CHILD NEGLECT

The law relating to the care of infants is comparatively new to our society although the problem is as old as society itself. The common law imposed a duty on parents to protect their offspring from physical harm. This duty was a reflection of a natural duty and also one imposed by law in that anyone who takes on a duty to look after another who is incapable, has a duty to perform the task properly.

The first statutory enactments relating to the well-being of infants was the Poor Relief Act, 1601.[1] This statute was administered in conjunction with the church and its objective gave a negative approach to the welfare of any infants coming within its scope. The Act stated that children whose parents were not able to keep and maintain them should be set to work. The Act also imposed liability on certain persons to relieve and maintain relatives and extend this liability to parent and child.

Little legislation in connection with the welfare of children, followed the Poor Relief Act until the late 19th century. These were mainly relief measures and gave minimal consideration to the social welfare of the child. Orphanages came into vogue in the early 20th century. However, under present standards, the care given in these institutions would be considered as neglect.

The first venture by Manitoba into the legislative field regarding children was in 1902. "An Act for the Better Protection of Neglected and Dependent Children" is found on the statute books of that year and the administration set up under that statute has existed to the present day. The Lieutenant-Governor in Council was to appoint a supervisor of neglected children and his general duties were set out in sec. 9(a):

> "To encourage and assist in the organization and establishment, in various parts of the Province, of societies for the protection of children from neglect or cruelty and for the due care of neglected and dependent children, in temporary homes or shelters, and the placing of such children in properly selected foster homes".[2]

Section 10 of this Act defined "neglect"; a narrow and limited definition compared with the provisions of today's Act. Neglect, in 1902, comprised begging, wandering at a late hour, keeping company with criminals, desertion by parents and being convicted of petty crimes likely to develop criminal tendencies. The Act, however, did contain a provision for finding neglect if parents' vices were such that the child would be exposed to an "idle and dissolute life". There was no

1. 43 Eliz. I., C. 2.
2. R.S.M. 1902, C. 22.

provision for emotional neglect of any kind to enable apprehension. With the 1902 provisions as a basis, the definition of neglect has been widely expanded to its present form in the Child Welfare Act.[3] The existing legislation has also redefined child as "boy or girl actually or apparently under eighteen years of age".[4] This is a substantial increase from 1902 when it was fourteen years for boys and sixteen years for girls.

The accepted degree of child care is directly related to the standards tolerated by society at any given time and it is the writer's opinion that Manitoba's present legislation relating to neglected children is progressive and reflects present ideas of morality. From an examination of case law, the courts also reflect this attitude by taking more than a superficial short term approach to the problem.

The court *In Re Fisher Infants* [1948] O.R. 429, while dealing with an Act in Ontario similar to Manitoba's Child Welfare Act, stated the three functions of a judge under the Act were:

1. to determine whether a child is neglected or not within the meaning of the Act;
2. to commit the child either temporarily or permanently as a ward of the state if found neglected;
3. order maintenance payments by the director or parents or both.

With these functions in mind, it is proposed to examine part IV of Manitoba's Act (that part relating to child neglect). The case law on this section is sparse and academic articles on neglected children appear to be non-existent. As research was difficult, the writer interviewed social workers dealing with cases of neglect. The Children's Aid Society is the agency primarily responsible for apprehension and placement of neglected children in areas where it has been established; the majority of Manitoba. The Provincial Department of Health and Welfare takes jurisdiction in areas where the Children's Aid Society is not operative.

"Neglected child" is defined by sec. 19(1) which specifies sixteen instances that constitute neglect. The application of these subsections varies greatly. The more recent additions are most frequently used but the section still contains most of the categories set out in the 1902 statute .

Section 19(1)(a) deals with children whose parents are undergoing imprisonment and makes allowance for their apprehension if not being properly cared for by anyone. This section finds its main application in instances of deserted or unwed mothers who have been

3. R.S.M. 1954, C. 35.
4. Ibid., s. 2(b).

incarcerated. The general rule seems to be, apprehend temporarily until the mother is released unless the charge was one of morality in which case the courts apprehend permanently.

