

## JUVENILE LAW

### L.B. 346 AND L.B. 787: CHANGES IN NEBRASKA'S JUVENILE CODE

#### INTRODUCTION

"A lot of juveniles, very little justice, and no system."

ANON.

The above criticism is only one of many which have been leveled at the juvenile court system since its inception. This seems paradoxical as the first juvenile court, and those courts modeled after it, were created to benefit the child.<sup>1</sup> The philosophical rationale behind the entire legal process is to rehabilitate, not to punish.<sup>2</sup> However, the goals of the juvenile justice system, and the reality of the workings of that system, have often been inconsistent.

While the juvenile system is primarily designed to meet the needs of youth, it also must serve the needs of society. This dual responsibility both strains and limits the system.<sup>3</sup> The variety of problems addressed by juvenile courts requires that the system be flexible.<sup>4</sup> Juvenile courts are confronted with minors who have committed the most heinous of offenses,<sup>5</sup> children who are the victims of parental abuse,<sup>6</sup> children who do nothing more than run away from home,<sup>7</sup> children who skip school<sup>8</sup> and children who suf-

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1. NATIONAL JUVENILE LAW CENTER, *LAW AND TACTICS IN JUVENILE CASES* 3 (2d ed. 1974). The first juvenile court was created in Chicago in 1899. The remedy came in the form of a kind legal system which replaced the merciless criminal court process. The state accepted the role of *parens patriae*. *Id.*

2. *In re Gault*, 387 U.S. 1, 15-6 (1966). See Note, *Nebraska Juvenile Courts: Jurisdiction, New Rights for Juveniles, New Duties for Prosecutors*, 8 CREIGHTON L. REV. 81 (1974).

3. See generally Lauer, *The New Mexico Children's Code: Some Remaining Problems*, 10 N.M.L. REV. 341, 341-42 (1980). See also F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 53 (1964).

4. See note 49 and accompanying text *infra*.

5. Concerns such as this have recently been splashed across the national media. See, *Nightmare in Vermont*, LIFE, July 1982, at 30. The article tells of the outrage of a Vermont community after the Vermont Juvenile Code prohibited a 15 year old from standing trial as an adult for a hideous rape and murder. In the aftermath of the crime, two housewives circulated a petition and gathered 27,600 signatures to change the Vermont Juvenile Code. Vermont's legislature, in a special session and without a dissenting vote, lowered the age to 10 for when a child could be tried as an adult for a variety of felonies. *Id.* at 36.

6. See NEB. REV. STAT. § 28-707 (Reissue 1979).

7. See *id.* at § 43-247(3)(a) (Supp. 1981).

8. *Id.* at § 43-247(3)(b).

fer from chemical dependency.<sup>9</sup> Unfortunately, juvenile courts are faced with a chronic shortage of resources and facilities for juveniles.<sup>10</sup> Despite this need for flexibility, the system must operate within constitutional limits.<sup>11</sup>

The Nebraska Legislature recently passed two bills re-codifying the state juvenile code.<sup>12</sup> This article reviews the changes effected by the new code, examines the purposes behind the changes and highlights significant areas.

#### BACKGROUND

Nebraska's juvenile justice system came into existence only six years after the nation's first juvenile court was created in Illinois in 1899.<sup>13</sup> Since that time, Nebraska's juvenile laws have evolved by "unharmonious accretion."<sup>14</sup> This evolution reflects the

9. *Id.* at § 43-247(1), note (2).

10. *Kent v. United States*, 383 U.S. 541, 555-56 (1966). Interview with Sarpy County Juvenile Court Judge (June, 1982). Interview with Douglas County Juvenile Court Judge (July, 1982).

11. See cases cited at note 49 *infra*. See F. ALLEN, *supra* note 3, at 56.

12. L.B. 787, 1982 Neb. Laws 858-75 (to be codified at NEB. REV. STAT. §§ 43-245 to -2,129); L.B. 346, 1981 Neb. Laws 1173-1208, *codified at* NEB. REV. STAT. §§ 43-245 to -2,129 (Supp. 1981).

13. Note, *supra* note 2, at 81.

14. Letter from Nebraska State Senator William E. Nichol, Judiciary Committee Chairman for Nebraska's 87th Legislature, to fellow senators (Mar. 24, 1981) (urging support of L.B. 346) (on file with *Creighton Law Review*).

I take this opportunity to urge you to support LB 346 to comprehensively organize and coordinate Nebraska's current juvenile statutes. This bill has been developed over the past two years by a committee composed of Juvenile Court Judges, County Judges, attorneys, and court personnel. This bill has been carefully studied and amended by the Judiciary Committee over the past two years, and was reported to the Legislature by the Committee.

Nebraska's juvenile laws have grown over the years by uncoordinated accretion. This growth has taken place over a period in which tremendous changes have taken place in the Juvenile Law and Domestic Relations Law to respond to social changes and to incorporate in the statutory law the mandates of the Supreme Court of the United States, the State of Nebraska, and resulting case law. Basically the juvenile law which has evolved in Nebraska is sound and reflects the general philosophy of the people of the State. Its weakness has been the lack of order and coordination of its parts.

