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Juvenile Court Practice and Procedure

By Glen W. Clark*

I. LEGISLATION

The most significant change in the Georgia juvenile justice system made by the 1980 general assembly is that effected by Senate Bill 489 which adds a new chapter, 24A-23A, to the Juvenile Court Code. This legislation establishes a new category of offenses called designated felony acts, and sets up a special schedule of dispositions to go with it. Because of their importance, the provisions of the new chapter will be set forth in some detail before discussing their impact.

A designated felony act is defined as an act committed by a juvenile thirteen or more years of age, which, if done by an adult would constitute murder, rape, kidnapping, arson in the first or second degree, aggravated assault, voluntary manslaughter, aggravated sodomy, armed robbery or attempted murder or kidnapping. Whenever a child is adjudicated delinquent on the basis of a designated felony act, the new provision requires the juvenile court judge to find, using a preponderance of the evidence standard, whether or not the child requires restrictive custody, a new dispositional category created by the Act. If restrictive custody is ordered, the juvenile will be placed in the custody of the Division of Youth Services for an initial period of five years, the first twelve to eighteen months as determined by the judge to be spent in confinement at a Youth Development Center. If the juvenile has been found to have committed a prior designated felony act, the term of confinement will be a mandatory eigh-
teen months. Early release from the Youth Development Center is authorized only upon court order. In all cases, release will be followed by a mandatory twelve-month period of "intensive supervision," which can only be shortened by court order. Release from intensive supervision after the mandatory twelve months is by written approval of the Director of the Division of Youth Services or his designated deputy. The juvenile may not be discharged from Division custody in less than three years and thereafter only if the court approves the release. Youth Development Center terms may be extended past the initial twelve to eighteen months or any prior extension thereof by order of the court after a dispositional hearing. This would be initiated by motion of the Division Director. In no case could a juvenile be held past age twenty-one.

The standards set forth in the Act for determining if restrictive custody is required include (1) the needs and best interests of the juvenile, (2) his record and background, (3) the nature and circumstances of the offense including whether personal injury occurred, (4) the need for protection of the community, and (5) the age and physical condition of the victim. Restrictive custody is mandatory in any case in which a juvenile inflicts serious physical injury upon a person aged sixty-two years or older during commission of a designated felony act.

The thrust of this legislation is clear. It is a response to growing frustration with the rehabilitative ideal which was the conceptual foundation of the Georgia Juvenile Court Act of 1971 and most of the legislation enacted by other states in the aftermath of In re Gault. The substitution in designated felony cases of determinate sentences, set generally by the legislature and within the legislative limits by the juvenile court judges, for the indeterminate approach of the existing Juvenile Court Code under which a child is released when rehabilitated, carries definite connotations of a shift from the rehabilitative concept to one of punishment in the sense of retribution and deterrence. The standards outlined in the preceding paragraph, except for the first one, bear this out.

7. Id. Section 24A-2301a defines "intensive supervision" as especially close monitoring involving more frequent contacts than the present aftercare supervision.
The shift of emphasis away from rehabilitation is also apparent in the enlarged scope accorded judicial discretion in the disposition of serious offenders at the expense of the Division of Youth Services. Until now, the most drastic disposition available to the juvenile court judge in delinquency cases has been to commit the child to the Division. It was then up to division personnel whether to place a child in a Youth Development Center or to try its own form of probation—this, even though the judge may have recommended commitment to a center. Under the new procedure, as to this class of offender, if the judge orders commitment that order will be carried out. And the order will have been based on standards which give added weight to retribution, that is, to proportionality between severity of the disposition and seriousness of the offense, and to community security.

The designated felony act provision conforms with what is identifiable as a national trend away from reliance on rehabilitation as the "polar star" of juvenile justice in favor of greater emphasis on other justifications for offender sanction—retribution, deterrence and restraint, sometimes considered together under the term punishment. Tangible evidence of such a trend is not difficult to find. The IJA/ABA Juvenile Justice Standards Project offers a prime example. The project established classes of juvenile offenses, with determinate sentences of varying severity to be made by the courts according to class. For example, a Class I offense, death or imprisonment for life or a term of more than twenty years for an adult, could, for a child, result in secure confinement for a period of twenty-four months.

The Juvenile Justice Act of 1977 of the State of Washington provides another example. The purposes section of this Act states the legislature's intent to:

(a) Protect the citizenry from criminal behavior;
(b) . . . .
(c) Make the juvenile offender accountable for his or her criminal behavior;
(d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender.

The Washington Act provides for the establishment of dispositional standards for all offenses, fixing determinate terms of confinement or other disposition for the various offenses, not to exceed the period to which an adult could be subjected for the same offense.\footnote{Id. § 13.40.030.}

Recent revisions of other state juvenile codes show the same trend. Of particular significance among them, since the courts there have already considered its constitutionality, is New York's Juvenile Justice Reform Act of 1976.\footnote{N.Y. FAMILY COURT ACT §§ 712(b) and 753-a (McKinney 1977).} This enactment added a designated felony act/restrictive placement procedure to the New York Family Court Act and appears to have been the model on which the new Georgia provision was based.

The case which considered the constitutionality of the New York law, and incidentally found it unconstitutional, was \textit{In re Felder},\footnote{93 Misc. 2d 369, 402 N.Y.S.2d 528 (1978).} a 1978 family court case in Onondaga County. Although rendered by a court of limited jurisdiction, the opinion is noteworthy because its rationale would appear to be directly applicable to the Georgia designated felony statute.

