proceedings, filed and verified the petition, appeared as the complaining witness to testify against the child, and generally conducted himself as a prosecuting official. In addition, he was obligated to protect the interests of neglected, delinquent and dependent children in the county as well as to "be present in court when cases are heard covering children *and represent their interests.*"[13] Obviously, these duties are in conflict—a fact which was recognized by the court. Such a situation must create confusion for all concerned and particularly for the poor, uneducated, or uninformed persons who are often centrally involved. As already noted, in Arizona these functions of the probation officer are assigned by statute, and several other states have similar provisions.[14]

In most states, the statute authorizes any person to file a petition.[15] In addition the statutes of many of these states specifically authorize the probation officer to perform this function. Since probation practices often vary from community to community, even with a state, the actual number of courts in which the officer files the petition is not known; however, evidence gained by the children's bureau through consultations and surveys indicates that this practice is extensive. In about forty percent of the states, the probation officer, by statute, is vested with the full powers of a peace officer, and in about the same percentage of states he is charged with representing the interests of the child in court.

Statutory revision will, therefore, be necessary in some states in order to modify probation practices. In other states, hopefully, such modification could be accomplished through court rules.

Another practice which has led to confusion as to the role of the probation officer is the failure of many courts to recognize the need for a bifurcated hearing, *i.e.*, separation of the adjudicative and dispositional

13. ARIZ. REV. STAT. ANN. § 8-204(C)(3) (1956).

14. California has the same provisions. In Iowa either the district attorney or the probation officer is required to file the petition. In Virginia the probation officer is required to file if directed by the judge.

15. The STANDARD ACTS, use the phrase "any person" without any express limitation on the commencement of proceedings by the probation officer. Sec. 6 "Powers and Duties of Probation Officers," of the UNIFORM, ACT, provides that "a probation officer does not have the powers of a law enforcement officer nor may he commence or conduct proceedings under this Act against a child who is or may be under his care of supervision." Sec. 6 of the PROPOSED ACT, provides that "a probation officer does not have the powers of a law enforcement officer nor may he commence or conduct proceedings under this Act against a child who is or may be under his care of supervision." Sec. 6 of the PROPOSED ACT, provides that ". . . a probation officer does not have the powers of a law enforcement officer nor may he commence proceedings under this Act with respect to a child who is not on probation; . . . ."

phases.[16] Although the Supreme Court distinguished between these two phases in *Gault*, there is no evidence that the trial court recognized that distinction. Even if it had, such a distinction would be meaningless since the probation officer was discharging several inconsistent roles.

It has also been stated that the *Gault* decision requires that the administration or probation services be divorced from the judiciary.[17] Regardless of the validity of this conclusion, such action would aid in clarifying the role of the probation officer and has been recommended by the author for several additional reasons.[18] No doubt other cases raising issues pertinent to the pre-adjudication and dispositional phases of juvenile court procedures will reach the Supreme Court in the near future.[19] Decisions on those issues will probably also have a direct bearing on probation practices.

The need for clarification of the role of the probation officer is thus increasingly apparent. Every effort must be made to assure that probation procedures do not conflict with current due process safeguards or those decreed applicable in the future. Hopefully the *Gault* decision, in addition to establishing procedural safeguards in juvenile court proceedings, will also lead to the clarification of the role of the probation officer in such proceedings.

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16. *See* STANDARD ACTS § 19 (Comment); UNIFORM ACT § 28; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967); STANDARDS, 67.

17. Note, *Juvenile Justice in California—A Re-Evaluation*, 19 HASTINGS L.J. 119 (1967-68).

18. Sheridan, *New Directions For the Juvenile Court*, 31 FED. PROB. 15 (1967).

19. *In re* Whittington, *appeal docketed*, 36 U.S.L.W. 3163 (U.S. Oct. 17, 1967) (No. 701).