Marquette Law Review

Volume 58
Issue 1 *1975 (Number 1)*

Article 13

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Gregory M. Weyandt

these would be factors for consideration in determining the amount of recovery. One writer has, in fact, insisted that the courts would not be making a radical departure if they recognized a cause of action for wrongful birth:

> The most incisive objections to recognition of the cause of action are based upon public policy and the historical judicial reluctance to impose a duty where nonfeasance is concerned. These objections, however, do not necessarily compel the conclusion that legislative action alone would permit courts to recognize the claim. Without great deviation from precedent, courts could let the bastard recover.[34]

Despite such views, a legal remedy for the illegitimate must await future developments. For the present, *Slawek* has determined that illegitimacy is a wrong for which there is no relief.

The court's decision in *Slawek* and the legislature's response to it,[35] bring Wisconsin into line with the rulings of the United States Supreme Court on a putative father's assertion of parental rights. The possible effects that *Slawek* will have on custody proceedings remain to be seen. The necessity for an unwed mother to reveal the father's identity in order that notice may be given him will probably be challenged as a violation of the consitutional right to privacy as was asserted in *Griswold v. Connecticut*.[36] In such a case, the father's right to notice and a hearing, the mother's right to privacy and the child's best interests must be balanced and, if the court continues to move in the direction it has taken in *Slawek,* the mother's right to privacy will surely be outweighed.

MARY PAT KOESTERER

Use of a Juvenile's Confession While Under Exclusive Jurisdiction of the Juvenile Court in a Subsequent Criminal Proceeding—In *State v. Loyd*[1] four youths gained entrance to the home of two elderly women whom they assaulted and robbed. A Minneapolis Police Department school liaison officer was assigned to investi-

34. R. Thomas Farrar, *Does the Bastard Have a Legitimate Complaint?*, 22 MIAMI L. REV. 884, 905 (Summer, 1968).

35. See footnote 14, *supra.*

36. 381 U.S. 479 (1965).

1. ___ Minn. ___, 212 N.W.2d 671 (1973).

gate this and other robberies which had occurred in the area. Stanley Loyd was known to the liaison officer because Loyd was on juvenile parole and because the officer had previously agreed to assist him in obtaining a job. Based on information obtained by the officer a warrant was secured for Loyd's arrest. Upon learning Loyd was wanted for questioning, his parents accompanied him to the courthouse where he was informed that he was suspected of committing the robbery. He was given a standard *Miranda* warning but was not informed that he might be prosecuted as an adult. Both the defendant and his parents acknowledged that they understood his rights. Defendant admitted involvement in the robbery. Later, after another *Miranda* warning and waiver of rights, defendant signed a statement to this effect.

In April of 1971, the Hennepin County Juvenile Court waived its jurisdiction over the defendant and referred him for prosecution as an adult pursuant to Minnesota Statute section 260.125 (1971). Loyd was tried and found guilty of aggravated robbery. His conviction was appealed on the basis that his confession, which was given while he was under the exclusive jurisdiction of the juvenile court, should not have been admitted as evidence in a criminal proceeding. The foundation for this contention was Minnesota Statute section 260.211(1) (1971), pertinent portions of which read, ". . . the disposition of the child or any evidence given by the child in the juvenile court shall not be admissable as evidence against him in any case or proceeding in any other court. . . ."

Prior to this decision, other jurisdictions had established four basic modes of dealing with confessions of juveniles made prior to their referral to criminal court. The District of Columbia Circuit Court of Appeals in *Harling v. United States*[2] stated:

> It would offend these principles [of fundamental fairness] to allow admissions made by the child in the non-criminal and non-punitive setting of juvenile proceedings to be used later for the purpose of securing his criminal conviction and punishment.[3]

The court held that "admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding."[4] The court relied upon language in *Pee v. United States*[5] which indicated that a minor who has committed a

2. 295 F.2d 161 (D.C. Cir. 1961).
3. *Id.* at 163.
4. *Id.* at 164.
5. 274 F.2d 556, 558 (D.C. Cir. 1959).

