II. The Legal Definition of "Child Abuse"

To understand how to prove that a child is abused, it is necessary to understand the legal meaning of "child abuse." Thus, this section describes the Family Court's jurisdiction over child abuse. Subsequent sections describe the patterns of proof used to establish that a child falls within the Court's jurisdiction.

The Reason for a Separate Definition

Despite our idealized view of family life, parents can be violently assaultive to their child. Accounts of physical battering are found throughout recorded history.[1] Organized efforts to protect endangered children are likewise not of recent origin. The first Society for the Prevention of Cruelty to Children, for example, was incorporated under the laws of New York in 1875.[2] However, until the late 1960's, there was a tendency to assume that child battering was a minor problem that did not require sustained or focused attention.

In New York State, complacency over the plight of the physically abused child came to an abrupt end in 1969, when the brutal murder of a young girl by her parents gained intensive media coverage. For more than a month, New York newspapers ran numerous front page stories about Roxanne Felumero's death, and the tragic mistakes of social service agencies and the family court that led to it. Roxanne was returned from a foster home to her parents even though she had been brutally beaten while with them, and despite her foster parents' objections. An Appellate Division Committee investigated the case and identified many weaknesses in the handling of child protection cases. The Committee concluded: "If the Family Court and the complex of public and private agencies operating within it had functioned more effectively, Roxanne Felumero would probably not have met her tragic death."[3] But the most important effect of Roxanne's death was the addition of Article 10 to the Family Court Act, which the popular press dubbed the "Children's Bill of Rights."

Passed unanimously by the Legislature, and promptly signed by the Governor, the new Article 10 created a new definitional category of court jurisdiction: the "abused child." Prior to the enactment of Article 10, the concept of the abused child was mentioned nowhere in the Family Court Act, even though cases of serious injury to children were an important part of the court's jurisdiction and case load. Under Article 3, cases of "child abuse" were treated as simply a form of "neglect," which was the intent of the drafters of the original Act. The death of Roxanne Felumero convinced the Legislature that cases of child abuse were not receiving the prompt and careful consideration they required. In the words of the Assembly Select Committee on Child Abuse: "No problem facing the urban Family Courts . . . is more deplorable than that of overburdened and overcrowded court facilities.. The backlogs, delays, and rushed proceedings this causes can have tragic consequences if, as a result, an adequate inquiry into a child's safety is postponed or precluded."[4]

Therefore, in establishing the definitional category of the "abused child," the Legislature did not seek to enlarge the court's substantive definition; rather, it sought to identify those children (previously handled as "neglected children") who were in greatest immediate danger and to accord to their cases the needed priority. Other sections of the Family Court Act mandate, for example, a special "child abuse part" for the expeditious and expert handling of cases;[5] more rapid service of summonses and warrants and closer judicial monitoring if they go unserved;[6] a preliminary hearing to determine if the child's safety requires that he be removed from the home pending trial;[7] and calendaring preferences in the scheduling of hearings.[8]

1. *See, e.g.*, Radbill, "A History of Child Abuse and Infanticide," in *The Battered Child*, p. 3 (R. Helfer & C.H. Kempe, eds. 1974).
2. An Act for the Incorporation of Societies for the Prevention of Cruelty to Children, 1875 N.Y. Laws 114, ch. 130.
3. Report of the Judiciary Relations Committee of the Appellate Division, First Department, *New York Law Journal*, June 30, 1969, p.1, col. 4.
4. New York State Assembly Select Committee on Child Abuse, *Report*, p. 256 (1972).
5. Fam. Ct. Act §117(a)(1983).
6. *Id.* at §1035(a), 1036(a) & 1037(a).
7. *Id.* at §1027(a).
8. *Id.* at §1049.

There are three definitional categories within the concept of "child abuse:" (1) "seriously harmful" parental conduct, (2) the child in danger of serious injury, and (3) sexual abuse.

"Seriously Harmful" Parental Conduct

The infliction of serious injury is child abuse. Subdivision 1012(e)(i)(1983) defines an abused child as a child under eighteen whose parent or other person legally responsible for his care inflicts a physical injury which causes "death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ."

No serious injury is required. The parent's conduct, however, need not have caused a serious injury for it to be considered abusive. The parent's conduct falls within subdivision 1012(e)(i) if it resulted in an injury which "creates a substantial risk" of serious injury. Furthermore, even when the parent's conduct did not actually injure the child, if the conduct was capable of injuring the child, then it falls under subdivision 1012(e)(ii) because such conduct "creates . . . a substantial risk of [serious] physical injury." Thus, the existence of court jurisdiction is judged by the *potential* effects of the parent's conduct on the child as well as its actual effect.