Section 19(1)(b) deals with children deserted by both parents or by one parent and not being properly cared for by the remaining parent. This section has little application as "not being properly cared for by the other parent" must constitute neglect in its own right and hence another section would apply *a fortiori*. The provision does, however, make desertion an absolute neglect situation. The question of what constitutes desertion and whether or not it is analogous to the desertion of one spouse remains unanswered.

Section 19(1)(c) allows apprehension if the parents have allowed the child to be brought up at someone else's expense. This section is a throwback from the old Act and no one interviewed could recall it being used.

Section 19(1)(d) specifies that children of parents who by reason of disease or infirmity are unable to care for them may be adjudged wards of the state. This section is rarely used but in instances where it has been applied, it was usually found to involve elderly guardians caring for children who were distant relatives. It does, however, find application where a lone parent is in need of temporary hospitalization and during this period, the child will not have proper parental control.

Section 19(1)(e) is a much used and all encompassing section including both physical and emotional neglect. It states:

> "a child whose *home* by reason of neglect, cruelty, or depravity, on the part of the parents, guardian, or other person in whose charge he is, is an unfit and improper place for him".

A differentiation is made here between the conduct of the parents as in the first sections and the condition of the home. This allows the conduct of other children or the parents' treatment of other children to be brought in as evidence of neglect. This is the only section of the Act allowing apprehension in the increasing number of emotional neglect cases. Emotional neglect is difficult to establish and qualified psychiatric evidence is required before the courts will order wardship. One criticism of the Act was that a specific section spelling out the mental aspect of neglect was lacking and apprehension was only possible by the wide interpretation of the section, plus a progressive attitude on the part of the Bench. The situation in this area is unsatisfactory as these are the most frequently contested cases. Also emotional disturbances can have monstrous lasting effects on the child.

In the case of *Re Ward* (1933) 3 D.L.R. 467, the problem of emotional neglect was discussed in relation to religion. Here, a Roman

Catholic society brought an action to have a child born of Roman Catholic parentage found negelected in that it had been left with Protestant guardians. It was held that:

> "it can not be held that a child of Roman Catholic parentage found in a Protestant home (converse true) must *per se* be regarded as a neglected child".

This is one of the many cases that has tried to down-play religion in areas of child guardianship; however, many regulations still remain both in statute and case law.

Town of Dauphin v. D.P.W.[5] involved a mentally ill child about to be released from an institution with the father turning down custody. For reasons not explained, the father's refusal did not *per se* amount to neglect, but psychiatric evidence that the boy should not be returned led the court to a finding of neglect, although it had not yet occurred. Schultz, J. A., quoting from *Newton v. Newton* [1924] 2 W.W.R. 840 at 849, stated:

> "the courts are never called upon to wait until physical injuries are received or minds are unhinged. It is sufficient if there is reasonable apprehension that such things will happen, and the courts should interfere before they have happend, if that be possible".[6]

If this progressive attitude is taken by all members of the Bench, the welfare of children will be greatly safeguarded, which is, after all, the paramount object of the Act.

Section 19(1)(f) deems a child to be neglected if found associating with a thief, drunkard, vagrant, prostitute or disreputable person *not* his parent. The section would appear to allow a parent to fall into the aforementioned categories without any action being taken. This is not the case, however, as the majority of such cases are covered by 19(1)(p).

Section 19(1)(g) automatically makes children found begging or receiving alms in any place, neglected. The writer could not find an instance where this section was even referred to and would suggest its deletion. It could have application where otherwise unneglected children were sent out begging as an additional source of income but the possibility of this happening today is remote.