To begin with, the \textit{Felder} court found that the New York designated felony provision constituted a shift away from the rehabilitative theme which had characterized the handling of juveniles prior to its adoption. In the words of the court, the new provisions revealed a "thinly disguised intent of the Legislature to punish an adjudicated designated felon."\footnote{Id. at ___, 402 N.Y.S.2d at 533.}

The constitutional argument made by the respondent in \textit{Felder} focused on the right to jury trial. He argued that it was the benevolent rehabilitative character of the state's handling of juvenile offenders which justified their being adjudicated delinquent in proceedings which could result in loss of freedom without their being afforded all the procedural rights an adult would receive if tried for the same offense. If the rehabilitative objective is replaced by punishment, the \textit{quid pro quo} supporting procedural differences which have been recognized in juvenile trials no longer exists. The court concluded that since "the designated felony portions of the [statute] are fundamentally criminal in nature, the respondent is entitled to a trial by jury for a criminal prosecution."\footnote{Id. at ___, 402 N.Y.S.2d at 536.}

In finding that the New York designated felony act provisions were punitive and thus criminal in nature, the court associated indeterminate sentences with the rehabilitative approach—the subject of treatment is released when he has been rehabilitated or cured, not upon expiration of a fixed term of confinement set by a judge or the legislature. Determinate sentences, in contrast, are inherently punitive. The factors according to which they are fixed are proportional to the offense and need of the com-

\begin{itemize}
\item \textbf{21.} Id. § 13.40.030.
\item \textbf{22.} N.Y. FAMILY COURT ACT §§ 712(b) and 753-a (McKinney 1977).
\item \textbf{23.} 93 Misc. 2d 369, 402 N.Y.S.2d 528 (1978).
\item \textbf{24.} Id. at ___, 402 N.Y.S.2d at 533.
\item \textbf{25.} Id. at ___, 402 N.Y.S.2d at 536.
\end{itemize}
community for protection with, perhaps, considerations of deterrence also given weight. That the juvenile under the New York plan would be given treatment while serving his determinate period of confinement did not change matters. As the court pointed out, "[w]hat is at issue is the mandatory time period required for treatment." 26

I have indicated that the New York designated felony provision was declared unconstitutional. That is not quite accurate, although the court's decision had that effect. What the court actually did was to remove the determinate term of confinement feature from the statute, 27 which effectively neutralized the legislative purpose for adopting it.

So, what about the constitutionality of the Georgia designated felony act provisions? Juries are not used in juvenile courts in Georgia, 28 and if the new sections constitute a shift from rehabilitation to punishment as the dispositional objective in this class of cases, the rationale of the New York decision would seem to apply. There may, however, be a distinguishing feature in Georgia's version of the statute which could save it, and which warrants at least cursory examination.

Both the New York and the Georgia versions provide that secure commitments originally ordered for a definite term can be extended by court order on motion of the division after a dispositional hearing. This indicates that the rehabilitative motif has not been completely abandoned. Since the original term of commitment will have been based on considerations of retribution, deterrence and restraint, it is reasonable to infer that the decision to extend would be based in large part on a determination by the court that the juvenile had not been rehabilitated and could not safely be returned to the community. This would be applicable, of course, only for extension of otherwise determinate terms.

It is at the other end of the spectrum, where the question is one of shortening otherwise determinate terms, that the New York and Georgia versions differ. The New York statute makes no provision for early release of a juvenile on a designated felony act commitment. Unless the term is extended, such a juvenile is released when the original term expires and not before. The court in Felder emphasized this point in characterizing restrictive commitments as determinate. The Georgia version, which otherwise tracks its New York counterpart section on early release almost verbatim, adds the words "unless by court order." 29 These added

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26. Id. at ___, 402 N.Y.S.2d at 533.
27. Id. at ___, 402 N.Y.S.2d at 536.
29. See GA. CODE ANN. § 24A-2302a(d)(1)(D) (Supp. 1980) which reads:
   The juvenile may not be released from a Youth Development Center or transferred to a nonsecure facility during the period provided in subparagraph (B) of this paragraph, nor may the juvenile be released from intensive supervision during
words are crucial. If they are interpreted to apply both to release from a Youth Development Center and to release from intensive supervision, rather than just the latter, then it can be argued that Georgia has made provision for rehabilitative considerations to be applied with respect to shortening otherwise definite terms as well as to extending them. The statute, according to this interpretation would, while introducing punitive concepts into original dispositional decisions in designated felony cases, permit rehabilitative considerations to override the determinate terms originally assigned if the judge is convinced that rehabilitation has, or in extension cases has not, occurred. Presumably this would be done on motion of the division and after a dispositional hearing as in the case of extensions although the statute is silent on this. Responsibility for the decision on whether or not rehabilitation has been accomplished, if this interpretation is correct, will have been shifted from the Division of Children and Youth where it previously rested, to the Juvenile Court judge. The rehabilitative ideal with the *quid pro quo* it generates, supporting different procedures in juvenile and adult criminal courts, although de-emphasized, will nevertheless remain alive. This could provide a basis for upholding the constitutionality of the Georgia statute while acknowledging the soundness of the *Felder* rationale.

Other arguments can be made in support of the constitutionality of the designated felony act provisions, and it is possible the Georgia courts would uphold the legislation without distinguishing it from the New York version in the manner described. Considerable advantages accrue to a child adjudicated in the juvenile justice system as compared to an adult even if dispositions are viewed as punishment. The duration of any determinate sentence authorized for a child would be much shorter. Other advantages exist in terms of confidentiality, sealing of records and place of confinement. A *quid pro quo* for denial of jury trial might conceivably be found in these considerations.

In the final analysis, if the need for a shift to punishment is real and it cannot be effected any other way, the legislature might consider amending the Juvenile Court Code to provide for jury trial in designated felony act cases. The procedural rights afforded juveniles are already in substantial conformance with those given adults in other respects. A six person jury in this class of cases should not place an unreasonable burden on the system.