The rationale for jurisdiction over potential harm is simple. A child is in serious danger if the parent did something whose reasonably foreseeable consequence could have been the child's serious injury – but serious injury was averted by the intervention of an outside force, or perhaps simple good luck. A parent shoots at a child, but misses; a parent throws an infant against a wall, but by some good luck, the child is not injured; a parent begins to brutally beat a child, but a relative or neighbor intervenes. Although, through some good fortune, such children did not suffer serious injury, it is fair to predict that what the parents once did, they will do again. As the Supreme Court of California said in the landmark case of *Landeros v. Flood*:

> Experiences with the repetitive nature of injuries indicate that an adult who has once injured a child is likely to repeat. . . . [T]he child must be considered to be in grave danger unless his environment can be proved to be safe.[9]

Subdivision 1012(e)(i) and this aspect of subdivision (ii) are limited to parental conduct which was *itself* sufficiently harmful to cause serious injury or *to be capable of causing serious injury*. For convenience and clarity, this monograph calls such conduct "seriously harmful" parental conduct. (The criminal law would call such conduct an "attempt" or "reckless endangerment." However, such terms are not appropriate to child protection because they imply a higher level of intent than is necessary.)

Under section 1012(e)(i), the injury's seriousness is gauged by its effect (or probable effect) on the child's emotional as well as physical health. *Matter of Shane T* [10] involved an unusual application of this subdivision. The Court held that serious physical injury could be inflicted by repeated verbal assaults. The father constantly called 14 year old Shane a "fag," "Faggot," and "queer." The court found that, as a result of these verbal assaults, the boy suffered "stomach pain" which satisfied this section's definition of physical injury. The court went on to find that there was a substantial risk of protracted impairment of the child's emotional health:

> The behavior of this respondent father is as serious a form of abuse as if he had plunged a knife into the stomach of the child. In fact, it is probably worse since the agony and heartache suffered by Shane has already assailed him for several years and constitutes a grave and imminent threat to his future psychological development.[11]

Heartfelt concern for children leads many people to believe that all minor assaults – whether or not they are "seriously harmful" – should be grounds for intervention. This is a mistake. Even though its purpose is to protect endangered children, child protective intervention is a major intrusion on parental rights which can often do more harm than good. It should be limited to situations in which the need for intervention is supported by clear and sufficient evidence.

Almost all parents have physically or verbally lashed out at their children during times of unusual stress; all parents have at least some

9. 17 Cal. 3d 399, 412, n. 9, 131 Cal. Rptr. 69, 551 P. 2d 389, 395 (1976).

10. 115 Misc.2d 161, 453 N.Y.S.2d 590 (Fam. Ct., Richmond Co., 1982).

11. 453 N.Y.S.2d at 594.

moments when they neglect to meet the needs of their children. (If actual harm results, it is usually minor; if it is more serious, it is usually transitory.) According to data collected by the National Incidence Study, less than one in five minor assaults or other examples of poor child rearing will ever grow into anything resembling child abuse or child neglect.[12] Unfortunately, there is no way of knowing which will become more serious with the degree of assurance needed to justify court intervention.

This does not mean that situations of less damaging child care do not merit social action. Many would benefit from specific social and community services. But these services should be offered for the parent's voluntary acceptance – or refusal.

"Reasonable" Punishment

"Reasonable" corporal punishment is not child abuse. Nor is it child neglect.[13] New York, like all other states, recognizes the right of parents to discipline their children – so long as the punishment is "reasonable" or not "excessive."[14] As New York Family Court Judge Nanette Dembitz explained: "physical discipline is considered part of the parents' right and duty to nurture his child."[15] Such beliefs run deep in our culture; the Bible admonishes: "He that spareth the rod hateth his son, but he that loveth him chasteneth him betimes."[16]

By definition, a parent who intentionally engages in "seriously harmful behavior" is not engaged in "reasonable" corporal punishment. A child's misbehavior, no matter how egregious, never justifies the purposeful infliction of seriously hurtful or injurious punishment.

> Any injury that requires medical treatment is outside the range of normal corrective measures. One bruise may be inflicted inadvertently; however, old and new bruises, bruises on the face, or bruising in a child less than one year of age represents abuse. In addition, any punishment that involves hitting with a closed fist or [a dangerous] instrument, kicking, inflicting burns, or throwing the child obviously represents child abuse regardless of the severity of the injury sustained as a result.[17]

In less extreme cases, though, it is often difficult to distinguish between appropriate parental discipline and child maltreatment. In part, this reflects an underlying disagreement within our society. Many people feel that some misbehaving children can be controlled only through corporal punishment and they approve of its use (so long as it does not cause serious injury). Other people, though, feel that all forms of corporal punishment, no matter how moderate, are emotionally harmful to children, and should be considered maltreatment.