Subsections (h) and (i) of Section 19(1), are concerned with employment of children. Children under twelve years are not allowed to peddle articles, specifically newspapers. Night shifts for children under eighteen are specifically forbidden. These prohibitions are in essence labour legislation and have no connection to the problem of emotional

5. (1957) 64 M.R. 142.
6. Ibid., at p. 154.

and physical neglect. Although no comment was passed on them, it seems these subsections are never used by agencies dealing in child neglect and serve merely as regulations for employers with minor employees. The outcome of any information laid under these sections is difficult to anticipate but it is submitted that more than mere contravention would be required to warrant a finding of neglect.

Section 19(1)(j) involves children who are convicted of crimes consented to by their parents. This is unquestionably an instance of moral neglect and although instances are rare, no question would be raised as to apprehension. This section could apply specifically to instances where children are used to assist in shoplifting although no such action has been taken recently by the Children's Aid Society. Usually, apprehension is sought under sections which can more easily be proven.

Section 19(1)(k) deems neglected, children who frequent pool rooms, bucket shops, and gambling halls. This is another example of a section retained from previous legislation, and no cases of apprehension under it could be uncovered.

Section 19(1)(l) give the court a wide scope to find a child neglected. It states that if a child by reason of inadequate parental control is growing up under circumstances tending to make him idle, dissolute, delinquent or incorrigible, he is a neglected child. It was surprising to find that this section is used very little as it would appear to have wide application. The only reasons determinable for its disuse seem to be that the family courts have not given precise definition to its terms. Because of the nebulous nature of the terms and the difficulty in proving them, workers have avoided this section in favour of others more precisely defined.

Section 19(1)(m) allows apprehension if a child without sufficient cause absents himself from home or school. This seems to imply that a child can neglect himself. This is not the case in practice, as some activity or non-activity is required on the part of the parents and as a consequence, some other section would apply.

Section 19(1)(n) appears to have wide application and is used mainly in cases of unwed mothers. The problem arises when an unwed mother of tender years refuses to relinquish her child to the agency. When an action is brought in this regard, the court must look to the physical and mental age of the mother and to the facilities and accommodation open to the child either by the mother or her relatives. There do not appear to be any set criteria in this area and each case turns on its particular facts.

There are two reported cases on the subject, both from British Columbia. In *Re Jepson and Maw* (1960) 32 W.W.R. 93, the British Columbia Supreme Court held that the child of a 14½ year old mother should be awarded to the Children's Aid Society:

> "Biological parenthood is not as important as the child's best interests."

The other decision, one of the British Columbia County Court, gives a wide berth to the civil liberties of the parent. In this instance, application was made for apprehension of the child of a 15 year old mother. Both the social worker and grandparents were in favour of apprehension and a psychiatrist's evidence showed that the mother was not capable of control. It was held that the evidence was insufficient to prove the child was in need of protection and the mother was incapable. The standard of proof required was also dealt with and the learned judge stated it was closer to that in criminal proceedings. It is submitted that the case is wrongly decided and I was assured that in Manitoba, a very young unwed mother must give a good account of herself and her situation before she will be allowed to keep her child. Also, the Manitoba experience seems to be that the civil test of preponderance of evidence is required.

Section 19(1)(o) has specific application to instances of refusal by some religious groups to obtain or allow proper medical treatment for their children. The section states, in part:

> "Neglected or refused to provide or secure, or permit to be provided or secured, proper medical, surgical or remedial care or treatment necessary for his health or well-being."

The judge in each case must decide what is "necessary for his health", but because of the controversy over these cases, procedure has been specifically spelled out in the Act. Section 24(2)A allows the judge to hear evidence from three duly qualified medical practitioners and 24(6)A allows him to waive notice provisions to parents if he feels the situation is an emergency and the child may die or suffer serious injury. One social worker writing on Jehovah Witnesses and blood transfusions states that many experts feel Jehovah Witnesses really want the court to decide to save the child's life in order that their religious principles will not be compromised.