Another significant change affecting juvenile court law was made by House Bill 523 which amended Title 27 of the Georgia Code by adding a

the period provided in subparagraph (C) of this paragraph unless by court or-
der. . . (emphasis added).
new chapter expressing a strong state policy that “restitution by those found guilty of crimes to their victims is a primary concern of the criminal justice system.” The restitution policy is specifically made applicable to juvenile proceedings, but restitution is not to be given precedence over the goals of rehabilitation and treatment in juvenile cases. The juvenile courts are expressly authorized to order restitution as a condition of probation. They may retain jurisdiction over a juvenile subject to a restitution order for a reasonable period after he reaches majority for purposes of insuring compliance with the order, or as an alternative, may transfer him to superior court for enforcement of the order. The Act requires that in deciding cases in which there are victims to whom restitution could be made, written findings will be prepared indicating whether restitution is appropriate. Failure to make such findings however, will not invalidate other parts of an order. The Act lists factors to be considered in fixing the amount of restitution and provides that while restitution will not bar civil action against an offender by the victim, payments made under a restitution order will constitute a set off against any judgment awarded the victim.

The age for legal purchase or knowing possession of alcoholic beverages was raised from eighteen to nineteen by Senate Bill 68, and this, while not amending the Juvenile Court Code itself, will have considerable impact in the juvenile area. The Act amends Georgia Code Ann. section 58-612, adding a new section 58-612.1. The Act makes it a misdemeanor either to furnish, or permit an employee to furnish, alcoholic beverages to anyone under nineteen years of age except for medical purposes, religious ceremonies, or consumption in the home with parental consent. From the standpoint of the consumer, it is unlawful for persons under nineteen to purchase or knowingly possess alcoholic beverages, subject to the same exception. Knowing and intentional purchase as agent for an underage

41. Id.
person is proscribed." Violations by the underage party are also established as misdemeanors. The Act makes provision for a kind of informal adjustment under which a first offender can be placed on probation without a judgment of guilt being entered if he consents to undergo a comprehensive rehabilitation program. Probation could last up to three years and, if successfully completed, would lead to dismissal of the proceedings. The Act contains an overall exception for active members of the regular armed forces of the United States. For them the legal drinking age remains eighteen.

Section 8 of the Act may well present a problem for the juvenile courts. According to this section, "nothing in this Act shall be construed to modify, amend, or supersede Title 24A, the Juvenile Court Code of Georgia, as now or hereafter amended." What, then, will happen when a child under seventeen violates the Act? Since violation is a misdemeanor, the offender could be processed as a delinquent under Georgia Code Ann. section 24A-401(e)(1). The Code, however, in section 24A-401(g)(7), defines an unruly child as one "patronizing any bar where alcoholic beverages are being sold, unaccompanied by the child's parents, guardian or custodian; or possessing alcoholic beverages." This, in view of section 8 of the Act quoted above, would seem to dictate handling a juvenile offender in the unruly category. Which will it be? The answer, obviously, will make a considerable difference in how the case is processed and the dispositions available to the juvenile court.

Another change to the Juvenile Court Code is made by House Bill 1147. This Act requires the juvenile court, within forty-eight hours of learning of a juvenile who has committed an act which would be a felony for an adult, to notify the district attorney in the judicial circuit in which juvenile proceedings are to be instituted. Also, under the provisions of this Act, the district attorney is now required, if requested by the juvenile court at least ninety-six hours in advance, to prosecute juvenile court cases.

Senate Bill 580 is also of interest. It transfers all juvenile detention

47. Id.
53. Id.
facilities operated by counties to the control and jurisdiction of the Division of Youth Services, effective July 1, 1981. Counties will continue to operate detention centers until that date. The Division of Youth Services will reimburse, or partially reimburse, counties for the costs incurred in operating the facilities pending transfer. Such transfers will not become effective unless counties “transfer and deed to the State of Georgia the real and personal property which comprise the offices, facilities and equipment of such detention facilities, if such property is desired by the State of Georgia.”

The Act also repeals the juvenile court judge’s authority to appoint certain personnel, by deleting “employees of the detention home” from the list of employees judges are entitled to appoint.

Three resolutions were passed by the Georgia Senate and two by the House which are relevant to the juvenile justice system. The first, Senate Resolution 353, continues the Senate Juvenile Justice Study Committee for another year. The committee consists of five members of the senate who are appointed by the President of the Senate and is “authorized to study and make recommendations regarding the entire juvenile justice system of this state.” It would appear from the resolution that the committee would function in the same manner as its predecessors. It was this group which last year worked on Senate Bill 144 which would have established a standardized system of juvenile courts throughout the state and which, having passed the senate in 1979, failed in the house in 1980 by a single vote.

Senate Resolution 381 created a Probation Officer and Detention Facility Study Committee. According to the resolution, the primary aim of this committee is to study “all aspects of” bringing probation personnel and detention facilities throughout the state under state supervision, operation and control. This would include but not be limited to juvenile probation officers and facilities. This committee, which also has five members to be appointed by the President of the Senate, is charged with making its report prior to December 1, 1980.

Senate Resolution 358 created a Joint Child Abuse Study Committee. The membership of this committee will consist of four Senators and two citizens-at-large, appointed by the President of the Senate, and four members of the House with two citizens-at-large appointed by the Speaker.

56. Id.
57. Id.
60. Id.
61. Senate Resolution 381 (1980 Georgia General Assembly).
House Resolution 551-1437\textsuperscript{63} proposed an amendment to the state constitution which would authorize the general assembly to “provide by local law for the initial appointment and subsequent election of the Judge of the Juvenile Court of Floyd County.”\textsuperscript{64} In the event the constitution is amended and the necessary legislation enacted, the term of the judge then sitting in Floyd County would be shortened and the new procedure would take effect immediately.