Merely because an outsider might disapprove of the parent's conduct does not make it "excessive." Only a parent who has overstepped this legal right to discipline a child should be considered abusive (or neglectful).

Unfortunately, there are few absolute rules about where reasonable discipline ends and

12. U.S. National Center on Child Abuse and Neglect, *National Study of the Incidence and Severity of Child Abuse and Neglect*, p. 18, Table 4-1 (DHEW 1981).

13. A physical assault by a parent can be either abuse or neglect, depending upon the degree of harm or threatened harm that results. To constitute abuse under subdivisions 1012(e)(i) and (ii), the harm must be "death or serious or protracted disfigurement or protracted impairment of physical or emotional health or protracted loss or impairment of the functions of any bodily organ," or a substantial risk thereof. Because of this high threshold of harm needed to label an assault as abusive, excessive corporal punishment, which does not result in serious injury or the substantial risk thereof, becomes a form of *neglect*. (The definition of neglect in subsection 1012(f)(i)(1983) requires merely the "impairment" of the child's physical, mental, or emotional condition.) See *In the Matter of Rodney C.*, 91 Misc.2d 677, 682, 398 N.Y.S.2d 511 516 (Fam.Ct., Onondaga Co., 1977), holding that the child was "neglected" rather than "abused" because "the court does not find that the punishment was excessive as to be life threatening or likely to cause permanent disfigurement."

14. By expressly mentioning "excessive corporal punishment," subdivision 1012(f)(i)(B)(1983) implicitly authorizes "reasonable corporal punishment." In addition, Penal Law § 35.10(10)(1) (1975) allows a parent to "use physical force, but not deadly physical force, upon [his child] when and to the extent that he reasonably believes it necessary to maintain discipline and to promote the welfare of such person."

15. Dembitz, "Child Abuse and the Law – Fact and Fiction," 24 *Record of the Bar Association of the City of New York* 613, 620 (1969).

16. Proverbs 13:24.

17. McNeese, M., & Hebler, J., *The Abused Child: A Clinical Approach to Identification and Management*, p. 3 (Clinical Symposia, Vol. 29, No. 5, 1977, CIBA Pharmaceutical Company, Summit, New Jersey 07901).

maltreatment begins. As Chart #2 indicates, in deciding whether a particular punishment was "reasonable," the court must assess a number of factors, including: the child's age and physical and mental condition; the severity and location of the injuries; the parents' behavior and motives; and the surrounding circumstances.

There are many borderline cases in which people will disagree about whether a particular punishment crossed the line between reasonable discipline and maltreatment. However, in most cases, the application of the factors cited in Chart #2 will greatly facilitate decision-making. For example, in one widely cited case, *In re Rodney C.*, the court held that twenty-six marks on the back of a seven-year old boy with emotional difficulties, marks which were visible three days after the beating was administered, were evidence of immoderate and unreasonable corporal punishment. The court also held that "punishment administered to an 11-year-old boy who is undergoing [emotional] therapy; . . . punishment which requires him to hold his ankles and keep his knees straight for variable lengths of time; punishment which causes him to scream [and to vomit], is a punishment beyond the child's endurance and a punishment beyond his capacity to understand as correction . . . [and] a degrading punishment as well."[18]

As in the case of corporal punishment, disciplining a child through verbal or emotional punishment is permitted, but only if it is not "excessive." Hence, locking a child in a closet for days at a time would be "excessive" and therefore proscribed, while the withholding of privileges ordinarily would not be considered excessive. Although such issues hardly ever are discussed in the caselaw or statutes, South Carolina's Child Protection Act of 1977 codified the concept of reasonable withholding of privileges:

> Provided, nothing herein shall be construed as prohibiting a person responsible for a child's welfare from imposing reasonable restrictions deemed necessary by such person for the intellectual, psychological or emotional well-being of the child by any of the following means or methods: (1) restrictions relating to attendance at amusements, concerts, social events or activities, or theaters; (2) restrictions on amount of exposure to secular activities such as television, extra-curricular school activities or community recreational activities; (3) instructions, directions, or mandates relating to public or private elementary or secondary education or attendance at

Chart #2

FACTORS IN DECIDING WHETHER PUNISHMENT WAS "REASONABLE"*

- *Was the purpose of the punishment to preserve discipline or to train or educate the child? Or, was the punishment primarily for the parent's gratification, or the result of the parent's uncontrolled rage.*
- *Did the child have the capacity to understand or appreciate the corrective purpose of the discipline? (Very young children and mentally disabled children cannot.)*
- *Was the punishment appropriate to the child's misbehavior? (However, no matter how serious a child's misbehavior, extremely hurtful or injurious punishments are never justified.)*
- *Was a less severe but equally effective punishment available?*
- *Was the punishment unnecessarily degrading, brutal, or beastly in character, or protracted beyond the child's power of endurance?*
- *If physical force was used, was it recklessly applied? (Force directed toward a safe part of the body, such as the buttocks, ordinarily is much more reasonable than force directed toward vulnerable organs, such as the head or genitalia.)*

*Quoted from: Besharov, D., *Reporting Child Abuse and Neglect* (in press, 1984).