An American decision *In re Seiferth,* 309 N.Y. 80 (1955), involved a boy of 12 years with a facial distortion correctable by an operation involving little risk. The social worker wanted it done at state expense but the boy was so indoctrinated with his father's faith-healing beliefs he did not want the operation. As the operation could wait, the court would not allow the order and the boy could wait until he was 21 years and decide for himself. The Manitoba court would in all prob-

ability have found similarly as the boy was in no physical danger. It is submitted that a case of similar circumstances would be well founded in Manitoba by interpreting the word "well-being" in Section 19(1)(o) as emotional well-being.

The only Canadian decision on point is *Forsyth v. Children's Aid Society of Kingston* (1962) 35 D.L.R. 690, the issue being whether or not to quash the apprehension order as proper notice had not been given to the parents. The motion was granted as the notice provisions were specifically set out and could not be contravened. However, the transfusion had been given and the child had regained his health. This situation could not arise in Manitoba as notice, as was mentioned above, is not mandatory in such instances, but at the judge's discretion. An article on the subject states that even wihout statutory authority, a doctor might give blood with impunity. An action in tort against the doctor would fail for lack of damage and a criminal prosecution for lack of *mens rea*.[7]

Section 19(1)(p) is one of wide application as it encompasses both physical and moral neglect. The great majority of the neglect cases before the courts involve physical neglect and superficially this would appear to be the most serious form. Until recently, instances of physcial neglect preoccupied the minds of those in the field, while emotional neglect situations were given little consideration. The trend at present is to stress both forms equally as society is beginning to recognize and admit that mental illness can be prevented and treated.

Two American decisions were found dealing with the definition of neglect: *Oregon v. Grady* (1962) 231 Ore. 65; here, the mother of the child had been imprisoned and the state made application for permanent wardship. The court felt the mother could be rehabilitated and on this ground the order was not granted. In *re Marsh* (1961) 344 S.W. 2nd, 251, wardship was petitioned on the grounds (1) the children were born of an incestuous relationship; (2) as both the parents had consented to the relationship, the home was an unfit place for the children. Wardship was granted. The writer submits that both decisions would be good law in Manitoba.

One problem that arises and is not covered by the Act, is that of non-ward care. Consequently there is no provision for looking after children temporarily without having them adjudged wards of the state. The problem arises most often when a parent must be hospitalized temporarily and adequate care is not available to the children during this period. In order that maintenance can be allotted to these chil-

7. "Parental Refusal to Blood Transfusion", Sol. J., 105:97.

dren they must first be found neglected by the court. There is a social stigma attached to this for both the parent and the child plus unnecessary administration. Also, there is no intent on the part of the parent to neglect his children and some more suitable arrangement should be instigated.

Section 19(2) allows for the apprehension of children who are already under the care and custody of the Director. This has specific application where foster parents are found to be neglecting their wards.

Sections 20 - 23 deal with the physical act of apprehension. Although sec. 21 allows anyone, after complying with certain formalities, to apprehend children they feel are neglected, in practice, all apprehension is done by either Provincial social workers or workers for the Children's Aid Society. Special provisions are set out for those people as well as police officers, school attendance officers and officers of Juvenile Court. None of them require warrants to take a child into custody but merely reasonable and probable grounds to believe them neglected. A recent amendment gives these officers authority to enter premises to take custody without a warrant if they believe the child has been left alone.

Section 21(1) states that anyone can lay an information on oath before a judge and if the judge feels he is acting in the best interest of the child and has reasonable and probable grounds to suspect neglect, that judge may issue the informant with a warrant for the apprehension of the child. Subsection (2) allows the person so authorized to enter a building to remove the child. Subsection (3) allows the warrant to be made out without including the child's name therein. This does not mean that blanket warrants can be issued but allows apprehension when a neglect situation is recognized but the party is not familiar with the child.

Section 22 prohibits the detention of apprehended children in jails, police stations, or any area with adult prisoners. This provision protects the child and insures that he is not treated as a criminal. In the interim period prior to appearance before a judge, the children are cared for either in a hospital or approved foster home. The Children's Aid Society has set up a receiving home to care for children during this period because foster homes are not always available on short notice. The home in Winnipeg has a capacity of twenty-five and is staffed by competent people under the direct supervision of the Children's Aid Society. This home is relatively new and was begun as an experiment in solving the problem of immediate care. It has had unquestionable success and it is expected more will open in the future.