The other House Resolution, number 483-1270,\textsuperscript{65} proposed a constitutional amendment which would end the controversy associated with venue under the 1971 Juvenile Court Code. Georgia Constitution article VI, section 14, paragraph \textsuperscript{66} provides that civil cases be tried in the county where the defendant resides and criminal cases in the county where the crime was committed. The Juvenile Court Code venue provisions\textsuperscript{67} provide that in delinquency and unruly cases a proceeding may be commenced in the county in which the acts occurred, and where deprivation is alleged in the county in which the child is present. The provision for delinquency cases was upheld by rather strained reasoning in \textit{M.E.B. v. State}\textsuperscript{68} in 1973, but in 1978 the deprivation provision was held unconstitutional in \textit{Quire v. Clayton County Department of Family and Children’s Services}.\textsuperscript{69} The constitutional amendment, if adopted, would take juvenile court cases out of the constitution insofar as venue is concerned. The constitution as amended would read: “All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed.”\textsuperscript{70} The amendment would appear to resolve the problem.

II. RECENT UNITED STATES SUPREME COURT CASES AFFECTING GEORGIA JUVENILE COURT LAW

In \textit{Smith v. Daily Mail Publishing Co.}\textsuperscript{71} the U.S. Supreme Court addressed the problem of confidentiality in the juvenile court. The case

\begin{itemize}
  \item 63. 1980 Ga. Laws 2200.
  \item 64. Id.
  \item 65. 1980 Ga. Laws 2174.
  \item 70. 1980 Ga. Laws at 2175.
  \item 71. 443 U.S. 97 (1979).
\end{itemize}
arose under a West Virginia statute which prohibited newspapers from publishing the names of children involved in juvenile court proceedings without a written order of the court, and made violation of the provision a misdemeanor. The case is of particular interest in Georgia because Georgia Code Ann. section 24A-3503(g), while differing in significant respects from the West Virginia statute bears enough resemblance to make it constitutionally suspect under Smith.

In Smith, a juvenile was alleged to have shot and killed a fifteen year old classmate. There were a number of eyewitnesses, and the juvenile was arrested soon after the incident. The newspaper got his name from witnesses but in deference to the statute it initially refrained from publishing it. After three different radio stations had broadcast the name, however, The Daily Mail ran a story in which the juvenile was identified. This story resulted in The Daily Mail being indicted for alleged knowing publication of the name in violation of the West Virginia Code. At this point the newspaper obtained a writ of prohibition against further prosecution alleging that the indictment was based on a statute which violated the first and fourteenth amendments of the United States Constitution as well as several provisions of the state constitution.

In holding the statute unconstitutional, the Court first considered whether it constituted a prior restraint, which the state did not deny, and concluded that, even if prior restraint were not involved, the statute would still violate the first amendment because it punished the publication of information lawfully obtained. The first amendment tolerates this, the Court said, only “when necessary to further an interest more substantial” than any presented in this case. First amendment values prevail unless a state interest of the highest form is offered to justify their infringement. The state interest advanced here was that withholding the identity of juvenile offenders is crucial to achieving the rehabilitative goals of the juvenile justice system. This interest, the court held, while substantial, does not justify the burden placed on the first amendment.

Under the West Virginia statute the judge had discretion to permit the publication of names, and the only restriction on press coverage of such stories without judicial approval was use of the child’s name itself which the state argued was a minor restriction. While these factors were seen by the court as mitigating infringement on the first amendment, the balance of interests still favored publication. A major and perhaps fatal flaw in the state’s case was that the West Virginia statute only barred publica-

74. 443 U.S. at 104.
75. Id. at 103.
76. Id. at 104.
tion by newspapers and did not apply to electronic media. The statute was thus incapable of accomplishing its stated objective of protecting children.77

Georgia Code Ann. section 24A-3503(g)(1)78 prohibits publication of the name or picture of any child under the jurisdiction of the court for the first time by any news media upon penalty of contempt, unless authorized by order of the court. This formulation is free of the West Virginia vice which exempted electronic media, and it might also be argued that it constitutes a lesser infringement on the first amendment inasmuch as it applies only to first offenders. Nevertheless, it does punish violators, and that was the essential fault the court found in the West Virginia statute.79

Are there, then, constitutional problems with the Georgia provision? The Court inferred that there might be in pointing out that "all fifty states have statutes that provide in some way for confidentiality [of juvenile court proceedings], but only five including West Virginia, impose criminal penalties on non-parties for publication of the identity of the juvenile."80 A footnote to this passage lists the other four states. Georgia is one of them.

Another 1979 case in the U.S. Supreme Court, Fare v. Michael C.,81 dealt with a Miranda82 problem which arose in a juvenile case. The Court made the following statement in a footnote to the opinion: "we assume without deciding that the Miranda principles [are] fully applicable to the present proceedings."83 This is significant because the assumption that Miranda fully applies is widely accepted. Juvenile justice is being administered on that assumption throughout the nation. Yet the Supreme Court took the trouble to disclaim the idea that it was deciding that Miranda did fully apply. Gault, of course, held that the privilege against self-incrimination applied to the adjudicatory stage in juvenile delinquency cases.84 However, Gault, although it mentioned Miranda, was not clear that all of the adult law associated with self-incrimination was being incorporated into the juvenile justice system. The extent to which the constitutional gloss associated with procedural rights afforded adults in criminal cases also applies in the juvenile system has never been made clear by the Court, and it is unfortunate that, although not vital to its decision, the Court did not take a position on the issue in Fare.