criminal offense is exempt from the criminal law unless and until the juvenile court waives its jurisdiction. Relying upon principles of fundamental fairness, it would be a breach of faith, the court reasoned, to allow pre-referral confessions to be admitted in a criminal proceeding. This breach would arise were the child to be charged with: (1) knowledge of his privilege against self-incrimination, and (2) knowledge of the juvenile court's power to waive its jurisdiction and subject him to criminal penalties.[6]

The court also reasoned that if admissions made prior to waiver of jurisdiction by the juvenile court were admitted in a criminal proceeding, this would violate the *parens patriae*[7] function of the juvenile court in that the juvenile proceedings would be made to serve as an adjunct to and part of the criminal process. This could not be allowed since it would intrude upon the non-criminal philosophy of the juvenile court.[8] The juvenile court has never been equated with a criminal court. It has always been viewed as a civil forum: its dispositions are civil, indeterminate, and aimed at the treatment and rehabilitation of the child.[9]

Although the court did not cite the D.C. Code Annotated, section 11-915 (1961), as a basis for its decision, it should be noted that the language of this statute is virtually the same as that of Minnesota Statute section 260.211(1) (1971).[10] It should also be noted that the *Harling* decision was prior to *In re Gault*[11] which required that due process of law be applied in adjudicating the delinquency of a minor if this decision could lead to commitment in a state institution. Thus, since post *Gault* delinquency adjudications must apply stricter standards than those prior to *Gault,* one might assume that more stringent requirements for pre-referral confessions would also be applied. Rather than this being the case the post *Gault* decisions have applied a less rigorous standard for admission of the pre-referral confession in subsequent criminal proceedings.[12]

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6. Harling v. United States, 295 F.2d 161, 163 (D.C. Cir. 1961).

7. *Parens patriae,* meaning father or parent of his country, refers to the duty a government has to protect, control and guard the interests of minor children. 46 MINN. L. REV. 967, 968 (1962).

8. Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961).

9. In re Gault, 387 U.S. 1, 15-16 (1967).

10. "The disposition of a child or any evidence given in the court shall not be admissable as evidence against the child in any case or proceeding in any other court. . . ." June 12, 1952, 66 Stat. 134, Ch. 417, § 2. Revised and re-enacted by act December 23, 1963, Public Law 88-241, 77 Stat. 478, effective January 1, 1964.

11. 387 U.S. 1 (1967).

12. Of the cases discussed, Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961),

A second method of dealing with confessions of juveniles prior to their being referred to criminal court was developed by the Arizona Supreme Court in *State v. Maloney*.[13] Chief Justice Bernstein, writing for the court, relied heavily upon the *Harling* decision but came to a different conclusion. As has been noted, *Harling* held that admissions by a juvenile in connection with the non-criminal proceeding of the juvenile court be excluded from evidence in a criminal proceeding. The Arizona court held that the due process demands of fundamental fairness would be satisfied if "he and his parents are advised before questioning not only of the child's right to counsel and privilege against self-incrimination, *but also* of the possibility that he may be remanded to be tried as an adult."[14] (Emphasis added.) Thus, procedural steps were established which would allow the admission of pre-referral confessions into evidence.

Chief Justice Bernstein discussed the role of the juvenile court in light of Arizona Revised Statute section 8-228 (1965), subsection B, which also is substantially identical with the Minnesota and District of Columbia Statutes.[15] Justice Bernstein determined that

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and State v. Gullings, 244 Or. 173, 416 P.2d 311 (1966), pre-date In re Gault, 387 U.S. 1 (1967). State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1967); O'Neil v. State, 2 Tn. Cr. 518, 455 S.W.2d 597 (1970); and State v. Loyd, ___ Minn. ___, 212 N.W.2d 671 (1973) are subsequent decisions. Whether they were pre or post Gault, *supra.*, seems to have had little to do with the test they employed concerning statements of the juvenile made prior to juvenile court waiver of jurisdiction.