Section 23 imposes upon the person apprehending, the duty to notify the Director of Public Welfare of the apprehension and to give full particulars with respect to the child.

Section 24 deals with the court's proceedings and orders once a child is brought before a Family Court Judge. Once the Director has knowledge of an apprehension, he must, by the Act, notify the parents promptly where possible, with the exception of Sec. 24(6)A discussed previously. The writer was informed that before a hearing can take place, the child must be identified by the parents or relatives. If this is not possible, it must be proven that an exhaustive search for them has been carried out.

Section 24(1) also gives to the Director or an executive officer of a society a discretion. He may either return the child to his parents or bring him before a judge for examination. It would appear that the court's function is usurped by delegating the power of not finding neglect to an administrative officer. In practice, this is not the case as virtually all apprehensions are made by persons acting for these administrators and it would be ludicrous for them to return the children to their parents. In practice then, all apprehended children appear before the judge.

The appearance before a judge must be within four days of apprehension. The hearing can be remanded but only by a judge's order and therefore a judge is always informed of the case within four days. In *Re Kowaliuk* (1933) 41 M.R. 463, the child was not brought forward within the four days and an action of habeas corpus was commenced. The court held that the delay did not deprive the magistrate of jurisdiction although the habeas corpus action was well brougt. In *Re Perepolkin* (1957) 8 D.L.R. 297, the British Columbia court had to decide if the child had been lawfully committed. Here, the court held:

> "Unless there is lawful committal, the court has no power, on habeas corpus, to exercise its discretion. While the benefit of the child is the policy of the Act, there is a more fundamental question of freedom of the individual involved."

The most important function of the court under Sec. 24(1) is to ascertain whether or not the child is neglected within the meaning of the Act. There are no set criteria or guide lines by which this decision is made but all the facts must be heard from all concerned. In *Re Perepolkin* another issue was whether or not a proper examination had been conducted. The child was merely asked whether he had been attending school and his answer was "no". Apprehension was ordered but on appeal, the order was reversed as this did not constitute a proper examination. The children themselves may be questioned

during the hearing and the consideration given their wishes varies greatly depending on their age and the particular circumstances. In *Re Allen and Allen* (1961) 26 D.L.R. 653, the British Columbia court had this to say regarding the wishes of the child:

> "the welfare of the infants when in issue is not to be confused with the wishes or will of the infants."

The governing considerations in neglect cases were set out in *Hepton v. Moat* [1957] S.C.R. 606:

1. welfare and happiness of the infant is the paramount consideration.
2. the welfare of the child can never be determined as an isolated fact as if the child was free from natural parental bonds entailing moral responsibility.
3. prima facie natural parents have a right to the custody of their children.
4. apart from statute, parents can lose that right only by abadoning the child or so misconducting themselves that in the opinion of the court, it would be improper that the child should be allowed to remain with them.
5. effect must be given to the parents' wishes unless very serious and important reasons require that, having regard to the child's welfare, they must be disregarded.

Once the examination has been concluded, the judge has four choices:

1. find the child not neglected and order him returned to his parents;
2. find the child neglected and order him returned to his parents under supervision of the Society;
3. find the child neglected and order him committed temporarily to the care and custody of the Society;
4. find the child neglected and order him committed permanently to the care and custody of the Society.

Three cases have revealed themselves on the subject of orders of the judge. In *Re L* [1962] 1 W.L.R. 886, the mother, about to set up an adulterous relationship, left home taking her two children. The father, because of financial difficulties, applied to have them made wards of the state with custody to him. The mother continued to give adequate care to the children in her new home. At first instance, the application was dismissed but on appeal, Denning, J. A., held:

> "Although the welfare of the child is paramount, it is not the sole consideration. The mother could not break up the home and take the children, her conduct must be considered. It was a matter of simple justice that the father should have control."

