

95th Annual Meeting The American Law Institute

Proceedings 2018

Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
telephone: (215) 243-1600
fax: (215) 243-1636
e-mail: ali@ali.org
website: <http://www.ali.org>

© 2019 by The American Law Institute

The American Law Institute has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

The Wednesday afternoon session of The American Law Institute convened in the Ritz-Carlton Ballroom, Washington, DC, and was called to order at 1:41 p.m. by Mr. Wallace B. Jefferson.

Mr. Jefferson: So the luncheon next door went a little bit longer than anticipated. There will be people coming in and joining in the final substantive project for this year's Annual Meeting, and that is the Restatement of the Law, Children and the Law.

And I just have one comment to make before we begin, and that is that the luncheon featured Bryan Stevenson, who gave a powerful talk on the work that his Equal Justice Institute is doing. But he said a few things that I think are very prescient for the work that we are about to undertake and discuss this afternoon, and that is a society must be committed to children.

And he talked about the law as a narrative and how that can have an impact on the most vulnerable in our society, and he mentioned children quite a lot. And one of his central messages was to make the law work for them, and I think that is a great way to begin our discussion today.

We have a very thoroughly researched and heavily edited piece of work for your consideration today on the Restatement of the Law, Children and the Law. I'm just going to give a few housekeeping thoughts to you before we begin, and then I'm going to ask the Reporters to introduce themselves and maybe give a brief introduction.

If you have your book with you, if you'll look at the cover, we're going to go in a slightly different order than usual. Usually, we go chronologically from the early Section to the end, but for this one, we're going to take up § 2.10 first on economic support, and then we are going to look at §§ 3.20 and 3.24 together, as the next Section. That is about physical abuse and corporal punishment.

And then from there, § 2.30 and § 3.26 on medical care and neglect, and then we'll go from that to Chapter 14.

So don't worry if you didn't follow along, I'll mention this as we go through this great draft. And I will now ask Elizabeth to give a few remarks, introduce the Reporters, and then after you're finished, we'll start with any questions.

Professor Elizabeth S. Scott (NY): Thank you so much, Wallace.

We are just delighted to be here, at the Annual Meeting, for our first opportunity to present Sections of the proposed Tentative Draft of the new Restatement of Children and the Law. I'd like to just make a couple of comments, but first, to introduce the other Reporters on this project.

On the dais with me are Clare Huntington and Solangel Maldonado. There are three other Reporters who are not presenting today, but who are very much involved in the project, sitting in the front. And you maybe could stand up—Richard Bonnie, Emily Buss, and David Meyer. So we have lots of Reporters, and we're working hard on this Restatement project.

I'm just going to say a few words about the project. This Restatement will include four different Parts. The first Part is Children in Families, which deals with the regulation of the parent-child relationship and the scope and limits of parental authority over their children.

A part of the purpose of this Part is to clarify and modernize the rationale for parental rights, which continue to be very robust under American law, as grounded in child welfare and values of privacy and diversity and certainly no longer in the kind of property-like ownership that was the basis of traditional parental rights.

The second Part is Children in Schools. This Part deals primarily with the state's authority in public schools and children's rights in the context of public schools and how that context can limit children's rights.

The third Part is Children in the Justice System, and this Part focuses, to a large extent, on how the legal treatment of children, of juveniles differs from that of adults in the justice system due to the developmental immaturity of juveniles. This is an area of law that is in the process of very active reform, which the Restatement is aiming to capture.

And the fourth Part is Children in Society, which basically involves the legal regulation of children, unmediated to some extent by these other institutional settings. So the infancy doctrine in contract law, children's tort liability, children's decisionmaking ability in the context of medical decisions, and particularly reproductive health treatment are all in that section.

So as you can see from the Sections that we are presenting, we are not proceeding sequentially through the Restatement, but rather working on Sections in all four Parts sort of simultaneously. And in part, this is because different Reporters are focusing primarily on different Parts.

We do have, and it's included in the draft, a comprehensive Table of Contents so that you can sort of locate the Sections that we're focusing on within the plan for the whole Restatement. And today, we're going to discuss and offer for discussion and, hopefully, your approval Sections from two Parts, Children in Families—Angel and Clare have taken primary responsibility as the drafters of these Sections—and in the Children in the Justice System Part, we're presenting Sections on interrogation of minors.

So, with that, I think we're ready to proceed.

Mr. Jefferson: Great. Then we will begin with § 2.10, on page 5, "Duty to Provide Reasonable Economic Support."