13. 102 Ariz. 495, 433 P.2d 625 (1967).

14. State v. Maloney, 102 Ariz. 445, ___, 433 P.2d 625, 629 (1967).

15. At the time of the decision the statute read: "The disposition of a child or of evidence given in the juvenile court shall not be admissable as evidence against the child in any proceeding in another court . . ." Since the decision it has been repealed. Arizona Laws 1970, Chapter 223 §1, effective August 11, 1970. Presently ARIZ. REV. STAT. § 8-207(c) (1971) reads: "The disposition of a child in the juvenile court may not be used against the child in any case or proceeding in any court other than a juvenile court. . . ." Whether this repeal and enactment of the subsequent statute which did not direct itself to evidence given in the juvenile court, but only to the *disposition* of a child in the juvenile court was a legislative attempt to limit Maloney and cases which subsequently followed it is unclear. But the Arizona court in State v. Hardy, 107 Ariz. 583, ___, 491 P.2d 17, 18 (1971) stated:

> The presence of the child's parents or their consent to a waiver of rights is only *one* of the elements to be considered by the trial court in determining that the Statement was voluntary and the child intelligently comprehended his rights. To the extent that this position deviates from State v. Maloney, *supra* that decision is overruled.

This overruling of Maloney came after the statute change and it would have been difficult to give as expansive a reading to the new statute, which only stated that the disposition of a child in the juvenile court would not be used in another court. The Minnesota statute dealt with the disposition of the child or any evidence given by him. Thus, the overruled Maloney decision was still pertinent to any decision made by the Minnesota court.

the scope of the statute included more than evidence which was presented in the courtroom.

> [A]n inculpatory statement obtained by the police while the child is within the jurisdiction of the juvenile court is part of the evidence gathering function of that court. The fact that such evidence was never offered to the juvenile court in a hearing to adjudicate whether the child is delinquent does not alter the fact that such an inculpatory statement is evidence.[16]

This interpretation of "evidence given in juvenile court" includes more than evidence presented in a court adjudication. The inadmissable evidence extends to any and all evidence which has been obtained while the child was within the jurisdiction of the juvenile court.

A third approach was adopted by the Supreme Court of Oregon in *State v. Gullings*.[17] The court rejected the absolute prohibition of pre-referral confessions and set up standards by which admissions of juveniles could be admitted in a criminal proceeding. *Gullings* required only that it be made clear to the juvenile that criminal responsibility could result and that the questioning authorities were not operating as his friends but as his adversaries.[18] A prime consideration in determining that Gullings was aware of the adversary setting was the fact that the arresting officer was cognizant of the possibility the youth might later be charged in criminal court, and therefore the officer was specific in informing the defendant of possible consequences. The difference between the Arizona and Oregon tests is that in *Maloney* the Arizona court made it clear that a juvenile and his parents must be warned of a possible criminal charge prior to the juvenile's making any statement, while in Oregon a court does an after-the-fact examination of the facts and circumstances and then determines if the juvenile was aware some form of punishment could result. Although the warning given by the Oregon police officer in *Gullings* would meet the Arizona court test, such warning is not required by the Oregon court.

A second significant difference between the Arizona and Oregon courts is the narrower interpretation the Oregon court places upon the statutory language, "evidence given by the child in the juvenile court." While Arizona had concluded that this meant all

16. State v. Maloney, 102 Ariz. 445, ___, 433 P.2d 625, 628 (1967).
17. 244 Or. 173, 416 P.2d 311 (1966).

evidence gathered while the youth was under the jurisdiction of the juvenile court, the Oregon court reasoned that this language did not extend to information obtained through investigatory activities of the police. This was because the statute ought to promote the *parens patriae* relationship between the juvenile court and the child, and not between the police and the child.[19]