In re *Edwards and Edwards* (1960) 23 D.L.R. 662, the spouses were separated and the husband had custody of the children. Since he could not maintain them, he gave them up to the Children's Aid Society and they were subsequently found neglected. The mother who was living an adulterous relationship appealed the order on the grounds:

1. that she is providing a good home and is willing and able to provide for them;
2. if they are neglected the judge should have allowed them home to her under supervision.

The Ontario Court of Appeal held that whether the mother was a fit person was irrelevant as the father had custody.

In *Re Hrivnoh* [1963] 2 O.R. 729, custody was awarded against an infant mother but when the application was heard, she had reached her majority. No guardian ad litem had been appointed on the mother's behalf. The court held the validity of the order should be determined on the basis of whether it was for her benefit. Making the child a ward was for the mother's benefit but the order against her for maintenance was not and should be set aside.

Orders for custody of children of unwed mothers are usually permanent unless the girl is over eighteen and can convince the court she merely needs time to re-establish herself. These cases appear frequently and the welfare of the child is stressed to a greater extent than the wishes of the mother.

If the parents contest the case, the usual procedure is to make temporary orders unless the situation is beyond correction. The attitude adopted both by workers and the courts seems to be that the best place for children is in the family unit. The trend now is to find the children neglected but return them to the parents with conditions that the situation must improve. The number of instances of permanent custody are also on the decline. If the family can be improved this is undoubtedly the best place for the child.

Section 24(6) states that before a committal order is made, fourteen days' notice must be given, where possible, to the parents.

Section 25 allows the Society to apply to the court for an extension of a temporary order and this is made at the judge's discretion.

Section 27 deals with the guardianship of children found neglected and the right of the parents to appeal to Queen's Bench in instances of permanent wardship. Sec. 33 allows an appeal from an order or refusal to make an order to a County Court judge. It would seem that the Act specifies two appeals in the case of permanent wardship while it gives only one for temporary orders.

A confused situation arose in *Re Hallas v. Children's Aid Society of Winnipeg,* (1960) 33 W.W.R. 506. The Juvenile Court judge declared a child (a Roman Catholic), a permanent ward of the Children's Aid Society. They, in turn, boarded him in a Protestant foster home. When adoptive parents were found, the foster parents refused to give the child up to the Society. The Society proceeded by habeas corpus which was opposed by the foster parents in addition to applying to have the child made a ward of the court. The foster parents' claim was defeated and the court held:

> "Where a juvenile court judge has granted the permanent care and custody of a neglected Roman Catholic child to a children's aid society, for another court to grant permanent care and custody to Protestant foster parents with whom the child has been placed by said society, would be both to treat the juvenile court judge's order as a nullity, even if it be shown that it would be in the child's best interest".[8]
>
> "Where under sec. 27 of said Act an order for permanent guardianship of an infant until he is twenty-one has been made, unless and until a natural parent of said child applies under said section as provided therein, the courts have no power to interfere with said section which precludes dealing with the child's guardianship except as provided therein".[9]

On application under sec. 27 to Queen's Bench, sec. 137 gives that court discretion to refuse the application if the parent has abandoned or deserted the child. It also contains a wider clause, "or otherwise conducted himself" that gives the court wide discretionary powers to refuse.

In *Re D'Andrea* (1916) 37 O.L.R. 30, a father brought an action to have his child, a temporary ward of the state, returned. Held:

> "The onus was on the father to show that the removal of the child from the foster parents would enure to her welfare, and that onus has not been discharged. The court ought not lightly to interfere with the status quo."

There does not appear to be any time limitation on appeals to the County Court but sec. 27(3) a and b. place a restriction on appeals to Queen's Bench in instances of permanent wardship. This appeal must be brought within one year of the making of the order or before the child has been placed for adoption, whichever first occurs. An anomaly appears because of the unlimited right of appeal set out in sec. 33. It would be interesting to see if a permanent order could be appealed after one year of placement for adoption by invoking sec. 33.