77. Id.
78. GA. CODE ANN. § 3503(g)(1) (1976).
79. 443 U.S. at 105.
80. Id.
83. 442 U.S. at 717, note 4.
84. 387 U.S. at 55.
The specific issue in *Fare* was whether a request by a juvenile during custodial interrogation to have his probation officer present per se invoked his fifth amendment right to remain silent as it would have had he requested the assistance of an attorney. The California Supreme Court held that it did, but the U.S. Supreme Court did not agree. Although a child might consider his probation officer a friend and a person whose counsel he would like to have at such a time, probation officers are state employees and as such cannot adequately fill the role of advocate for the child. Neither did the child’s having asked for his probation officer without more constitute a request to remain silent. The juvenile here continued to talk and he made statements which incriminated him. According to the Supreme Court, whether a child intends to invoke his right to silence when he asks for his probation officer is a question of fact to be decided on a case by case basis. Reviewing the facts, the Court decided that there was no invocation of *Miranda* in this case.88

III. The Georgia Cases

A. Delinquency

The delinquency cases decided by the Georgia appellate courts last year, while few, present some interesting and troublesome problems.

*Lane v. Jones*88 is a good example of this. The Georgia Supreme Court dealt once again in this case with the problem of concurrent jurisdiction between juvenile and superior courts in capital felony cases. The fifteen year old appellant in *Lane*, arrested on a warrant for murder, was being held in the juvenile section of the Glynn County Detention Center pursuant to an order issued by the juvenile court. Acting on appellant’s behalf, the public defender tendered a petition alleging delinquency to the juvenile court in an apparent effort to force the juvenile court to assume jurisdiction. The juvenile court refused to accept the petition and appellant filed for habeas corpus in superior court. On the day of the habeas corpus hearing, but prior to its having begun, an indictment charging appellant with murder was returned. The writ was denied, and the juvenile appealed, his theory being that the juvenile court judge, by refusing to file a delinquency petition, allowed the case to be transferred to superior court without the benefit of the transfer hearing required by Georgia Code Ann. section 24A-2501.87 This action, it was argued, violated due process of law.

The court had little difficulty deciding against the appellant, but one is

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85. 442 U.S. at 728.
86. 244 Ga. 17, 257 S.E.2d 524 (1979).
left with an uncomfortable feeling that all the problems associated with concurrent jurisdiction have not yet been resolved. The court, referring to *Hartley v. Clack*, 88 pointed out that the juvenile court’s detention order did not vest jurisdiction in the juvenile court. Only the filing of a delinquency petition would have done that. Furthermore, Georgia Code Ann. section 24A-1601 89 provides that juvenile court petitions will be filed only after the judge or his authorized representative first decides that filing is in “the best interest of the public and the child.” The juvenile court judge has discretion whether to file, and in this case he decided not to file pending action by the grand jury. The indictment, when it was returned, vested jurisdiction in the superior court which was the first of the two courts having concurrent jurisdiction to acquire it. Denial of the writ of habeas corpus was not error.

Doubts persist, however, as to the manner in which these cases are being handled, perhaps because it is not always possible from reading the opinions to know exactly what happened or the timing involved. For example, Georgia Code Ann. section 24A-1403(b) 90 requires that a child subject to concurrent jurisdiction be detained only in juvenile facilities pending a committal hearing under Georgia Code Ann. Chapter 27-4, 91 or indictment. The *Lane* opinion makes no mention of a committal hearing; neither did *Hartley*. It was clear in *Hartley* that there was no juvenile detention hearing either. *Lane* is silent on this point and we do not know from the opinion what kind of hearing if any was held before the detention order was issued by the juvenile court. The problem with the absence of a hearing at this point is that after an alleged juvenile capital offender has been taken into custody but prior to the attachment of jurisdiction by either the juvenile or superior court, the child is in a legal limbo. According to the Juvenile Court Code, 92 such a child is to be brought before the superior court. However, “pending a committal hearing . . . or indictment,” absent special circumstances, he shall be placed in detention only in juvenile facilities. This language suggests that following a committal hearing, further detention of the juvenile can be in adult facilities. Yet, a later section 93 authorizes the use of adult detention facilities only after indictment. Where he is detained, however, does not determine which court has jurisdiction.

It would seem that if the district attorney intends to prosecute in the adult system, the child should be processed throughout in that system

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88. 239 Ga. 113, 236 S.E.2d 63 (1977).
90. GA. CODE ANN. § 24A-1403(b) (Supp. 1980).
93. GA. CODE ANN. § 24A-1403(c) (Supp. 1980).
and have the benefit of whatever rights the system provides. For example, in the adult system he should have a committal hearing and the state should adhere to the time limitations on detention without one. If, on the other hand, because the facility in which he is initially detained is a juvenile facility it is desired that the juvenile system handle the "committal" decision, then it should be done under Georgia Code Ann. section 24A-1404(c) and the time limits established in that section should be met including the seventy-two hour limit on filing a petition after the hearing. Unless the rules of one system or the other are followed, the child risks receiving "the worst of both worlds."

Another disquieting aspect of the concurrent jurisdiction problem is the fact that when the district attorney decides, in the exercise of his traditional charging discretion, that the alleged violation is a capital offense to be tried in superior court, this determination is made without any semblance of procedural due process. If, on the other hand, juvenile court jurisdiction attaches in a capital offense case and the decision to prosecute in superior court is made by a judge rather than the district attorney, a full due process hearing would be required. Why require due process when a judge decides, but none when the decision is made by a district attorney? The effect on the juvenile is the same either way—if tried in superior court he will be subjected to the full range of adult criminal sanctions. The usual answer to this question is that district attorneys make these kinds of charging decisions every day. But the decision being made here is more than a charging decision. It is a decision to shift the trial from one system of justice to another. It is not, like the usual charging decision, just the first step in a long process of prosecution. It is the final step in determining which system of sanctions the juvenile will be subjected to, and the loss he risks seems grievous enough to warrant at least a minimal level of procedural due process.

Much has been written on this subject and a number of cases in other jurisdictions have dealt with it. For the most part, prosecutorial discretion has withstood the challenges levelled against it.