The fourth and last approach taken in dealing with confessions made prior to the referral to criminal court is that taken by the Tennessee Court of Criminal Appeals in *O'Neil v. State*.[20] The court concluded that the mandate of *In re Gault*, which required that there be clear and unequivocal evidence that an admission of a juvenile was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent,[21] was satisfied if a proper *Miranda* warning were given.[22] Of the four methods chosen by courts to deal with pre-referral confessions make by juveniles the approach of the Tennessee court demands the least rigorous safeguards for protection of the juvenile. The District of Columbia court refused to allow any pre-referral evidence into a later criminal trial. The Arizona court in *Maloney* required the protection afforded by *Gault* plus an additional warning to the youth and his parents that any statements made could later be used in a criminal proceeding. The Oregon court requires the *Gault* protection plus a showing that the youth was aware that some form of punishment could occur. The Tennessee court concluded that after the *Miranda* warning has been given the protection required by *Gault* has been afforded and no more is needed.

The Minnesota court had the option of choosing one of these four approaches, which ranged from complete exclusion of confessions made prior to referral to criminal court to the mere requirement that a *Miranda* warning be given to the youth. The Minnesota court chose the Oregon method of dealing with pre-referral confessions.

> A confession by a juvenile is admissable if he has been apprised of his constitutional rights and voluntarily and intelligently waives those rights in making statement. . . . While all of the

18. *Id.* at ____, 416 P.2d 313.

19. *Id.* at ____, 416 P.2d 315.

20. 2 Tn. Cr. 518, 455 S.W.2d 597 (1970).

21. In re Gault, 387 U.S. 1 (1967).

22. *Accord*, State v. Francois, 197 So. 2d 492 (1967), *cert. denied*, Walker v. Florida, 390 U.S. 982 (1968).

> facts and circumstances should be examined in determining whether a juvenile has intelligently waived those rights, it is important that the juvenile is questioned in an adversary setting and not in the confidential atmosphere of the juvenile court process; otherwise he may not realize that criminal responsibility may result.[23]

The choice made by the Minnesota court seems poor for two reasons. First, of the four possible options, the Minnesota court chose the one which is most ambiguous when attempting to ascertain if the requirements of the law have been met in order to have pre-referral confessions admitted as evidence in criminal court. The standards adopted by the court required that the juvenile must be advised of his constitutional rights and voluntarily and intelligently waive those rights. If this were all that was needed, a *Miranda* warning and waiver would satisfy the requirements. But the court indicated it was following the Oregon court, not the Tennessee Court of Criminal Appeals, which only required the *Miranda* warning. The Oregon court required something over and above this: a showing of awareness of adversity on the part of the juvenile. The Minnesota court stated it is important that the juvenile is questioned in an adversary setting and not in the confidential atmosphere of the juvenile court process. In dicta the court observed that the safest way of showing adversity is to advise the suspect that criminal prosecution may result.[24] This language suggests that this warning is not mandatory. Since this advice is not required, the ambiguity arises. How does one establish that the juvenile was aware he was being questioned in an adversary setting and not in the confidential atmosphere of the juvenile court? Whether the matter is adjudicated within the civil confines of the juvenile court or prosecuted in criminal court, the same people will have pursued the investigation and questioned the youth. Only the seriousness of the offense may indicate to a television-seasoned generation of youth that there is a possibility that the case may end up in criminal court. The second or third time youthful offender, when compared to the first time offender, is at a disadvantage under these circumstances. The repeater knows how the system worked in the past and has every reason to believe it will continue to work in the same way. In the past, he was encouraged to give all pertinent information to the authorities so they could help him.