18. 91 Misc. 2d 677, 682, 398 N.Y.S. 2d 511, 516 (Fam. Ct., Onondaga Co., 1977). *See also Monroe v. Blum*, 90 A.D.2d 572, 456 N.Y.S.2d 142, 144 (3rd Dept., 1982), finding excessive corporal punishment based on evidence of "striking the child with a plastic covered bicycle cord, striking her with a belt and throwing milk on her "

churches or other places of religious worship.[19]

As a general rule, emotional maltreatment is treated as a form of child neglect, not abuse.[20] It becomes abuse only if there is a danger of serious physical or emotional injury.[21]

The Child in Danger of Serious Injury

Subdivision 1012(e)(ii)(1983) dispenses with the requirement discussed above that there actually has been a physical injury. A child may be considered abused if the parent "creates a substantial risk" of a physical injury, which in turn "would be likely to cause death or serious" injury.

As mentioned above, under this subdivision, a child may be considered "abused" if the parent engaged in "seriously harmful behavior" – even if no injury resulted. But this subdivision goes further. Under it, a child may be considered "abused" before the parents have done anything harmful to the child. Jurisdiction is established upon proof that the parent's future behavior will be seriously harmful to the child. No prior overt parental behavior (such as shooting and missing) is required, making this a proactive authorization for state intervention. On this point, the terminology of the Family Court Act is somewhat misleading. Calling a child an "abused child" suggests that the abuse has already happened, when, under this subdivision, all that needs to be established is that the child is sufficiently "endangered." That is why reform efforts such as the IJA/ABA Juvenile Justice Standards Project have proposed that this entire area of court jurisdiction be relabeled "child endangerment."[22]

Such jurisdiction is an essential tool to protect endangered children. Nevertheless, decisions under this subdivision must be recognized for what they are – *predictions*. The question before the court is whether the parent's *future behavior* is likely to be sufficiently harmful to the child to justify taking preventive action. Such predictions are no more than probabilistic assessments based on our admittedly uncertain ability to understand the forces which shape future human behavior, and they make the court's decision-making process even more prone to error. Thus, this uncertain area must be entered with great care, lest concern over the welfare of children result in the unjustified violation of parental rights. The need to focus the parties' and the court's critical attention on the fact that such predictions are being made was the prime reason that this proactive jurisdiction was placed in a separate subdivision.

Extreme cases of parental brutality and neglect make society anxious to protect as many children as possible from future maltreatment. Thus, there is a tendency to believe that judges and caseworkers can identify potentially abusive or neglectful parents by making sophisticated psychological assessments. But they cannot. Besides the limitations imposed by large caseloads and often poorly trained staff, such refined predictions are simply beyond our reach.[23]

Despite years of research, there is no psychological profile that accurately identifies parents who will abuse or neglect their child in the future.[24] "Indeed, the most detailed and fully developed of these profiles designated some 60 percent of the general population at risk for becoming involved in child abuse."[25] As Dr. Ray Helfer has concluded after years of research on the subject, "the ability to separate out a distinct

19. Child Protection Act of 1977, South Carolina Code §20-10-20 (G) (1)-(3) (Supp. 1980).

20. *See In the Matter of Leif Z.*, 105 Misc.2d 973, 431 N.Y.S.2d 290 (Fam. Ct., Richmond Co., 1980), substituting a finding of neglect in a PINS proceeding based on the parent's emotional maltreatment of the child.

21. *See, e.g., In the Matter of Shane T.*, 115 Misc. 2d 161, 453 N.Y.S. 2d 590 (Fam. Ct., Richmond Co., 1982), discussed at *supra* n. 10.

22. IJA/ABA Juvenile Justice Standards, *Child Abuse and Neglect* 48 (Tentative Draft 1977). *See also* Penal Law § 260 10 (1980), entitled "endangering the welfare of a child."

23. *See generally* Cocozza, J., & Steadman, H., "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence," 29 *Rutgers Law Review* 1084(1976); Cocozza, J., & Steadman, H., "Some Refinements in the Measurement and Prediction of Dangerous Behavior," 131 *American Journal of Psychiatry* 1012 (1974).