Since law is a living system, the current juvenile statutes will need constant upgrading over the years. But in order for the Legislature to properly evaluate proposed future changes, there is a need for placing our current laws in logical procedural order. For better judicial comprehension of the entire juvenile legal structure by new judges, the logical progression of the written law is essential. Under the current statutory melange, familiarity can only come with constant usage. Adopting the proposed Code as a comprehensive whole without major changes at this time would provide a basic document that eliminates the present ambiguities and confusion.

Please study LB 346 and the enclosed materials. You will see that LB 346 is a responsible redrafting of the current juvenile law. The bill makes

significant changes that have taken place in juvenile and family law in response to social changes,<sup>15</sup> United States Supreme Court mandates<sup>16</sup> and Nebraska Supreme Court decisions.<sup>17</sup>

The early Nebraska Juvenile Court Act was similar to juvenile acts in other states.<sup>18</sup> However, the Nebraska Act suffered from problems of vagueness. The extent of the juvenile court's jurisdiction, and, indeed, the very purpose of the juvenile justice system, were unclear.<sup>19</sup> The role of the prosecutor was largely undefined.<sup>20</sup> Furthermore, the Act failed to protect expressly the fundamental rights of juveniles.<sup>21</sup>

The legislature intends that the juvenile law of Nebraska reflect the basic philosophy underlying traditional juvenile justice.<sup>22</sup> However, prior to 1981, the Juvenile Court Act and its amendments could have been characterized by its lack of order and coordination.<sup>23</sup> The legislature recognized this lack of order as an impediment to systemized evaluation of the act for purposes of future

some nonsubstantive changes in language to clarify and give the juvenile law common application in the light of current practice. New material has been added only where there were gaps in previous procedures and it was drafted to conform with the other practices and procedures which were left unchanged.

Organizing the current laws of Nebraska into a Juvenile Code makes the present law a cohesive document. Codifying the law into a logical progression from intake to disposition eliminates the necessity of checking the entire chapter to determine what happens next. I trust you will see the great need for this comprehensive redrafting of Nebraska's juvenile statutes.

15. *See id.*

16. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971); *In re Winship*, 397 U.S. 358, 368 (1970); *In re Gault*, 387 U.S. 1, 13, 33-34, 36 (1967); *Kent v. United States*, 383 U.S. 541, 560-63 (1966). *See* L.B. 620, 1974 Neb. Laws 356-70, *codified at* NEB. REV. STAT. § 43-201.01 (Reissue 1978). In 1974 the Nebraska State Legislature enacted this bill in response to the above-mentioned federal cases. *See* Note, *supra* note 2, at 86-88.

17. *State v. Grayer*, 191 Neb. 523, 525-26, 215 N.W.2d 859, 860-61 (1974) (prosecutor's discretion in filing in juvenile or criminal court is not violative of due process); *Fugate v. Ronin*, 167 Neb. 70, 74-76, 91 N.W.2d 240, 244 (1958) (transfer from criminal to juvenile court not mandatory upon motion); *Lingo v. Hann*, 161 Neb. 67, 73, 71 N.W.2d 716, 720 (1955) (district court may sentence youth to penitentiary); *State v. McCoy*, 145 Neb. 750, 760-61, 18 N.W.2d 101, 105-06 (1945) (juvenile court's jurisdiction is not exclusive).

18. *See* Note, *supra* note 2, at 81.

19. *See id.* at 82.

20. *See id.*

21. *Id.* at 86.

22. *See* NEB. REV. STAT. § 43-246 (Supp. 1981), *amended by* L.B. 787, § 1, 1982 Neb. Laws 858. *See* notes 40-56 and accompanying text *infra*.

23. NEB. REV. STAT. §§ 43-201 to -244 (Reissue 1978). The only two major headings in the Act were "Jurisdiction, Powers, and Duties" and "Separate Juvenile Court." The statutes were not arranged in any logical progression, making it extremely difficult to understand the procedures. *Id.*

change.<sup>24</sup> Additionally, the legislature viewed the disorganized act as a liability for new judges seeking to become familiar with the act.<sup>25</sup>

For these reasons, in 1979 the legislature organized a committee composed of juvenile court judges, county judges, attorneys and court personnel to work with the Judiciary Committee in reorganizing the juvenile laws of Nebraska into a cohesive document.<sup>26</sup> The result of the committee's work is L.B. 346<sup>27</sup> and L.B. 787.<sup>28</sup> Those laws went into effect July 1, 1982, and have become the new Nebraska Juvenile Code.<sup>29</sup> L.B. 346 essentially clarifies ambiguous language in, and redrafts, the former act.<sup>30</sup> L.B. 787 makes a number of substantive changes in the former law which, though few in number, may be vital in application.<sup>31</sup>

### *L.B. 346 and L.B. 787*

The initial step in analyzing the underlying philosophy of the Nebraska Juvenile Code is to examine the label which the code employs to describe a youth within its terms. The term "juvenile" is used to describe any person under the age of eighteen.<sup>32</sup> The age of majority is nineteen years of age.<sup>33</sup> The code does not permit the juvenile court to obtain initial jurisdiction over an eighteen year old. However, the code does allow the juvenile court, once jurisdiction has been obtained over an individual under the age of eighteen, to retain jurisdiction until the youth reaches the age of nineteen.<sup>34</sup>

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24. See Letter, *supra* note 14.