23. State v. Loyd, ___ Minn. ___, 212 N.W.2d 671, 677 (1973).
24. *Id.*

The theory of the juvenile system was that he was not to be punished but assisted. In this way he could avoid the same mistake in the future. The same people who sought information in order to assist him in avoiding future mistakes will now be seeking the same type of information in order to convict him of a crime. In the instant case Stanley Loyd was questioned by a police officer whom he knew and who had promised to help Loyd in obtaining a job. The Minnesota Supreme Court, concurring with the trial court, found that there was a showing of adversity when Loyd was questioned. It seems clear that both courts could have logically found that Loyd felt he was in the confidential atmosphere of the juvenile court. A test which offers no clearer guidelines than this is a poor test. It is safe to predict that in the future Minnesota police forces, attorneys, trial judges and the Supreme Court will be wrestling with the conceptual boundaries of adversity and the issue of whether the particular youthful suspect comprehended his presence in an adversary setting.[25]

The second weakness of the Minnesota decision is that the youth who has committed a crime will suffer. The juvenile court system was established:

> . . . [B]ecause every legislature in the country has seen fit to institutionalize the societal consensus that children who run afoul of the law should be treated differently than adults and given an opportunity to be helped and rehabilitated rather than abandoned to the retributive social machinery of the adult criminal justice system.[26]

If there is a commitment to this philosophy, it should be made clear to a youthful suspect that it is possible he will be treated as an adult and a criminal, not as a youth.

In requiring that a youth be advised of the possibility of criminal prosecution from the outset, the Arizona court in *Maloney* avoided the difficulty of determining whether he was aware he was in an adversary setting or that punishment might follow. The *Maloney* decision also offered a youth more protection than the Tennessee court which required no more than a *Miranda* warning because in *Maloney* the youth and his parents had to be advised that criminal proceedings could follow. *Maloney* also avoided the pitfalls of the *Harling* decision, which would never allow evidence

25. State v. O'Neil, ___ Minn. ___, 216 N.W.2d 822 (1974).

26. Stamm, *Transfer of Jurisdiction in Juvenile Court*, 62 KY. L. J. 122, 124 (1973).

obtained while the juvenile was under the jurisdiction of the juvenile court to be later used in a criminal trial.

For the above mentioned reasons, the Arizona approach in *Maloney* is to be preferred over that of the Minnesota court in *Loyd*. When this question presents itself in other jurisdictions, *Maloney* is the precedent which should be followed.[27]

GREGORY M. WEYANDT

Landlord and Tenant Law—The Implied Warranty of Habitability in Residential Leases—The recent case of *Green v. Sumski*[1] arose when landlord Jack Sumski, seeking possession of leased premises and back rent, commenced an unlawful detainer action in the San Francisco Small Claims Court. The tenant admitted nonpayment of rent and defended the action on the ground that the landlord failed to maintain the premises in a habitable condition. The small claims court awarded the landlord possession of the premises and entered a money judgment for back rent against the tenant. The tenant appealed to the San Francisco Superior Court and a de novo trial was held. The tenant submitted a copy of an inspection report of the San Francisco Department of Public Works disclosing about eighty housing code violations in the building as well as an order of the department scheduling a condemnation hearing. The tenant also submitted a detailed list of serious defects[2] which had not been repaired by the landlord after notice. The landlord

27. As yet, Wisconsin has not been faced with this problem. WIS. STAT. § 48.38(1) (1971), states:

> . . . The disposition of any child's case or any evidence given in the juvenile court shall not be admissable as evidence against the child in any case or proceeding in any other court. . . .

In Banas v. State, 34 Wis. 2d 468, 473, 149 N.W.2d 571, 574 (1966), the court stated:

> . . . Under the prohibitions of sec. 48.38(1) the disposition of the child's case and any evidence given in the juvenile court are not admissable as evidence against the child in any case or proceeding in any other court.

This statement was made with reference to the refusal to allow a juvenile adjudication to be used to impeach a juvenile witness. Whether it would apply in the same manner in a *Loyd* fact situation and what is meant by "evidence given in the juvenile court" remains to be seen.

1. Green v. Sumski, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

2. The supreme court listed some of the more serious defects described by the tenant including (1) the collapse and non-repair of the bathroom ceiling, (2) the continued presence of rats, mice, and cock-roaches on the premises, (3) the lack of any heat in four of the apartment's rooms, (4) plumbing blockages, (5) exposed and faulty wiring, and (6) an illegally installed and dangerous stove. *Id.* at 621, 517 P.2d at 1170, 111 Cal. Rptr. at 706.