24. *See generally* U.S. National Center on Child Abuse and Neglect, *Review of Child Abuse Research: 1979-1981*, pp. 42-105 (DHHS 1981).

25. Garbarino & Stocking, "The Social Context of Child Maltreatment," in Garbarino, J., Stocking, S.H., and Associates, *Protecting Children from Abuse and Neglect*, p. 7 (1981), referring to Helfer, R., *Report on the Research Using the Michigan Screening Profile of Parenting* (MSPP), Washington, D.C.: National Center on Child Abuse and Neglect, 1978.

group of parents (or future parents) who will *physically* abuse or serious *[sic]* neglect one or more of their children will probably never be possible."[26]

Cast in this light, court intervention cannot be based on a psychological diagnosis that an individual is a "high risk" parent who may maltreat a child in the future. A more trustworthy measure is needed in order to justify the imposition of home supervision and treatment services on unwilling parents, let alone to justify the child's placement in protective custody or long term foster care. At the present time, there are only four grounds upon which a reasonably reliable prediction of future maltreatment can be based:

- The parent's severe drug or alcohol abuse,
- The parent's past abuse (or neglect) of another child,
- The parent's severe and demonstrable mental disability, and
- The parent's inability to care for a newborn.

Each of these grounds for predicting future child abuse could be the basis of an adjudication under Family Court Act §1012(e)(ii). However, recognizing that such an adjudication would be a formal prediction of future child abuse, and in keeping with the general judicial reluctance to label parents "abusive," judges rarely use the authority granted by this provision. (In fact, this author has found no reported case applying it.) Instead, when confronted with evidence of likely future abuse, most judges will make a finding of *child neglect* (because the child also is "in imminent danger" of physical, mental, or emotional impairment).[27] For this reason, such cases, and this ground for preventive court intervention, are not discussed in this monograph.[28]

It is important to note, though, that each of the foregoing conditions also can – and should – be used to bolster the evidence in support of past abuse. For example, knowledge of a parent's past abuse of another child can be crucial in assessing the significance of apparently inflicted or ambiguous injuries.[29] Therefore, when appropriate, these conditions are discussed within the direct or circumstantial proof of past child abuse.

Sexual Abuse

Subdivision 1012(e)(iii)(1983) adds "sex offenses," as defined by the Penal Law, to the definition of child abuse. "Sex offenses" are defined by the Penal Law to be: sexual misconduct,[30] rape,[31] consensual sodomy,[32] sodomy,[33] and sexual abuse.[34]

"Rape" is defined by the Penal Law to be "sexual intercourse," which, in turn, is defined as having "its ordinary meaning and occurs upon any penetration, however slight." [35] "Thus, 'sexual intercourse' may occur without orgasm or complete penetration of the penis into the vagina."[36]

"Sodomy" is defined by the Penal Law to be "deviate sexual intercourse," which, in turn, is defined to mean "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva."[37]

"Sexual abuse" is defined by the Penal Law as subjecting "another person to *sexual contact*

26. Helfer, "Basic Issues Concerning Prediction," in *Child Abuse and Neglect: The Family and the Community*, p. 363 (Helfer, R., and Kempe, C.H., eds. 1976).

27. Fam. Ct. Act §1012(f)(i)(1983).

28. For a partial discussion of this topic, *see* Besharov, "Practice Commentary to McKinney's New York Family Court Act," §1012 (1983).

29. *See* the section entitled "Ambiguous Situations," *infra*

30. Penal L. §130.20 (1975).

31. *Id.* at §§130.25-130.35.

32. *Id.* at §130.38.

33. *Id.* at §§130.40-130.50.

34. *Id.* at §§130.60-130.65.

35. *Id.* at §130.00(1).

36. Hechtman, "Practice Commentary to McKinney's Penal Law," §130.00" (1975), p. 446.

37. Penal Law §130.00(2)(1975).

without the latter's consent."[38] "Sexual contact," in turn, is defined as "any touching of the sexual or other intimate parts of a person . . . *for the purpose of gratifying sexual desire of either party*."[39] Arnold Hechtman explains the meaning of these provisions:

> Thus, an inadvertent touching of the intimate parts of another person does not constitute "sexual contact" as here defined.. . . The term "sexual contact" will be applicable to such acts as the manipulation of a boy's genitals, digital penetration of a girl's private parts, and the unconsented fondling of a woman's breast.[40]
>
> * * *
>
> An actual "touching" must occur. Indecent proposals or obscene gestures are treated elsewhere in the Revised Penal Law §240.20[3]: §240.25[2]. It is not necessary in order to constitute a "sexual contact" that there be a direct contact with the victim's body, *i.e.*, it is enough if the defendent touches another's "sexual or other intimate parts" through clothing. If certain aggravating factors are present, a higher degree of the offense will be applicable.[41]

"Allowing" a Child to Be Abused

The Family Court may have jurisdiction over parents (and other persons legally responsible for the child) even if they are not the actual perpetrators of the abuse. The definition of "abused child" includes the phrases "allows to be inflicted," "allows to be created," and "allows to be committed" to cover situations where the parent or other person legally responsible for the child's care is not the perpetrator but is present or knows about the abuse and does nothing to prevent or stop it – either because of fear, negligence, incompetence, or lack of concern.