25. See *id.*

26. See *id.*

27. L.B. 346, 1981 Neb. Laws 1173-1208, *codified at* NEB. REV. STAT. §§ 43-245 to -2,129 (Supp. 1981).

28. L.B. 787, 1982 Neb. Laws 858-75 (to be *codified at* NEB. REV. STAT. §§ 43-245 to -2,129).

29. NEB. REV. STAT. § 43-2,129 (Supp. 1981).

30. See Letter, *supra* note 14, *Compare* NEB. REV. STAT. §§ 43-245 to -2,129 (Supp. 1981) *with* NEB. REV. STAT. §§ 43-201 to -244 (Reissue 1978).

31. See notes 68-126 and accompanying text *infra*.

32. NEB. REV. STAT. § 43-245(6) (Supp. 1981). The age of 18 conforms to the Federal Juvenile Delinquency Act. 18 U.S.C. § 5031 (1976).

33. NEB. REV. STAT. § 43-245(7) (Supp. 1981).

34. *Id.* at § 43-247. This code provision could pose potential equal protection problems because two 18 year olds, charged with the same crime, could be treated differently depending upon when they enter the system. See *id.* Note also some of the different age junctures facing youth: See U.S. CONST. amend. XXVI (allowing 18 year olds the right to vote); 50 U.S.C. app. § 453 (1980) (requiring eighteen year olds to register for purposes of a draft); NEB. REV. STAT. § 53-180.02 (Supp. 1980) (prohibiting drinking alcohol until 20 years of age); *id.* at §§ 38-101, 42-102 (Reissue 1978) (allowing 17 year olds to marry with the consent of a parent).

The term "juvenile" has been adopted throughout the code.<sup>35</sup> However, the word "delinquent" is used sparingly.<sup>36</sup> The legislative reliance on the term "juvenile," instead of "delinquent," may be an attempt to decriminalize the status of youth offenders. Yet there is a caveat. Semantic problems exist even with the word "juvenile." The word has so often been used in conjunction with the word "delinquent" that the public may perceive the two words as synonymous.<sup>37</sup> Perhaps as the Nebraska Legislature identifies steps in its continuing effort to substantively improve the juvenile code, care will be taken to select words that do not conjure up a connotation of criminality, particularly in reference to youth situated in non-criminal circumstances.

As amended by L.B. 787, section 43-246 establishes the framework for the rest of the code and illustrates the necessity of maintaining a separate court for youth.<sup>38</sup> The criminal justice system has the preservation of peace and security in society as a primary goal.<sup>39</sup> The Nebraska Juvenile Code acknowledges this goal.<sup>40</sup> However, the primary goal of the code is to provide for the needs of children involved in the legal system.<sup>41</sup>

Section 43-246 sets forth specific goals which the juvenile justice system must attempt to achieve.<sup>42</sup> First, the system must strive to assure the rights of all children.<sup>43</sup> This includes legal intervention to guarantee a stable living environment necessary for the healthy development of children.<sup>44</sup> Second, such intervention must be made with due regard for parental rights and capacities and the availability of nonjudicial resources.<sup>45</sup> Third, the system must seek to remove children, who are within the provisions of this act, from the criminal justice system whenever possible by provid-

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35. See NEB. REV. STAT. §§ 43-245 to -2,129 (Supp. 1981).

36. See *id.* at § 43-286. "Delinquent" is used in conjunction with certain criminal acts and status offenses. *Id.*

37. See Note, *supra* note 2, at 89; NATIONAL JUVENILE LAW CENTER, *supra* note 1, at 20. See also BLACK'S LAW DICTIONARY 779 (rev. 5th ed. 1979). "Juvenile" is defined as a young person who is not yet old enough to be treated as an adult for the purpose of criminal law. The definition further states that the term "juvenile" often is used to refer to a young criminal offender while "minor" is used to refer to legal capacity. *Id.*

38. See NEB. REV. STAT. § 43-246 (Supp. 1981), amended by L.B. 787, § 1, 1982 Neb. Laws 858.

39. *Id.* S. FOX, MODERN JUVENILE JUSTICE 12 (1972).

40. NEB. REV. STAT. § 43-246 (Supp. 1981), amended by L.B. 787, § 1, 1982 Neb. Laws 858.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at § 43-246(1).

