

NOTES

WAIVER OF JUVENILE COURT JURISDICTION UNDER IOWA'S NEW JUVENILE JUSTICE ACT

I. INTRODUCTION

At common law a juvenile's arrest, trial and punishment for public offenses were conducted under procedures identical to those applied to adult criminals.¹ This punishment-oriented system dominated the treatment of juveniles until 1899, when Illinois established the first juvenile court.² This juvenile system was rapidly accepted among other jurisdictions, and by 1929 every state, the District of Columbia, and the federal government had adopted a separate juvenile code to handle the needs of juveniles.³ The underlying philosophy of these juvenile court systems was that juveniles should be protected from the harshness of adult criminal courts and from the abuses which result from incarcerating juveniles with adult criminals.⁴ The new codes did not emphasize the determination of guilt or innocence *per se*, but rather focused on the rehabilitation and treatment of the juvenile.⁵ As one commentator noted:

[t]he problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career?⁶

1. Comment, *Juvenile Law - Waiver Of Jurisdiction Of The Juvenile Court In Missouri*, 43 MO. L. REV. 49, 49 (1978) (hereinafter cited as Missouri Comment).

2. ILL. STAT. ch. 23, §§ 169-89 (1899); see Note, *The Amended Kansas Juvenile Code: Can Parens Patriae Withstand Due Process?* 18 WASHBURN L. J. 244, 245 (1979) (hereinafter cited as Kansas Note).

3. Sorrentino & Olsen, *Certification of Juveniles To Adult Court*, 4 PEPPERDINE L. REV. 497, 498 (1977) (hereinafter cited as Sorrentino). Iowa adopted the juvenile court system in 1904. Frey, *The Effect Of The Gault Decision On The Iowa Juvenile Justice System*, 17 DRAKE L. REV. 53 n.4 (1967) (hereinafter cited as Frey). For a discussion of the development of the juvenile court system in Iowa, see *State v. Halverson*, 192 N.W.2d 765, 766-68 (Iowa 1972).

4. See National Council of Juvenile Court Judges, *The Philosophy and Theory of the Juvenile Court*, 23 JUV. JUST. 4, 4 (1972) (hereinafter cited as Council of Judges); See also Peuler, *Juveniles Tried As Adults: Waiver Of Juvenile Court Jurisdiction*, 3 J. OF CONTEMP. L. 349, 349 (1977) (hereinafter cited as Peuler).

5. Council of Judges, *supra* note 4. A minor's brush with the law is usually considered to be the product of peer pressure or youthful exuberance. Comment, *Juvenile Transfer in Illinois*, 67 J. OF CRIM. L. & C. 287, 287 (1976) (hereinafter cited as Illinois Comment).

6. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909); see Brown, *Guide-*

Because the basic purpose of the juvenile courts was to rescue a child, rather than determine his criminal culpability, the procedural processes utilized were generally flexible and informal, and thus did not incorporate many of the due process guarantees extended to adults.⁷ The rebuttal of constitutional attacks on the system's informal procedures was often based upon the doctrine of *parens patriae*, under which the state was substituted for the natural parents of a child when they were deemed to have failed in that capacity.⁸ Further, juvenile proceedings were considered to be civil in nature, rather than criminal; this provided additional support for the viewpoint that the constitutional guarantees of due process were not relevant in the juvenile setting.⁹ In summary, the constitutional protections extended to an adult defendant were replaced by the state's attempt, as surrogate parent, to "achieve the rehabilitation, education and salvation of the child."¹⁰

Despite the humanitarian goals and philosophy of the juvenile court system, its procedural informality and resultant lack of due process guarantees have resulted in severe criticism in recent years.¹¹ Commentators have accused the system of being too protective, of failing to rehabilitate juvenile offenders and of resulting in abuse of discretionary powers.¹² Further, the "magic" words *parens patriae* no longer shielded the system from change after the Supreme Court recognized the need for reform in juvenile proceedings in *Kent v. United States*.¹³ In *Kent*, Justice Fortas stated, "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."¹⁴

Currently, the juvenile system is undergoing the most extensive legislative scrutiny and change since its inception in 1899.¹⁵ Following the Supreme Court's lead, state legislatures have recognized that the "great hopes

lines for Statutes for Transfer of Juveniles to Criminal Court, 4 PEPPERDINE L. REV. 479, 479 (1977) (hereinafter cited as Browne).