People often are surprised to learn that many parents do not protect their children from the maltreatment of their spouses and third parties, such as paramours, baby-sitters, and even siblings. However, examples of such behavior are found in many cases and are frequently cited in the literature.[42] In fact, most experts believe that the nonabusing spouse plays a crucial role in the family dynamic that leads the other parent to maltreat the child (especially in cases of sexual abuse).[43]

A nonabusing parent has an affirmative duty to protect a child from the abuse of a spouse. If nothing else succeeds in protecting the child, the nonabusing parent must call the police or child protective agency. Failure to do so strongly suggests the need to make a finding of abuse (or neglect) against such parent. A recent decision provides a straightforward description of the issues involved:

> The respondent mother testified that she tried to keep peace in the marital home. And the Court does find that she attempted to dissuade her husband from continuing his verbal abuse of Shane. Despite this, the fact remains that she failed to protect her son from an ongoing, serious abuse. She hardly discharged her parental duty to Shane by, in effect, keeping peace at his expense. When her husband persisted in his abuse of the child, she had an obligation to act meaningfully to protect the boy. And, in this regard, no action is meaningful unless and until it results in a cessation of the abuse and protection of the child. To uphold any lesser standard would seriously undercut legislative efforts to halt the senseless abuse and neglect of children.

38. *Id.* at § 130.55 (emphasis added).

39. *Id.* at § 130.00(3) (emphasis added).

40. Hechtman, *supra* n. 36 at pp. 446-447.

41 *Id.* at §130.55, pp. 486-487.

42. *See, e.g., In the Matter of Trina Marie H.*, 48 N Y 2d 742, 743, 422 N.Y.S.2d 659, 660, 397 N.E. 2d 1327 (1979), citing the mother's "toleration of her present husband's beating of the infant child."

43. *See, e.g.*, Kempe, R., & Kempe, C.H , *Child Abuse*, p. 23 (1978).

> It is also significant that the respondent mother continues to speak of a reconciliation with her husband despite the absence of any indication that he recognizes the seriousness of his actions toward Shane or the need to involve himself in therapy. Accordingly, the Court finds that the respondent mother allowed physical injury to be inflicted upon Shane. . . .[44]

The custodial parent may also "allow" a third party – such as a paramour, a baby-sitter, or a sibling – to abuse a child. Even though such third parties might be criminally prosecuted or might be made respondents pursuant to the subsection 1012(g) definition of "person legally responsible," the court might be unable to fashion an adequate treatment plan without jurisdiction over the technically "non-abusive" parent. For example, the parent's past behavior is strong evidence that he or she might again allow some third person to abuse the child and therefore demonstrates the need for court jurisdiction over that parent as well as that parent's need for treatment – even if the perpetrator of the abuse is removed from the household.

Although this aspect of the court's child protective jurisdiction is usually exercised when a *custodial* parent "allows" the abuse to occur, the court also has jurisdiction over a *noncustodial* parent who fails to protect a child from a known danger. The noncustodial parent must have had "sufficient contact with the child so as to make his action or inaction responsible for the child's injuries."[45] Two recent cases illustrate how this might happen. In the first case, the father had moved out of the family home and left his three-month-old child in the mother's custody. The court held that jurisdiction over the father would be established if it was proved that he knew of the mother's "inclination" to maltreat the child.[46] How the petitioner planned to establish such knowledge is not explained in the opinion.

In the second case, the mother was found responsible for the death of her two-month-old child from malnutrition and dehydration. Her other child was held to be neglected based on the younger child's death.[47] Although the older child was not found to be neglected, but actually well-fed, healthy and happy, the court held that the abuse and subsequent death of the younger child constituted "proof of danger to [the older child] of future harm due to a lack of parental capacity on the part of her primary caretaker."[48] The petition also named the noncustodial father as a respondent. The father claimed that he could not be held responsible for the maltreatment of his children because he did not have custody of them.[49] The father argued "that the parent sought to be charged with neglect must have custody, care and control of the child during the period when neglect charges are alleged against the parent."[50] Rejecting the father's argument, the court held that "[i]t is only necessary that petitioner prove that the separated parent had sufficient contact with the child so as to make his action or inaction responsible for the child's injuries."[51] Because the facts of this case are common to many that raise the issue of the noncustodial parent's responsibility, the court's description of the situation bears repeating here.