45. *Id.* at § 43-246(2).

ing social and rehabilitative services to such children and their families.<sup>46</sup> Fourth, the courts must attempt to separate children from their parents only when necessary for the welfare of children, or in the interest of public safety.<sup>47</sup> When temporary separation is necessary, the court should consider the developmental needs of the individual child in all placements and make every reasonable effort to reunite the family.<sup>48</sup> Finally, the system must guarantee due process.<sup>49</sup>

### *Requirements of Due Process*

Statutory compliance with due process was explicitly set forth, in 1974, in L.B. 620,<sup>50</sup> as a direct response to four United States Supreme Court decisions, all concerning the constitutional rights of juveniles.<sup>51</sup> Prior to these decisions, juvenile courts led an unfettered existence for over fifty years.<sup>52</sup> However, by the late 1960's the United States Supreme Court had closely scrutinized the abuses of discretion in the juvenile courts and the minimal protection afforded juveniles against those abuses.<sup>53</sup> The Court expressed a desire to retain the benefits of the informal nature of the juvenile court system while simultaneously establishing guidelines to protect youth from abuses within that system.<sup>54</sup>

As a result of these decisions,<sup>55</sup> juveniles involved in the juvenile justice system are guaranteed the following rights: the right to representation by an attorney;<sup>56</sup> the right to a juvenile court hearing prior to that court waiving jurisdiction in favor of an adult crim-

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46. *Id.* at § 43-246(3). In a June 1982 interview, a Sarpy County Judge emphasized that it is ludicrous to operate the juvenile court system as a miniature adult criminal system, since a primary goal is to remove the child from a criminal adult proceeding.

47. NEB. REV. STAT. § 43-246(4) (Supp. 1981).

48. *Id.* This is a directive to provide for the youth on an individual, rather than labeled, basis. To assess the developmental needs of the child, placement cannot be made on the basis of a label such as "runaway" or "shoplifter." These labels do not identify what must be done to affect the youth and his or her home in a manner conducive to the well being of the youth. Interview with Sarpy County Juvenile Court Judge (June, 1982).

49. See NEB. REV. STAT. § 43-246(5) (Supp. 1981).

50. L.B. 620, 1974 Neb. Laws 356-70, *codified at* NEB. REV. STAT. § 43-201.01 (Reissue 1978).

51. See *McKeiver v. Pennsylvania*, 430 U.S. 528, 545 (1971); *In re Winship*, 397 U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 41 (1967); *Kent v. United States*, 383 U.S. 541, 556 (1966).

52. NATIONAL JUVENILE LAW CENTER, *supra* note 1, at 9.

53. *Id.*

54. See *McKeiver*, 403 U.S. at 550-51; *Winship*, 397 U.S. at 367; *Gault*, 387 U.S. at 21.

55. See cases cited at note 51 *supra*.

56. *Gault*, 387 U.S. at 41.

inal court;<sup>57</sup> the right of the juvenile's attorney to review the juvenile's social file compiled by the juvenile court;<sup>58</sup> the right to notice of the proceedings;<sup>59</sup> the privilege against self-incrimination;<sup>60</sup> and, finally, the right to a heightened standard of proof, *i.e.*, beyond a reasonable doubt, when the youth could be detained for the offenses charged.<sup>61</sup> However, the Supreme Court has held that juveniles do not have a constitutional right to be tried by a jury when charged as juvenile offenders.<sup>62</sup>

The Nebraska code reflects these constitutional guarantees.<sup>63</sup> In fact, the Nebraska Legislature may have extended one of these guarantees beyond that which is constitutionally required.<sup>64</sup> Nebraska law requires that guilt be proven beyond a reasonable doubt whenever a youth faces *any potential loss of liberty* as a result of adjudication.<sup>65</sup> Thus, theoretically, juveniles in Nebraska are guaranteed the protection of this standard of proof when probation or foster care placement are possible results of an adjudication.<sup>66</sup> The Constitution only requires that guilt be proven by this standard whenever a youth faces possible incarceration.<sup>67</sup>

#### *L.B. 346 and L.B. 787: New Substantive Changes*

Even though the new juvenile code was not originally in-

57. *Kent*, 383 U.S. at 557. See NEB. REV. STAT. § 43-261 (Supp. 1981). Nebraska is unique in that juvenile courts have no authority to waive jurisdiction to an adult criminal court. However, if the charge was filed against the juvenile in district court, the district court has the authority to waive its jurisdiction and to have the case transferred to juvenile court. *Id.* See M. LEVIN & R. SARRI, *JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES* 21 & n.30 (1974).

58. *Kent*, 383 U.S. at 562.

59. *Gault*, 387 U.S. at 33-34.

60. *Id.* at 55.

61. *Winship*, 397 U.S. at 365-66.

62. *McKeiver*, 402 U.S. at 545-51. This does not mean jury trials may not be provided for juveniles who are under the jurisdiction of adult criminal courts. The court reasoned that the imposition of a jury trial would effectively end the ideal prospect of an intimate, informal protective proceeding. Furthermore, it may slow down the procedure, increase publicity and neither strengthen the fact finding function nor cure the ills of the system. *Id.*

63. See NEB. REV. STAT. §§ 43-261, 43-272, 43-279, 43-2,108 (Supp. 1981). For an overview of these procedural due process rights afforded to juveniles in Nebraska see Note, *supra* note 2.

64. *Winship*, 397 U.S. at 355-56. The constitutional safeguard of proof beyond a reasonable doubt is required as a matter of due process during adjudication whenever a juvenile is charged with a crime which could subject him or her to confinement. *Id.* at 368. See Smith, *An Analysis of When Juveniles Must be Afforded Due Process Rights*, 58 NEB. L. REV. 136, 158 (1979).