7. Illinois Comment, *supra* note 5, at 290.

8. Council of Judges, *supra* note 4; Note, *Cautious Step Forward*, 39 LA. L. REV. 278, 279 (1978) (hereinafter cited as *Cautious Step*).

9. Illinois Comment, *supra* note 5, at 290. In Iowa, juvenile actions are deemed to be "special proceedings" which serve as ameliorative alternatives to criminal prosecution. See e.g., *In re Johnson*, 257 N.W.2d 47, 48 (Iowa 1977).

10. *Cautious Step*, *supra* note 8, at 2 (citing M. PAULSEN, *THE PROBLEMS OF JUVENILE COURTS AND THE RIGHTS OF CHILDREN* 5 (1975)).

11. Comment, *Waiver Of Juvenile Court Jurisdiction Under The Juvenile Justice Act Of 1977*, 14 GONZ. L. REV. 369, 369 (1979).

12. *Id.*

13. 383 U.S. 541 (1966).

14. *Id.* at 556.

15. Susmann, *Practitioner's Guide to Changes in Juvenile Law and Procedure*, 14 CRIM. L. BULL. 311, 340-41 (1978) (hereinafter cited as Susmann).

originally held for the juvenile courts have not been fulfilled,"¹⁶ and have amended or rewritten their juvenile codes.¹⁷ Joining this nationwide scrutiny, the Iowa legislature enacted a comprehensive Juvenile Justice Code which became effective July 1, 1979.¹⁸

One aspect of the juvenile justice system which has been a subject of the concerns noted above is that of waiver of jurisdiction, the process by which a juvenile court transfers a minor defendant to the adult criminal system for prosecution. Prior to the enactment of the new Juvenile Justice Code, Iowa's statutory waiver provision¹⁹ contained few procedural requirements and no substantive criteria to guide the juvenile courts.²⁰ This Note will focus on the section of the new Juvenile Justice Code dealing with waiver of juvenile court jurisdiction,²¹ in light of the general concerns and criticisms of the juvenile court system noted earlier. Initially, the United States Supreme Court decision which established the due process requirements of a waiver hearing, *Kent v. United States*,²² will be examined. Four major Iowa waiver cases decided subsequent to *Kent*, but prior to the enactment of the new waiver statute, will then be reviewed. These cases are helpful in illustrating the status of Iowa law before the legislative change and in predicting the Iowa Supreme Court's interpretation of the new statutory language. Finally, the provisions of the new waiver statute will be analyzed.

II. THE EVOLVING CONCEPT OF DUE PROCESS IN JUVENILE WAIVER

16. See Missouri Comment, *supra* note 1, at 49 (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967)).

17. Of forty states responding to one author's survey, only nine reported no proposed changes in their juvenile court laws. Susmann, *supra* note 16, at 312. For a 1967 article calling for thorough reevaluation of the statutory base of Iowa's juvenile justice system, see Frey, *supra* note 3.

18. New Chapter 232, Juvenile Justice, consisting of sections 232.1 to 232.152, was created by Acts 1978 (87 G.A.) ch. 1088, §§ 1 to 81, 100.

19. The former Iowa waiver statute, in its entirety, provided:

When a petition alleging delinquency is based on an alleged act committed after the minor's fourteenth birthday, and the court, after a hearing, deems it contrary to the best interest of the minor or the public to retain jurisdiction, the court may enter an order making such findings and referring the alleged violation to the appropriate prosecuting authority for proper action under the criminal law. When such child pleads guilty or is found guilty of a public offense in another court that court may with the consent of the juvenile court refer the child back to juvenile court for further disposition. In any event the court before whom the plea was made or the conviction was had is expressly authorized to set aside such plea or conviction but only after the child has successfully completed a period of probation of not less than one year.

Iowa CODE § 232.72 (1978).

20. *Id.*

21. IOWA CODE § 232.45 (1979). Only eight states having transfer laws have not revised them within the past ten years. Sorrentino, *supra* note 3, at 502 n.21.

22. 383 U.S. 541 (1966).