In re C.M.M. involved a delinquency petition charging a fourteen year old minor with kidnapping and motor vehicle theft. A motion was filed by

the district attorney to transfer the case to superior court under Georgia Code Ann. section 24A-2501. Some of the charges were transferred and others were not. The primary issue presented on appeal apparently concerned the constitutionality of this transfer. The appellant argued that section 24A-2501 was unconstitutional under the equal protection and due process clauses of the fourteenth amendment because it subjected a child of fourteen to transfer if charged with a capital offense, whereas a noncapital offender must be fifteen to be eligible for transfer. The court rejected this contention, but the opinion does not contain either the rationale of appellant’s arguments or any explanation of the court’s reason for rejecting it. The issue is therefore not suitable for development here.

Another aspect of C.M.M. which was more fully developed concerned the fact that the waiver hearing was conducted in the first instance by a referee. The appellants alleged, and appellees did not deny, that the referee failed to comply with Georgia Code Ann. section 24A-701(b). That section requires notice to the parties before any hearing conducted by a referee is begun, and if they request, the matter will be heard by a judge instead of the referee. It was also alleged that the referee failed to transmit findings and recommendations to the judge in writing with copies to the parties, or to provide the parties with written notice of their right to a rehearing before the judge. The court held that since the transfer order entered by the referee and approved by the judge contained the referee’s findings and recommendations, this satisfied the first part of the allegation. Because there was no written notice of the right to a rehearing, however, the transfer order had to be reversed. The court explained its decision to reverse by pointing out that the only way an appellate court can insure future observance of important safeguards such as those overlooked in this case is to reverse and remand.

The C.M.M. decision is perhaps not noteworthy in itself, but it broaches issues which could conceivably be quite important. The reference is to Georgia Code Ann. section 24A-701 on referees and whether it might be subject to constitutional attack in light of the U.S. Supreme Court’s 1978 decision in Swisher v. Brady. Swisher dealt with a Maryland procedure under which masters were authorized to conduct hearings in juvenile cases and to propose findings and recommendations for approval by judges. Where a master had heard a case, either party could file exceptions, but the judge could act only on the record plus “such additional [relevant] evidence to which the parties raise no objection.” Swisher addressed the question of whether or not this procedure consti-

100. GA. CODE ANN. § 24A-701(b) (1976).
103. Id. at 210-11, quoting Rule 911 of the Maryland Rules of Procedure.
tuted double jeopardy. The Court held that it did not, basing its decision on the fact that no new evidence could be introduced at the time of review by the judge without consent of the juvenile, and further, because under the Maryland scheme it was clear from the outset that only the judge had final decisional authority. An earlier Maryland procedure had been struck down by a federal district court under the double jeopardy clause because it provided for a de novo hearing before the judge whenever either party excepted to the master's findings. While the older Maryland procedure was not directly involved in *Swisher*, it was used by the Court to illustrate a situation in which double jeopardy would be involved. The prime purposes of the double jeopardy clause are to avoid giving the state opportunity in a second hearing to muster added evidence not brought out at a prior hearing, and to avoid subjecting a defendant to the "embarrassment, expense and ordeal of a second trial." In view of this rationale a judicial hearing de novo following an earlier one conducted by a master would constitute double jeopardy. The revised Maryland procedure, however, did not violate this rule. There was no added risk that "an innocent defendant may be convicted . . . by taking the question of guilt to a series of persons . . . empowered to make binding determinations." The potential double jeopardy problem with the Georgia procedure stems from the language of section 24A-701(d). This section provides that following an initial hearing before a referee "a rehearing may be ordered by the judge at any time and shall be ordered if a party files a written request therefore within five days after receiving the notice required . . . ." This proceeding would be a de novo hearing. It would seem to provide the state a "second crack" at the defendant. It would also subject him to the "embarrassment, expense and ordeal of a second trial." However, although two trials would seem to be possible under the Georgia procedure, there may be a saving feature in the notice required to be given the juvenile that he has the option of being tried before the judge in the first instance if he wishes. If, after receiving this notice, the defense agrees to a hearing conducted by the referee, it is arguable that the protection of the double jeopardy clause has been waived.

*L.C. v. State* was a delinquency case growing out of an attempted

105. 438 U.S. at 216.
106. Id.
108. Id.
109. 438 U.S. at 216.
burglary. The facts are complicated and do not warrant repetition here. The rule relied on by the court perhaps does. It constitutes a test for circumstantial evidence and was well stated by the court as follows: "Where the evidence tends to sustain two inconsistent propositions, neither can be said to have been established by legitimate proof. Facts which are consistent with either of two opposing theories prove nothing."111

P.D. v. State112 dealt with rules of evidence which are not peculiar to juvenile courts. J.E.T. v. State113 concerned an issue of substantive criminal law but is relevant to the juvenile system because it came up in a juvenile case and could come up again. The question was how substantial a step toward commission of a crime, robbery in this case, must the evidence show to constitute a criminal attempt. The answer the court gave was that first, "there must be an act done in pursuance of the intent directly tending to the commission of the crime,"114 and secondly, such an "alleged overt act or acts must be 'inexplicable as a lawful act in order to be more than mere preparation.'"115 The juvenile in this case admitted on cross-examination that he and a friend had intended to rob the store. He entered the store with a stocking cap hidden beneath a toboggan cap and at one point pulled the stocking cap down over his eyes. He had a concealed weapon. The court found there had been an attempted armed robbery even though the juvenile had replaced the stocking cap to his forehead and his friend had returned a six-pack of beer to the cooler, after which both had started to leave the store. The court suggested that delinquency would have been more easily proved had criminal conspiracy been charged. In that event proof of an overt act in preparation to commit the crime would have been enough.116

The only other Georgia delinquency case decided during the reporting period which is deemed to warrant discussion was P.D. v. State.117 This case dealt with the "speedy trial" issue. The juvenile here was charged with delinquent acts based on the adult crime of aggravated assault. He was "bound over" for trial, apparently at a detention hearing, and released to his father. Before a petition was filed, the father with the approval of the court, had the child admitted to West Paces Ferry Hospital in Atlanta for psychiatric evaluation. The court formalized this action with an order, and directed the father to make the hospital's evaluation

111. Id. at 309, 259 S.E.2d at 703-04.
114. Id. at 838, 261 S.E.2d at 754.
115. Id. at 839, 261 S.E.2d at 754 (emphasis added).
116. Id.
report available to the court when received. Further action was stayed pending receipt of the report.