> The Court is convinced that this father knew or should have known that his son's health, and, ultimately, his very life, was in jeopardy. In the face of this awesome fact, he did nothing. Instead, having left his estranged nineteen (19) year-old wife, unsupported, to care for a toddler and a new-born infant, he merely looked in on them occasionally, putting himself on notice as to their situation, and then walked away. He saw or should have seen a child dying,

44. *Matter of Shane T.*, 115 Misc.2d 161, 453 N.Y.S.2d 590, 594 (Fam. Ct., Richmond Co., 1982).

45. *In the Matter of Maureen G.*, 103 Misc. 2d 109, 426 N.Y.S.2d 384 (Fam. Ct., Richmond Co., 1980); *accord, In the Matter of J. Children*, 57 A.D.2d 568, 393 N.Y.S.2d 449 (2nd Dept. 1977).

46. *In re C.B.*, 81 Misc. 2d 1017, 367 N.Y.S. 2d 382 (Fam. Ct., Monroe Co., 1975).

47. *In re Maureen G.*, 103 Misc. 2d 109, 111-112, 426 N.Y.S. 2d 384, 386 (Fam. Ct., Richmond Co., 1980).

48. *Id.*, 426 N.Y.S. 2d at 386.

49. *Id.*, 426 N.Y.S.2d at 387.

50. *Id.*, 426 N.Y.S.2d at 387 (quoting *In re Karr*, 66 Misc. 2d 912, 914, 323 N.Y.S.2d 122, 124 Fam. Ct., Richmond Co., 1971) (emphasis in original).

51. *Id.*, 426 N.Y.S.2d at 389.

> and offered no help, made no complaint, sounded no alarm. Although this inaction may not have hastened David's death, it certainly did not prevent it. And it is by this omission that Michael G. violated his parental obligation to protect his child from recognizable harm.[52]

Neither of these cases, however, explains why the petitioners wanted to name the noncustodial parents as respondents. After all, the Family Court has no power to punish a parent, no matter how egregious the parent's behavior.[53] Perhaps the petitioners (and the court) were looking ahead to the possibility that the fathers would later gain, or seek, custody of their children.[54]

Court action is inappropriate against a non-abusing parent who did not know about the abuse, and whose lack of knowledge was not caused by negligence or inadequate concern. Parents unaware of what has happened to their child should be told immediately, so that they can take protective action. Court action against them should be considered only if they then fail to do so.

In fact, filing a petition against a parent who took appropriate protective action may be grounds for a lawsuit charging the petitioner with malicious prosecution. This was the case in *Doe v. County of Suffolk*,[55] where the mother sued for malicious prosecution, alleging that the worker and the agency initiated a court child protective proceeding "knowing full well that they could not successfully prosecute the petition against said plaintiff, and knowing full well that ultimately the said petition must be dismissed." The worker had filed a petition against both the mother and father even though it was the mother who had first told the police that her husband had sexually abused their child. Apparently, there was no reason to suspect that the mother had in any way been abusive or neglectful, and the county attorney withdrew the petition against her before the trial. The court allowed the mother's lawsuit under section 1983 of the Federal Civil Rights Act to continue.[56]

The "Person Legally Responsible"

Child protective petitions can be filed against parents or other persons legally responsible for the child's care. Subsection 1012(g)(1983) defines the phrase "person legally responsible" to include "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child."

For reasons of convenience, and to avoid clumsy and over long sentences, this monograph tends to use the word "parents" to encompass this broader definition of the persons who fall under the Family Court's jurisdiction because of the abuse they inflict on the children in their care.

However, *other household members may be named as respondents*, as evidenced by the provisions of subsection 1012(g) quoted above. The primary effect of this provision is to authorize child protective petitions against paramours. (Prior to this amendment, there had been a number of serious child abuse cases reported in the mass media involving common law spouses of the mother. Sometimes, the mother was actively involved in the maltreatment, and at other times she was a helpless onlooker.) However, the reach of this provision extends beyond paramours, and has been interpreted to include baby-sitters, siblings, and other relatives – if they are "continually or at regular intervals found in the same household as the child."

This provision was challenged by a paramour who claimed that it imposed parental obligations on him without his consent. In holding the provision to be a valid exercise of legislative authority, the court noted that the inclusion of

52. *Id.*, 426 N.Y.S.2d at 389-390.

53. In certain circumstances, though, a party may be held in contempt of court. See Fam. Ct. Act §156 (1983).

54. For a discussion of the status and rights of nonrespondent parents, see Besharov, "Practice Commentary to McKinney's Family Court Act," § 1041 (1983).