The problems of termination of guardianship were dealt with in *Re Van Allen* [1953] 3 D.L.R. 751. The Act sets out that the society shall be guardian until the expiration of a temporary order or in the case of a permanent order, until the child becomes twenty-one. This seems clear. However, sec. 2(b) defines "child" as anyone actually or apparently under the age of eighteen years. Why should the Act ignore neglected persons over eighteen yet maintain guardianship until twenty-one if they were neglected before eighteen? The *Van Allen* case dealt with this problem but the age specified in that Act was sixteen as opposed to eighteen. The court held:

> "Proceedings brought initially when a child is under sixteen years and resulting in a finding that he is a neglected child and an order for temporary custody does not come to an end when the child reaches sixteen and may be continued thereafter by another application either before or after the expiry of the temporary custody order. It is the age of the child immediately before being found neglected to which age limitations in the Act apply."

8. **Re Hallas, Ante, at pp. 507-508.**
9. **Ibid., at p. 508.**

Logically, it would seem that the permanent custody orders should terminate at eighteen unless special considerations such as further education were involved.

Section 28 deals exclusively with the maintenance of neglected children. The judge has the power to order maintenance against the Director of Welfare and/or the parents or parent of the child. The maintenance order is regulated by an advisory committee to the Department of Welfare and the maintenance order must correspond to the scale layed down by this committee.

Under the old Act, maintenance orders were made against the municipalities in which the child was resident. This system was inadequate in two aspects. First, and most important as far as the children were concerned, municipalities would not report cases of neglect coming to their attention because it meant spending their taxpayers' money. The situation has completely reversed with the new provisions and municipal governments are the most enthusiastic bodies bringing cases of neglect to the attention of the Children's Aid Society. This situation resulted as many children who they feel are neglected are also on public assistance, a responsibility of the municipal governments. By having these children apprehended, there are less mouths to feed on the municipal welfare scheme.

The second drawback of the old provision was the enormous volume of unnecessary litigation between the municipalities and the agencies over residency, the basis on which municipalities took jurisdiction. The Provincial Government, fountain of all monies for social welfare schemes, quite rightly decided to make the payments directly to the agencies. The impossible provisions of the old Act are exemplified in *Director of Child Welfare v. R.M. of Cartier* (1930) 2 W.W.R. 347. Here, the child, previously found neglected, had never resided anywhere in compliance with the Act. The residence of the mother had been in an institution and the child's residence could not be established through her. It was held, under the wording of the Act, maintenance could not be awarded against any municipality.

Orders against the parents for contribution to maintenance appear to be made in relation to their ability to pay. Normally, this ability does not exist and parental maintenance, although not rare, is infrequent.

In *Wikstrom v. Children's Aid Society of Winnipeg* (1955) 63 M.R. 272, a father was being charged maintenance for the illegitimate child of his wife. The illegitimacy had been proven by evidence of blood tests. The court held he was not responsible to support by giving an equitable interpretation to sec. 3 of the Wives and Children's Mainte-

nance Act.[10] This section states that a husband is responsible to support the children of his wife. This, I submit would also apply to the Child Welfare Act provisions regarding maintenance.

In *Children's Aid Society v. Brooklands* (1946) 54 M.R. 384, a common law union had created three children. The legal husband of the mother was alive but the mother and common law husband were both deceased. The children were found neglected and on an action for maintenance against the husband, it was held he was not responsible. The responsibility rested with the municipality as they were orphans.

The Act imposes a penalty for neglecting or refusing to make the maintenance payments. Section 28(9) provides that in default of maintenance a term of imprisonment of not more than six months may be imposed. Instances of incarceration as a result of default are rare indeed. The Children's Aid Society informs the provincial government of defaults but does not prosecute itself. Its main function is the welfare of children and prosecution of the parents does not come within these bounds. If the provincial authorities do not prosecute, and this seems to be the case, the whole idea of maintenance by the parents depends on the parents' willingness to pay.