One hundred seventy-one days later, an adjudication hearing was held, a delinquency petition having been filed on the same day. The hearing date had been fixed in an order seven days earlier. The child was found delinquent and committed to the Division of Children and Youth.

The court upheld this procedure saying that the rule requiring filing of a petition within thirty days after release of a juvenile to his parents was not violated inasmuch as the juvenile here was not "released." He was in the psychiatric ward of a hospital and had been committed there by his father which was satisfactory with the juvenile court.

B. Deprivation and Termination of Parental Rights

_Henderson v. Department of Human Resources,_118 a termination of parental rights case, is of interest from two standpoints. First, in considering whether the appellant father's right to consent to termination had been forfeited by failure to pay court ordered child support,119 the court of appeals credited the father with disability benefits paid to his children by Social Security on his behalf.120 Since the amounts of such payments were not disclosed by the evidence, the court found that the right had not been forfeited. The court was unable to determine if the court-ordered payment schedule had been met since it did not know the amounts of the Social Security checks. The court did terminate the father's rights, however, on the general ground that insofar as appellant was concerned, the children were deprived, the deprivation was likely to continue, and the children were likely to suffer serious mental, physical and emotional harm.121 The facts supporting these findings were as follows: the father was a drug addict and in the court's words "has a record of felony arrests since before the children's births, has spent more than a third of their lives in prison, and has not provided a home for the children."122 In stating the facts, the court pointed out that the father had contributed only sixty-five dollars of his own funds to support the children over a six year period although he had earnings in and out of prison of about $2,100.00 during that period. It was also pointed out that he had not visited or contacted the children during a five week parole. The weight given these facts by the court indicates that while parental conduct suggesting aban-

118. GA. CODE ANN. § 24A-1404(b) (Supp. 1980).
123. 152 Ga. App. at 77, 262 S.E.2d at 243.
donment may be insufficient for termination without consent under the specific code provisions on abandonment or nonsupport, such conduct will be considered under the general ground.

The court in *Henderson* stated the following as the rule governing termination without parental consent under the general ground:

> While the termination of parental rights is a severe measure, a termination hearing seeks above all else the welfare of the child, and in determining how the best interest of the child is served, the juvenile court is vested with a broad discretion which will not be controlled in the absence of manifest abuse.¹²⁴

Two other cases decided by the court of appeals during the survey period applied a child welfare oriented standard in terminating parental rights.¹²⁵ Another case, *Cox v. Department of Human Resources*,¹²⁶ also upheld termination, but explained its holding more in terms of parental fitness than of the best interests of the child. The court of appeals in that case approved the trial court's conclusion that "because of his age, his physical condition, and because of his inability to understand basic parental skills, [appellant] would be unable to provide the child with proper parental care and control."¹²⁷ The juvenile court had found that the child was often filthy, was given spoiled milk, and that appellant's home "had no indoor plumbing and that the exterior looked like a junkyard."¹²⁸ The parental rights of this appellant to an older daughter had been terminated in an earlier case.¹²⁹

The reason for noting what might seem a fine point of emphasis in stating the general termination standard is traceable to a long standing controversy associated with termination as well as with parent versus third-party custody cases in the Georgia law.¹³⁰ The issue of whether the focus

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¹²⁴ *Id.*, 262 S.E.2d at 243-44.
¹²⁶ *Id.* at 259, 259 S.E.2d at 666.
¹²⁷ *Id.* at 259, 259 S.E.2d at 666.
¹²⁸ *Id.* at 258, 259 S.E.2d at 666.
¹³⁰ *See* McGough, *Juvenile Court Practice and Procedure*, 31 MERCER L. REV. 143 at 152-53 (1979). This was last year's Survey of Georgia Juvenile Court law, and it contains a good discussion of the problem. *See also*, McGough and Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY LAW JOURNAL 209 (1978). Further discussion of the conflict between the parental rights and child welfare standards in termination cases is contained in appellee's brief in the case of Wilma L.N. *Ray v. Dep't of Human Resources*, Case No. 59869 in the Court of Appeals, by Assistant Attorney General Carol Cosgrove. This brief is reproduced in the materials of the *SPRING SEMINAR FOR GEORGIA JUVENILE JUDGES*, MAY 29-31, 1980, INSTITUTE OF CONTINUING JUDICIAL EDUCATION, University of Georgia School of Law, Athens, Ga., 30602. The relevant
should be on a parent’s fitness to raise a child properly or a child’s interest in being properly raised may seem “six of one or a half dozen of the other,” but the consequences can be of profound importance as Professor McGough has pointed out. This is particularly true if a requirement for parental fault in having brought about the unsatisfactory condition is introduced. The child welfare emphasis, of course, contemplates freeing the child from a harmful biological tie to facilitate his incorporation into a wholesome family relationship through adoption.

The current year’s cases provided support for the child’s welfare focus. This conclusion is buttressed to some extent by a Georgia Supreme Court decision, *In re M.A.C.*, which used child welfare language in upholding a termination. The case does not provide strong precedent, however. The parental conduct was flagrant enough almost certainly to have justified termination under either approach and the formulation of the standard quoted by the court includes elements of both positions.

Another court of appeals case, without discussing what rule was being applied, found the following circumstances to be sufficient evidence of deprivation to terminate parental rights under the general ground:

> [T]hat at the time of the termination hearing, appellant was incarcerated under a 20-year sentence for aggravated assault; that appellant made no attempt to legitimate the child; that appellant never contributed to the support of the child; and that neither appellant nor his family had contacted the child’s custodian regarding the child’s welfare.

