

Justice For Children in the 80s?

Les enfants sont des 'personnes' et ont des droits légaux:
droits à une légitime défense, à des soins médicaux, aux services de bienfaisance et à
l'éducation qui leur convient.

The law affecting children is in a state of flux. Consciousness-raising with respect to the rights of children in recent years has exposed the anachronisms, anomalies and gaps in existing law. The traditional legal assumption that minors are 'infants' who lack the capacity to participate in decision-making affecting their own affairs has been questioned. The 'protective' institutions established to 'save the children', eg. the child welfare system, juvenile court, compulsory public education, have been challenged to become more accountable. Moral prescriptions about 'the rights of the child' and 'support for the family' are increasingly recognized as no more than righteous rhetoric, unless secured by enforceable legal rights, and by programs and policies which will make them effective. The issues have been identified. Whether the position of young people in law and in society will improve, however, is not clear.

A few examples will illustrate the current situation.

Participation in Decision-Making:

The paternalism of the past is gradually giving way to the recognition that 'children are persons too'. They have individual interests distinct from those of parent or guardian. They have views and preferences which are relevant data to consider. As they grow older, they have the capacity, the desire, and the developmental need, to assume greater rights and responsibilities on their own behalf. The movement towards lawyers for children in child welfare matters and in custody and access disputes reflects this view of the child.

Unfortunately, statutes which empower children to have lawyers often do not specify what role that legal representative is to play. 'Should the lawyer act as guardian, presenting to the court what he or she determines to be in the best interests of the child? Or should the lawyer take instructions from the child and advocate those wishes in court, as he or she would for any other client?' To the extent that lawyers adopt the former role, they merely replicate the traditional relationship between infant and guardian which has existed in many court matters since the 19th century. Until the role of the lawyer is clarified to accord with new perceptions of the child, any new right to representation may be a misnomer.

Access to Medical Treatment and Counselling:

Whether young people should have access to medical treatment and to counselling in privacy and without the need for parental consent, is another issue arising from recognition of the child as a person. A sexually-active girl who seeks birth control from her family doctor may be refused treatment unless she agrees to parental involvement. A pregnant 14-year-old who wishes to carry her baby to term, is forced by her parents and the doctor to have an abortion. Another wants an abortion, but her parents won't consent. A fourth teenager, alienated from a depressive and abusive parent, cannot obtain counselling from his school social worker, because parental consent is a prerequisite.

At common law, anyone regardless of age can give a valid and sufficient consent to medical services if they understand and appreciate the nature and consequences of the treatment. In some provinces, that doctrine has been modified by statute or regulation. Elsewhere, professional associates, institutions, and agencies have adopted restrictive policies to protect themselves from liability. Efforts to clarify the law are struck down by anti-abortionists, religious lobbies, and 'parents' rights' groups in the name of the 'family'. All interests are represented, except that of the adolescent who wants medical treatment or counselling in privacy. The controversy surrounding this issue is an indicator that legislation favourable to young people may be a long time coming.

Child Welfare Services:

More than 80,000 children and youth — one in every 100 — live 'in care' across the country. They are in foster homes, group homes, and other residential care facilities as wards of Children's Aid Societies or the Crown. Although it is assumed that children 'in need of protection' benefit from state intervention, there is considerable evidence to dispute that premise.

Current reforms, therefore, focus on the child and quality of care he or she receives from the state. Continuity of placement, minimum standards of appropriate care, improved conditions for foster parents, early clarification of status, an early opportunity for adoption if reunion with the natural family is impossi-

ble — all are improvements directed to the 'back end' of the system, *after* the child has been removed from the natural family.

Although desirable, such reforms are merely tinkering with the system. The fundamental issue is how to assist families 'in need of protection'. These are disproportionately low-income, Native Canadian, and single parent families who cannot afford to obtain help for their family problems from private sources. Too often, children come into care by default for lack of preventive social services in the community. Once in care, the same paucity of support services makes it difficult, if not impossible, to help the family overcome the problems which necessitated intervention initially. These facts have prompted the demand for better income security programs, and for more (and better coordinated) preventive social services. In an era of 'cutbacks' and constraints, however, so radical a shift in priorities is unlikely.

An Appropriate Education:

A child graduates from high school to discover he is reading at a Grade 6 level. Another suffering from a learning disability because of an undiagnosed physical ailment, is labelled an 'emotional problem', shunted from one special education program to another and, ultimately, excluded from school. A third participates in an English as a Second Language program for two years, then scores poorly on an I.Q. test and is streamed into an 'opportunity' class.

In each of these situations, children and parents find that the duty to attend school does not impose a corresponding duty on school boards to provide an appropriate education. Education legislation typically says little, if anything, about the quality of instruction. The provision of special education programs is not

mandatory. Whether a pupil can 'benefit from instruction' is at the discretion of the principal.

The student rights movement which has revolutionized education in the United States has as yet had little impact in Canada. Change, however, is on the horizon. Parents are increasingly becoming effective lobbyists for political and legislative reforms. Others now turn to lawyers to foster new rights for children from whatever remedies are available.

These issues are typical of problems now confronting lawyers and others concerned with the legal rights of children. Why are legal rights important? Because legal representation, access to treatment and services, and an appropriate education cannot be guaranteed when they are ill-defined, considered privileges or left to the discretion of officials. If these objectives are to be effective rights, they must be established as duties which can be enforced in the courts.

At present, personal biases, institutional interests, and political priorities all stand in the way of what amounts to a fundamental revolution in the position of children under the law. Clearly, the effort to secure greater legal rights for children has only just begun.

For more information, contact Justice For Children at 455 Spadina Avenue, Suite 215, Toronto, Ontario. M5S 2G8. (416)596-1349.

Justice For Children is a non-profit public interest organization to promote the legal rights of children and their families through education, research and advocacy. It publishes a Newsletter on current developments in the law, including a bibliography on major issues, and maintains a Resource Centre on Canadian and American materials. Membership includes a subscription to the Newsletter, and is available at \$5-a-year.©



Suzanne Paul, from Women See Woman