55. 494 F. Supp. 179 (E.D.N.Y. 1980).

56. *But see Whelehan v. County of Monroe*, Civ. #81-135B(E), Memorandum and Order, U.S. Dist. Ct. of N.Y. (Feb. 22, 1983), holding that child protective workers, like prosecutors, enjoy absolute immunity under section 1983.

paramours was a "rational response to a changing social environment." The purpose of Family Court action is not to prosecute the parent but to help ensure that children are not abused or neglected by those with whom they live. "As non-conventional living arrangements became increasingly prevalent, it became necessary to give the child in those situations the same protection as children in the more traditional family unit."[57]

One might ask why such added jurisdiction is needed since, pursuant to the definitions of both "child abuse" and "child neglect," a parent who "allows" abuse to occur or who "fails to exercise a minimum degree of care" is subject to the court's jurisdiction. The answer is that even if the parent were to be adjudicated as "abusive" or "neglectful," the court would not gain control over the actual source of danger to the child; the court certainly could not place him under its supervision or order him to accept treatment services. Thus, if only the parent is adjudicated "abusive" or "neglectful," formal dispositions are limited to either (1) removing the child or (2) ordering the parent to exclude the offending person. In many cases, the first alternative is not in the best interests of the child, and the second alternative is not practical.

And yet, if no child protective action is taken in these situations, they likely will continue and fester because such informal relationships are often deep and long-lasting. (In the case of paramours, for example, without the aid of the court's authority, the mother is often unable to rid herself of the offending male, and, indeed, is often unwilling to do so.)

Although criminal prosecution might be considered appropriate for such nonparental custodians, prosecutions for child abuse or neglect are infrequent (being usually limited to the most severe cases) and, even then, are of limited utility. As a result, prior to the clear legislative authority and encouragement contained in this supplemental definition of the word "custodian," the Family Court often was powerless to take protective action even though the person responsible for the child's maltreatment was a permanent (or, at least, long term) member of the child's household, and thus represented a continuing threat to the child. Therefore, rather than ignoring such realities of evolving family life styles, the Legislature concluded that the court needed a practical jurisdictional tool with which to work within such untraditional family relationships.

The permissive nature of this supplemental definition bears note – a custodian "may include" a person who is "continually. . ." Hence, the Family Court may, but need not, assume jurisdiction of such cases. The most obvious example of the need for such flexibility is when circumstances change. For example, court action may not be needed if the offending adult departs the household, or the same baby sitter is no longer used. Nevertheless, the absence of standards concerning when a petition should be filed against a "custodian" reveals how, in this and so many other areas of Family Court practice, the complexities of contemporary living situations limit the Legislature's ability to draft precise guidelines, thus passing broad decision-making discretion to the Family Court.

Lastly, even though this section expressly grants the Family Court jurisdiction over such persons, nothing prevents a preemptive or concurrent criminal court proceeding.[58]

Public and private agencies may not be named as respondents. Over the years, isolated attempts have been made to convince Family Courts to assume jurisdiction over the alleged abuse and neglect of children by public and private agencies by interpreting the phrase "person legally responsible" to cover them. However, none of these attempts has met with any success and court after court has ruled that Article 10 is not the correct statutory vehicle to charge City, County, or State agencies with the neglect or abuse of children for failure to meet a statutory obligation in relation to them.[59]

57. *In the Matter of Roman*, 94 Misc.2d 796, 800, 405 N.Y.S.2d 899, 902 (Fam. Ct., Onondaga Co., 1978).

58. *See* Fam. Ct. Act §§1013(b) and 1014(c) (1982).

59. See, *e.g.*, *In re Arlene D.*, 70 Misc. 2d 953, 335 N.Y.S.2d 638 (Family Court, Richmond Co., 1972), holding that the Family Court judge did not have authority to institute an investigation of Willowbrook State School; *In re R.*, 61 Misc. 2d 20, 304 N.Y.S.2d 473 (Family Court, Bronx Co., 1969), holding that the New York City Commissioner of Social Services was not a person "legally responsible" under the Family Court Act who could be charged with failure to provide adequate shelter for a child in his care even though he was responsible for the Aid to Dependent Children Program; *Maynard v. Shanker*, 59 Misc. 2d 55, 297 N.Y.S.2d 801 (Family Court, New York Co., 1969), holding that the Board of Education and the Teacher's Union were not persons "legally responsible" within this section so that they could not be charged with neglect even though they violated their public duty in regard to providing education for children.

On the other hand, the Family Court has specific jurisdiction over certain aspects of the care of children in public and private institutions through Family Court Act section 255.[60]

60. See Besharov, "Practice Commentary to McKinney's New York Family Court Act," §255 (1983).