A number of termination cases decided during the survey period dealt with procedural matters. In *M.A.C.*, appellant argued that the provisions for notice to out-of-state parties set forth in Georgia Code Ann. section 24A-1702 were unconstitutional on both equal protection (as between portions are at pages 5.68 to 5.74.

133. The Court quoted from Elrod v. Hall County Dep’t of Family & Children Services, 136 Ga. App. 251, 255, 220 S.E.2d 726, 729 (1975), a case generally considered to express the child welfare philosophy, as follows:

> The thread running through [cases in which parental rights were terminated on the ground that the child or children were deprived] not only manifests moral unfitness, physical abuse and abandonment by the parent or parents but also reflects a condition of frequent moves from home to home thereby lessening the probability of a meaningful parent-child relationship as well as probable deprivation of a sound environment founded in love and nurture. These cases found a substantial danger of a child suffering emotional harm as well as physical, mental, or moral harm (emphasis in original).

135. *Id*.
in-state and out-of-state parties) and due process grounds. The court found no equal protection problem, because it considered both classes to have been treated the same. As far as the due process argument that five days notice to out-of-state parties by registered or certified mail did not meet U.S. constitutional standards, the court held that appellant did not have standing to attack the statute since she had in fact received seventy days notice and her attorney had admitted at the hearing that she had been notified in ample time. Appellant’s argument that the children were residents of Pennsylvania, since that was the mother’s state of residence, was rejected by the court on the basis of the venue provisions of the Georgia Juvenile Court Code which provide that deprivation cases can be brought in the county where the child is present when the case is commenced. That this provision has been held unconstitutional under the Georgia Constitution would, according to the court, not benefit a nonresident of Georgia. The court also found, in response to a third argument advanced by appellant, that sufficient “minimum contacts” with the state of Georgia existed to justify the exercise of in personam jurisdiction over her in this proceeding. The children having been left in Georgia, appellant having received child support payments in Georgia before leaving the state, her voluntarily having turned the children over to a Georgia state agency when she left and the fact they had been in foster care in Georgia provided sufficient contacts.

The requirement that trial courts set forth findings of fact and conclusions of law in orders terminating parental rights was an issue in three cases decided by the court of appeals. In McCary v. Department of Human Resources, the trial court stated no findings or conclusions. In reversing, the court of appeals pointed out that such findings should be made pursuant to section 52(a) of the Georgia Civil Practice Act. was reversed because, although the order stated that the child was deprived and that the conditions of deprivation were likely to continue, it did not include a finding that “by reason thereof the child is suffering or will probably suffer serious physical, mental, moral or emotional harm.” Williams v. Department of

140. Appellant’s argument was based on Kulko v. Superior Court, 436 U.S. 84 (1978).
144. Id.
Human Resources was reversed for lack of factual findings supporting venue and jurisdiction over the person of the appellant. Appellant was incarcerated at Reidsville, having been sentenced at a criminal trial conducted in Montgomery County. These circumstances did not establish that he was a resident of Montgomery County for purposes of venue in the termination proceeding since criminal trials are tried in the county where the offense is committed.

The use of caseworker’s written reports at adjudicatory hearings in termination cases was considered again in Wooten v. Department of Human Resources. The Juvenile Court Code, section 24A-2201(d), provides for use of written caseworker reports at dispositional hearings if copies are made available to the parties on request and the person making the report is available for cross-examination. But this does not apply to adjudicatory hearings. Prior cases have recognized that admission of such reports into evidence at adjudicatory hearings is a technical violation of the code but have held the error not reversible where the caseworker was available for cross-examination and sufficient evidence existed to support the court’s findings of fact without considering the hearsay. The judge is presumed capable of separating hearsay from direct evidence and relying only on the direct. Termination was reversed in Wooten, however, because the caseworker although subjected to cross-examination had been on the case only a short time and reports were admitted which antedated her assignment to the case and dealt with matters about which she had no personal knowledge. Furthermore, appellant was not allowed access to all of the records taken into consideration by the juvenile court. The court found that the termination order was based on hearsay in this case.

Department of Human Resources v. Ledbetter dealt with the problem of custody assignment where termination of parental rights leaves a child with no parent. The father in Ledbetter was prepared to relinquish parental rights voluntarily and the grandparents on the deceased mother’s side sought through intervention to have the children placed in their permanent custody. Were this permitted, the grandparents would have power to consent to any future adoption and, subject to the requirement for judicial review if no adoption took place within two years.

149. Actually they were grandparents through virtual adoption of the mother who had been their niece.
years,151 would be in a dominant position with respect to adoption of the children. The argument for this result was based on the Juvenile Court Code section authorizing placement of custody in “the Division of Children and Youth or a licensed child-placing agency, willing to accept custody for the purpose of placing the child for adoption, or in the absence thereof in a foster home or take other suitable measures for the care and welfare of the child.”152 Assignment of custody to the grandparents under the last clause of this provision would, in effect, be placing the child for adoption with the grandparents. If this were done, the court would have made itself the selecting agent of an adoptive family rather than an approving agent as contemplated by the statutory scheme. The court of appeals held that this was not the result intended and that custody awards in such cases should be made according to the precedence announced in the code. In other words, first priority should be given the Department of Human Resources, the state agency charged with placement for adoption. If this is not feasible, custody should be assigned to a licensed child placement agency, a foster home, or, last priority, to “some other undesignated receiver.”153 Foster parents should not be allowed to intervene with a view toward enhancing their prospects for adoption.154 Foster parents may, of course, seek adoption through established procedures.

154. Drummond v. Fulton County Dep’t of Family & Children Services, 237 Ga. 449, 228 S.E.2d 839 (1976), was cited in this connection.