Professor Solangel Maldonado (NJ): Yes. So thank you for that feedback.

I would like to clarify that, yes, we are trying to follow the definitions in the Model Penal Code, and § 3.26(a)(1) specifically is a criminally negligent—it applies to criminally negligent homicide. And then § 3.26(a)(2) in all other criminal proceedings, then if the child—if the failure to provide medical care has caused the child harm or substantial risk of harm but has not caused the child's death, then we do apply the higher degree of culpability—reckless, knowingly, purposely—again in line with the Model Penal Code.

Professor Gallant: To address what Guy Struve brought up, I wonder whether you ought to include language that would be, if this is consistent with a state statute, the court should do thus and so, because otherwise it looks like you are suggesting the common-law creation of criminal standards. And if that raises or broadens the definition of a crime, then you have questions of legality and retroactivity, at least for the first folks that are— Thank you.

Mr. Jefferson: Ricky?

Director Revesz: This is a problem that arises in every Section or every Restatement. Statutes trump common-law rules. These are common-law rules. To the extent there's a statute to the contrary, the statute takes precedence.

So I don't think we need to say this in this provision or any other provision. But the point that you make is a good one, that obviously a statute would trump this rule.

Justice Michael C. Massengale (TX): I wanted to draw your attention to another provision that may raise this question about characterization as a Restatement, or maybe it would be more appropriate in a Principles project. Section 2.30(1)(c). "A parent does not have authority to consent to medical procedures or treatments that impinge on the child's constitutional rights to bodily integrity or reproductive privacy."

The reference to "the child's constitutional rights to bodily integrity or reproductive privacy," there's a lot of vagueness in there that I'm not aware is really strongly supported by case law. If this is going to be in a Restatement, it would probably be helpful to define that more. But in any case, I'm not aware of case authority that really supports this to the level of rising to a Restatement of the Law.

And then, as applied in Illustration 7, on pages 26 and 27, this Illustration says that a parent's consent is insufficient to authorize a surgical corrective surgery for a two-year-old intersex child, and that the parent's authorization of such a surgery would impinge on the child's "fundamental right to bodily integrity and reproductive privacy."

The Reporters' Note concedes "[t]here are no published opinions addressing parental authority to consent to nontherapeutic genital-normalizing surgery

on an intersex child." The only authority referenced is a report from BuzzFeed about a monetary settlement of a single lawsuit.

So I think this not only raises questions of the appropriateness for inclusion in the Restatement, but also, frankly, threatens the credibility of the project as a Restatement, because these kinds of very values-laden judgments, while these are live issues in our society and many state legislatures are taking action, to say that outside the context of a statute that this is the state of the law today, I think, is very controversial and would be controversial in my jurisdiction, where I'm a state judge in Texas.

Professor Maldonado: Thank you for the comment. I was hoping that it was clear from the Reporters' Note that there isn't any case law, but we will consider adjusting the Illustration and sort of making that clearer in the Comment itself.

Justice Massengale: I think part of the confusion, for me, is the absence of state action, either implied in what's captured by this Section or by the Illustration. The cases that are cited in the Reporters' Note all involve the balancing of individual privacy interests against some kind of state action, and this appears to be contemplating the enforcement of a child's constitutional right as against a parent without any overlay of state action. And to me, that raises questions about just whether that is an accurate statement of the law.

Mr. Jefferson: Thank you. Any other comments or questions on § 2.30 or § 3.26?

(No response)

Mr. Jefferson: If not, we will turn to §§ 14-2 through 14.23. Section 14-2 is an Introductory Note. Any comments or questions on that?

(No response)

Mr. Jefferson: Section 14.20 is at page 227.

Section 14.21, on page 244, is "Waiver of Rights in a Custodial Setting." Questions or comments?

Mr. Frank P. Cervone (PA): I want to speak to the question of waiver with regard to the notion that is emerging in our field that, indeed, children might not be allowed to waive at all, absent the presence of an attorney. That is the position taken in § 14.22 as to children under age 14. Is it .22 or .23? Whichever.

And it's from my reading, the lean of the very well-done Reporters' Notes, this is an area that is of some controversy in the field of juvenile practice in juvenile law. And it's a fairly new set of ideas that folks would be familiar with in the *Roper* line of cases, etc., many of which were argued by our speaker of a few moments ago, Bryan Stevenson, who said, just a few minutes ago, the compelling aspect of this stuff, that we need to teach the courts and the world that kids are different.