65. NEB. REV. STAT. § 43-279(2) (Supp. 1981).

66. See *id.*

67. *Winship*, 397 U.S. at 365-66.

tended to make substantive changes in the Juvenile Code,<sup>68</sup> several changes were made.<sup>69</sup> Some of these changes should provide greater protection for the individual rights of youths coming in contact with the juvenile court system.<sup>70</sup> These changes concern the appointment and duties of the guardian ad litem,<sup>71</sup> the specificity of petitions,<sup>72</sup> the requirements of adjudication within six months,<sup>73</sup> the requirement that admissions must be made "with an affirmative waiver of rights,"<sup>74</sup> the reporting of location and needs of children in foster care,<sup>75</sup> the prohibition against jailing a juvenile<sup>76</sup> as a disposition of the court, and the prohibition of imposing the death penalty on anyone who was under eighteen years of age at the time the offense was committed.<sup>77</sup>

A guardian ad litem is an attorney appointed by the court to represent a minor whose interests may be affected by a judicial proceeding.<sup>78</sup> This appointment is an important mechanism for

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68. Interview with Nebraska State Senator Karen Kilgarin, Judiciary Committee member for Nebraska's 87th Legislature (June 1982).

69. See notes 71-77 and accompanying text *infra*.

70. See notes 78-126 and accompanying text *infra*.

71. NEB. REV. STAT. § 43-272 (Supp. 1981), amended by L.B. 787, § 13, 1982 Neb. Laws 867-68.

72. NEB. REV. STAT. § 43-274 (Supp. 1981).

73. *Id.* at § 43-278.

74. *Id.* at § 43-279, amended by L.B. 787, § 15, 1982 Neb. Laws 868-70.

75. NEB. REV. STAT. § 43-285 (Supp. 1981), amended by L.B. 787, § 17, 1982 Neb. Laws 870.

76. NEB. REV. STAT. § 43-286 (Supp. 1981), amended by L.B. 787, § 18, 1982 Neb. Laws 870-73.

77. L.B. 787, § 23, 1982 Neb. Laws 875.

78. Speca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 UMKC L. REV. 1, 19 (1969). BLACK'S LAW DICTIONARY 635 (rev. 5th ed. 1979). A guardian ad litem is defined as a special guardian appointed to defend or prosecute in behalf of an infant, a suit to which he is a party. Such guardian is considered an officer to the court to represent the infant's interest. *Id.*

See *In re Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982). In this case the supreme court interpreted §§ 43-104 and 43-105 on adoption and substitute consent for the first time. The issue addressed by the court arose in the context of a divorce and remarriage. The natural parents had been divorced. *Id.* at 509, 319 N.W.2d at 102. The wife had custody of the couple's only child and later the wife remarried. *Id.* She and her new spouse filed a petition in county court seeking to adopt the child involved in the action. *Id.* The natural father contested the proceeding. *Id.* at 509-10, 319 N.W.2d at 102-03.

In deciding the case, the Supreme Court addressed several legal issues and set out procedures to be followed when one seeks to obtain substitute consent to adoption on the basis that one of the parents has abandoned the child. First, a guardian must be appointed for the minor child who has been abandoned by one of the natural parents. *Id.* at 512, 319 N.W.2d at 104. The guardian has the power to consent to, or withhold approval of, the adoption. *Id.* at 515, 319 N.W.2d at 105. Second, the lower court had held that the guardianship proceeding must be brought in the juvenile, rather than the county, court. *Id.* at 510, 319 N.W.2d at 103. The supreme court ruled to the contrary and held that where a child had not been determined to be either dependent or neglected, a prerequisite to juvenile court jurisdiction, the

protecting the rights and interests of juveniles.<sup>79</sup> Mandatory appointment and delineation of powers and duties were adopted by the amendments.<sup>80</sup> The amendments to the statute are directed at providing ample opportunity for the guardian to prepare and present the case, and at prescribing additional powers to enable the guardian to function more effectively.<sup>81</sup>

In addition to mandatory appointment, the amendment requires that guardians be appointed at the beginning of all cases concerning abused, neglected, abandoned, homeless or destitute children.<sup>82</sup> The purpose of the change was to prevent appointment immediately prior to the hearing, a practice which often resulted in a guardian ad litem's poor preparation of the child's case.<sup>83</sup>

By way of powers and duties, the guardian ad litem is expected to be present at hearings and to enter stipulations and agreements necessary for adjudication.<sup>84</sup> The amendment makes clear that it is not the duty of the guardian to prosecute or defend the parents, but to defend the legal and social interests of the juvenile.<sup>85</sup> The guardian ad litem is empowered to present evidence and witnesses, cross-examine witnesses at evidentiary hearings,

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adoption proceeding comes within the exclusive jurisdiction of the county court. *Id.* at 513-14, 319 N.W.2d at 105. The supreme court further ruled that the county court has the authority to determine abandonment for the purpose of permitting the use of substitute consent and the authority to appoint the guardian for the child. *Id.*

Third, the court held it was critical that the appointed guardian be a disinterested, independent third party, in order to serve the best interests of the child. *Id.* at 515, 319 N.W.2d at 105. Fourth, the court held that a finding of abandonment does not terminate parental rights. *Id.* at 516, 319 N.W.2d at 105-06. Such a finding merely authorizes the exercise of substitute consent. Termination of parental rights does not occur until the adoption is granted. Finally, the court ruled that abandonment must be proven by clear and convincing evidence. *Id.* at 517, 319 N.W.2d at 106.