The Child Welfare Act while providing for the welfare of children, also provides penalties for persons involved in child neglect. The strongest of these sections is 127 that allows for a maximum term of imprisonment of five years. Anyone who neglects, abandons, etc., having custody of the child so that it is likely to suffer or have injury to its health, falls within the section.

In *R. v. Chief* (1964) 44 D.L.R. 108, it was argued that the section was ultra vires the province because it was criminal law. This argument was based solely on the basis of a five year sentence. The Manitoba Court held:

> "The Act does not encroach on the field of criminal law. Its purpose is not the creation of offenses but to aid the better enforcement of the Act and to secure the better treatment of children."

The case of *Re Child Welfare Act* (1963) 42 W.W.R. 236, was an appeal from a conviction under sec. 127. The appeal was brought on the grounds that the charge did not specifically identify the conduct complained of. It charged only "neglect likely to cause the child suffering or injury to his health". It was held:

> "The Act of neglect is a course of conduct or a pattern of behaviour rather than the doing of any particular act."

The appeal was dismissed.

10. R.S.M. 1954, C. 294.

The case of *Re Gutsch* (1959) 19 D.L.R. 572, was another appeal on the validity of a section similar to 127 in Ontario. The Ontario section also included a maintenance provision, and it was urgued that Federal legislation occupied the same field. If this were the case, the Federal Act would prevail. It was held:

> "It seems to me it is now too late to suggest that the province has no power to pass legislation which in pith and substance deals with the maintenance of children and enacts a penalty to enforce the obligation created. It is not a law which merely creates a new offence – it creates the offence for the purpose of enforcing the public duty of a parent to pay for the maintenance of his children."

It seems then, the provincial legislation is valid but its use in Manitoba is not great. No reason was given but the information received indicates all prosecutions by the Children's Aid Society are brought under sec. 128(e) which provides for a maximum fine of two hundred dollars or six months imprisonment or both. To be found guilty under sec. 128(e), the person must willfully contribute to a child becoming a neglected child. The child does not have to be neglected *per se* but "likely to be made neglected".

Besides the prohibitions and penalties set out by the Provincial Act, the Federal Government has included sections dealing with the mal-treatment of children in the Criminal Code.[11] Sections 157, 186 and 189 all deal in some way with the neglect of children in the broad sense. There are few reported cases dealing with these sections and those that are reported deal mainly with their constitutional aspects.

Section 157 encompasses moral neglect and anyone participating in any form of vice that would render the home an unfit place for the child could be convicted. *Re Edwards and Edwards* (1960) 23 D.L.R. 662, dealt with this section in part. Here, the appeal court held that just because sexual immorality was proved, a conviction did not immediately follow. This proof merely created a rebuttable presumption.

Section 186 imposes a legal duty on parents, foster parents and guardians to provide the necessaries of life to a child under sixteen. It is interesting to note that this provision is less stringent than sec. 127 of the Child Welfare Act which provides for a penalty of up to five years. The responsibility is also more encompassing as it extends to children eighteen years and under.

Section 189 imposes a punishment of two years maximum for abandoning or exposing a child under ten years so that its life or health

11. R.S.C. 1953-54, C. 51.

is likely to be permanently injured. Once again, the Child Welfare Act imposes more stringent requirements on the residents of Manitoba.

Prosecutions under the Criminal Code provisions are usually brought by local police forces. These charges are laid during the course of normal investigation or after complaints from private citizens. Although the police lay charges, they inform the agencies of the situation immediately in order that appropriate care can be given to the children. Prosecutions are not common in the field of child neglect but it must be recognized that someone involved could be subject to prosecution both under federal and provincial law for the same offence.

The field of child neglect is comparatively new to our law and because of this, and the changing attitudes of society, no rigid rules or guidelines have been laid down. The attitudes taken by those in the field seem to be the governing factors as to what specifically amounts to neglect. The situation, at present, in Manitoba seems to be adequate and working smoothly but it must be remembered that this could change drastically if reactionary individuals are appointed to the bench or employed by the agencies.

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