79. For an excellent discussion of guardians ad litem, see Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem*, 12 CREIGHTON L. REV. 234, 252-53 (1978).

80. NEB. REV. STAT. § 43-272 (Supp. 1981), amended by L.B. 787, § 13, 1982 Neb. Laws 867-68.

81. *See id.*

82. L.B. 787, § 13, 1982 Neb. Laws 867. *But cf. In re Freisz*, 190 Neb. 347, 348, 208 N.W.2d 259, 260 (1973) (in a proceeding for terminating parental rights, a guardian ad litem should be appointed to represent the child where it appears necessary or desirable, however, such appointment is not mandatory).

83. *See* Interview at note 68 *supra*. *See* Letter from Pat Taft, Coordinator, Advisory Committee on Assistance and Service, Nebraska State Department of Welfare, to Nebraska State Senator Karen Kilgarin (urging support for an amendment which would require the appointment of a guardian ad litem at the beginning of each case).

84. NEB. REV. STAT. § 43-272 (Supp. 1981), amended by L.B. 787, § 13(2)(a), 1982 Neb. Laws 867.

85. L.B. 787, § 13(2)(b), 1982 Neb. Laws 867.

make recommendations for the placement of the juvenile and file petitions in the juvenile court on behalf of the juvenile.<sup>86</sup> The power to file such a petition may require judicial or legislative clarification. This power appears to be in conflict with Section 43-274, which requires the consent of the county attorney before a petition may be filed.<sup>87</sup> Thus, it is not clear whether the guardian ad litem must receive permission from the county attorney to file or may do so upon personal initiative.

The guardian ad litem may petition the court to provide medical or psychological evaluations or treatment, and obtain access to subsequent reports.<sup>88</sup> The statute also urges the guardian to consult with any persons, such as caseworkers or teachers, who may have information or knowledge about the juvenile.<sup>89</sup> The guardian is under a duty to make every reasonable effort to become familiar with the needs of the juvenile, which may include visiting the juvenile within two weeks of appointment and at least every six months thereafter.<sup>90</sup> Hopefully, these changes in the statute will provide clearer guidelines of what is to be expected from the guardian ad litem and will result in increased quality of representation of juveniles. While these changes may allow for better representation, there is certainly no guarantee that such a result will obtain.

As a practical matter, the appointment of guardians ad litem may be made in several different ways. In the past, guardians have been appointed from public defender offices or have been appointed from a list of private attorneys who volunteered to be called.<sup>91</sup> Many of these private attorneys are just entering the practice of law.<sup>92</sup> A question may be raised whether such appoint-

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86. *Id.* § 13(2)(e)-(h), at 868.

87. NEB. REV. STAT. § 43-274 (Supp. 1981).

88. *Id.* at § 43-272, amended by L.B. 787, § 13(2)(c), 1982 Neb. Laws 867.

89. L.B. 787 § 13(2)(d)(ii), 1982 Neb. Laws 867-68.

90. *Id.* § 13(2)(d)(i), at 867. See Marlette, *Journal Statehouse Bureau*, Feb. 3, 1982. This amendment was urged by the Nebraska Foster and Adoptive Parents Association to insure more communication between guardians ad litem and juveniles. Gloria Leiferman, a foster parent, told the judiciary committee that she feels that there is a lack of contact with guardians and caseworkers assigned to the children for which she cares. She felt that the children placed in her home were forgotten. She stated she expected a guardian "to see who he's guardian for. He should keep informed of what the natural parents are doing and how they're progressing toward getting the child back." *Id.*

91. Interview with a Douglas County Juvenile Court Judge (July 1982). Guardians ad litem are an enormous part of the Douglas County Juvenile Court's budget,—\$240,000.00 was expended for attorney's fees out of a budget of \$586,000.00 in 1981. This rate of compensation is \$25 per hour, far less than the standard hourly rate charged by most practicing attorneys. *Id.*

92. *Id.* Often these attorneys are young, dedicated and enthusiastic about their

ments result in a trade-off of experience, and the wisdom it brings, for enthusiasm and dedication, which may or may not be to the benefit of the juvenile.

The guardian ad litem could be a vital part of Nebraska's juvenile court process. The position is potentially powerful,<sup>93</sup> and one from which a great deal of good could be accomplished.<sup>94</sup> Perhaps the legislature now should look at practical ways to insure the effectiveness of guardians ad litem. The legislature should consider establishing a permanent guardian ad litem office in densely populated urban areas. Such an office would facilitate specialization and competency of representation.

Another substantive change in the Nebraska Juvenile Code is the requirement that allegations charging a youth with committing a felony, misdemeanor or traffic offense must be pleaded with the same specificity as a criminal complaint.<sup>95</sup> This insures that the juvenile and the juvenile's attorney will be informed of the offense charged. This requirement also prevents vague, conclusory allegations such as, "the child is delinquent."<sup>96</sup> The statute does not require the same specific pleading for children alleged to be in need of supervision.<sup>97</sup> Children in need of supervision are those children whose parents do not provide a proper home or care and those children who cannot be controlled by their parents.<sup>98</sup> However, given the functions that a notice requirement is designed to serve, it would appear that there is no reason why the same specificity should not be afforded to children in need of supervision.

Apparently to prevent a court from obtaining jurisdiction and control over a juvenile for an unreasonable period of time without formalizing its actions, a time limit is set for adjudication. Adjudication must take place within six months after a petition is filed or the juvenile must be released.<sup>99</sup>

Another procedural requirement that protects a juvenile's con-

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duties. These young attorneys may find the juvenile court to be more informal than other courts, thus their appointment becomes a welcome and rewarding experience. *Id.*

93. See NEB. REV. STAT. § 43-272 (Supp. 1981), amended by L.B. 787, § 13, 1982 Neb. Laws 867-68; Speca & Wehrman, *supra* note 78, at 20-21; Comment, *supra* note 79, at 250-54.

94. See Comment, *supra* note 79, at 252-53. In a June 1982 interview, a practicing attorney in the Omaha area who has served as a guardian ad litem in Douglas County stated that the guardian ad litem has an important role in determining what ultimately happens to the juvenile.

95. NEB. REV. STAT. § 43-274 (Supp. 1981).

96. M. LEVIN & R. SARRI, *supra* note 57, at 27.

97. See NEB. REV. STAT. § 43-274 (Supp. 1981).

98. See NEB. REV. STAT. § 43-247(3) (Supp. 1981).

99. *Id.* at § 43-277.

stitutional rights is that an in-court admission must be voluntarily and knowingly made "with an affirmative waiver of rights."<sup>100</sup> This change may not appear to be of major significance, but it serves to emphasize that, because of a youth's immaturity and tendency to be impetuous, the court, in order to be fair, must absolutely make sure the youth is capable of understanding the results of such an admission.<sup>101</sup>

L.B. 787 makes a change in the area of foster care by requiring that any individual with whom, or any department or organization with which a child is placed, file a report within thirty days after placement and each six months thereafter reporting the location and needs of the juvenile.<sup>102</sup> Absent such reporting, a child could conceivably be placed with one foster family, then moved through several families, making it difficult for the court to determine the child's location and progress,<sup>103</sup> or whether a child's needs are being met at all, if not defeated.<sup>104</sup>

One substantive change in Nebraska's Juvenile Code was made after heated debate.<sup>105</sup> L.B. 787 now precludes the possibility of incarceration in a jail as an option for the disposition of a juvenile.<sup>106</sup> This amendment does not prohibit jailing of a juvenile convicted in an adult criminal proceeding. Nor does the amendment prohibit preadjudication placement of a juvenile fourteen through seventeen years of age in an adult jail. Under this circumstance, however, a different statute does prohibit youth from having any verbal, visual, or physical contact with adults while confined in jail.<sup>107</sup>

The reasons behind the prohibition of jailing a minor seem to be twofold. First, the punitive nature of jail is inconsistent with the code's goal of rehabilitation.<sup>108</sup> Second, the prohibition prevents exposing juveniles to the possibility of physical harm.<sup>109</sup>

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100. *Id.* at § 43-279, amended by L.B. 787, § 15, 1982 Neb. Laws 869.

101. See Bailey & Soderling, *Born to Lose—Waiver of Fifth and Sixth Amendment Rights By Juvenile Suspects*, 15 CLEARINGHOUSE REV. 127 (1981).

102. NEB. REV. STAT. § 43-285 (Supp. 1981), amended by L.B. 787, § 17, 1982 Neb. Laws 870.

103. See Interview, *supra* note 68.

104. See English, *The Foster Care System and the Role of Legal Service*, 14 CLEARINGHOUSE REV. 1234 (1981).

105. See JUDICIARY COMM. 87TH UNICAMERAL, COMMITTEE STATEMENT ON L.B. 787 (Comm. Print 1982). See Interview, *supra* note 68.

106. NEB. REV. STAT. § 43-286 (Supp. 1981), amended by L.B. 787, § 18, 1982 Neb. Laws 870-73.

107. NEB. REV. STAT. § 43-251 (Supp. 1981).

108. See *id.* at § 43-246(3). See NATIONAL JUVENILE LAW CENTER, *supra* note 1, at 4.

109. See Peterman, *Hearing Tapes Reveal Details of Jail Beating*, AP Press Release AA0471-PO2, June 1, 1982. Various versions of these tapes were released to

However, in certain rural areas of Nebraska, where youth facilities are sparse, it may actually be less traumatic for a youth to be jailed for a week in a local jail than to be sent to a distant youth facility.<sup>110</sup> However, this would be true only in situations requiring short term confinement.<sup>111</sup> The prohibition of jailing a youth is some insurance that the juvenile court process will not become a miniature adult criminal proceeding. This change in the code reaffirms the juvenile court system's philosophy.<sup>112</sup>

The final major substantive advance in Nebraska's Juvenile Code is the prohibition against imposing the death penalty on anyone who is under eighteen years of age at the time the crime was committed.<sup>113</sup> This prohibition applies to every court in the state.<sup>114</sup> This amendment was proposed on the ground that the United States Supreme Court<sup>115</sup> and the Nebraska Supreme Court<sup>116</sup> have recognized that the death penalty is of a different nature and kind than all other punishments.<sup>117</sup> A sponsor of this provision noted: "[I]t is an enormous punishment reserved for the most heinous and unique offenses committed by persons who meet certain criteria for 'wickedness'."<sup>118</sup> The code change reflects the legislature's recognition that juveniles below the age of eighteen should be exempt from such an "extreme" and "enormous"

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the national media reiterating the trial testimony of a participant in the fatal torture and beating of a 17 year old youth by cellmate. The youth in this case had been jailed for failure to pay three traffic tickets amounting to \$60.00. *Id.*

See Taylor, *Juveniles in Jail Assaults Lead to Challenge of Lock-'Em-up-Judge*, Omaha World Herald, Fed. 28, 1982. This article exposed Ohio Juvenile Judge Lloyd W. Burwell's belief that "this nation has been coddling kids for 20 years" and that one way to make kids "be good" is with time in county jail. Within a three year period, he jailed over 100 youths for status offenses and over 400 youths for delinquent conduct. One youth, known to be suicidal, hanged himself while in jail. Two 15 year old girls, jailed by the same judge as runaways, were sexually assaulted by a jailer and two adult inmates. *Id.*

In separate interviews, both Douglas and Sarpy county juvenile court judges agreed that jail was no substitute for treatment. However, one judge noted that a 24 hour sentence in the juvenile jail could prove to be a valuable educational tool for older youth who do not see jail as a serious threat.

110. Interview with a Douglas County Juvenile Court Judge (July 1982).

111. *Id.*

112. See NEB. REV. STAT. § 43-246 (Supp. 1981), amended by L.B. 787, § 1, 1982 Neb. Laws 858-59.

113. L.B. 787, § 23, 1982 Neb. Laws 875.

114. *Id.*

115. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

116. *State v. Simants*, 197 Neb. 549, 559-60; 250 N.W.2d 881, 888 (1977).

117. See, Letter from Nebraska State Senator Ernest Chambers, Judiciary Committee Member for 87th Legislature, to Attorney General Paul Douglas (April 8, 1982) (on file with *Creighton Law Review*).

118. *Id.* See also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (eighth amendment requires consideration of the offender's record, character and the nature of the crime before the death penalty can be inflicted).

punishment.<sup>119</sup>

In *Eddings v. Oklahoma*,<sup>120</sup> the United States Supreme Court held the eighth and fourteenth amendments require that, before a juvenile can be sentenced to death for a crime committed while still a juvenile, a trial court must consider all mitigating circumstances of the juvenile's situation.<sup>121</sup> In that case, the only mitigating circumstance the trial court had considered was the defendant's age at the time of the crime.<sup>122</sup> The trial court held that this alone was insufficient to outweigh the aggravating circumstances.<sup>123</sup> The Supreme Court held that other factors, including serious emotional disturbance, beatings by a harsh father and evidence of a turbulent family history must be considered.<sup>124</sup> The Nebraska Legislature has extended this principle by recognizing that the circumstance of youth alone is enough of a mitigating factor to preclude the imposition of the death penalty.<sup>125</sup> The legislature is to be commended for adopting a policy congruent with the philosophy behind the juvenile code.

#### CONCLUSION

The Nebraska Legislature has taken an important first step to protect the rights of both society and youth by enacting the juvenile code. Significant changes *allow* guardians to represent their young clients better than did the old code. Now that these changes have been made the legislature may be able to search for effective ways to *secure* better representation for abused and neglected children. The prohibitions against jailing and inflicting the death penalty reaffirm Nebraska's philosophy that youth are indeed in need of different treatment than adults under the law. The juvenile laws are now codified into an easily discernible structure. If one of the purposes of the recodification was to prepare for future change, then the next step for the Nebraska Legislature is to systematically analyze whether the existing system under the new code is effective. Where the system is weak the legislature should make the substantive changes necessary to ensure that the philosophy behind the Nebraska Juvenile Code is a working reality.

*Jill R. Ackerman—'84*

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119. See Letter, *supra* note 118. L.B. 787, § 23, 1982 Neb. Laws 875.

120. — U.S. —, 102 S.Ct. 869 (1982).

121. *Id.* at 876. See *Lockett v. Ohio*, 438 U.S. 586, 604-06 (1978).

122. 102 S.Ct. at 873.

123. *Id.*

124. *Id.* at 877.

125. L.B. 787, § 23, 1982 Neb. Laws 875.