PROCEEDINGS

A. *The Supreme Court Confronts Parens Patriae*

The absence of procedural responsibility in juvenile waiver proceedings eventually forced the Supreme Court to intervene.²³ In *Kent v. United States*,²⁴ juveniles, instead of being rescued from delinquency, were rescued from the doctrine of *parens patriae*.²⁵ Morris Kent was a sixteen year old boy taken into custody in the District of Columbia for housebreaking, robbery and rape. His counsel filed motions for a hearing on the question of waiver and for access to the juvenile court's social service file on the boy. The juvenile court held no hearing, made no ruling on these motions and summarily ordered waiver. The waiver order recited that the decision had been made after a full investigation, but the court made no findings of fact and did not give a reason for the waiver.²⁶

The *Kent* Court recognized that the state is *parens patriae* rather than prosecuting attorney and judge, but admonished that the duty to "function in a 'parental' relationship is not an invitation to procedural arbitrariness."²⁷ The waiver decision was deemed "critically important"²⁸ by the Court and was recognized as being as potentially important to Kent as the difference between five years confinement if sentenced in the juvenile system and a possible death sentence if sentenced in the criminal system.²⁹ Noting that

23. Note, *Sending the Accused Juvenile to Adult Criminal Court: A Due Process Analysis*, 42 BROOKLYN L. REV. 309, 313 (1975) (hereinafter cited as *Sending to Criminal Court*).

24. 383 U.S. 541 (1966).

25. *Sending to Criminal Court*, *supra* note 23. It is interesting to note the characteristics of the group allowed free reign, the juvenile judges. A 1967 report indicated that one-half of nearly 3,000 juvenile court judges in the United States had no undergraduate degree and one-fifth of the judges had no college education of any kind. See *id.* at 313 n.34. In Iowa, however, all juvenile judges are required to have law degrees. Interview with Judge R. A. Strickler, Judge of the Polk County Juvenile Court, in Des Moines, Iowa (March 20, 1980).

26. 383 U.S. at 543-46.

27. *Id.* at 555.

28. *Id.* at 553.

29. *Id.* at 557. Commentators have emphasized the importance to the juvenile of a transfer to criminal court. One author characterizes waiver as the most drastic disposition available to a juvenile court. See Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978) (hereinafter cited as Feld). Another commentator states:

There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile proceeding is replaced by the publicity and normative concepts of penal law; the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobrium attached thereto by prospective employers; . . . he may lose certain civil rights and be disqualified from public employment. Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and even sexual

the juvenile court does not have complete latitude in its waiver decision, the Supreme Court ruled that the waiver proceeding must "satisfy the basic requirements of due process and fairness."³⁰ Due process in waiver decisions was held to entitle the juvenile to a hearing at which he is represented by counsel,³¹ to his counsel having access to social records and reports considered by the juvenile court,³² and to a statement of the reasons for the court's waiver decision.³³

The above procedural safeguards were applied to the waiver determination because the Supreme Court was skeptical that the *parens patriae* theory traditionally used to justify the absence of safeguards actually provided sufficient protection for the juvenile.³⁴ However, the *Kent* Court failed to

abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly.

Schorhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L. J. 583, 586-87 (1968). See also Alers, *Transfer of Jurisdiction from Juvenile to Criminal Court*, 19 CRIME AND DELINQUENCY 519, 526 (1973) (hereinafter cited as Alers); Peuler, *supra* note 4, at 350; Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law*, 62 KY. L. J. 122, 143 (1973) (hereinafter cited as Stamm); Missouri Comment, *supra* note 1, at 50. However, for discussions of when waiver can be a strategic advantage to a juvenile see Browne, *supra* note 6, at 488; Article, *Juvenile Waiver: The Inconsistent Standard*, 2 AM. J. CRIM. L. 331, 342-43 (1974) (hereinafter cited as *Inconsistent Standard*).

30. 383 U.S. at 553. Initially, the state courts had a mixed response to *Kent*. Some refused to follow the requirements based on the distinction that the *Kent* decision was grounded on the particular District of Columbia statute. However, the majority of the state courts regarded *Kent* as being of constitutional dimensions. Browne, *supra* note 6, at 481; Peuler, *supra* note 4, at 352-53. Iowa followed the majority view. See *State v. Speck*, 242 N.W.2d 287, 290 (Iowa 1976). A later Supreme Court case, *In re Gault*, 387 U.S. 1 (1967), resolved the constitutional-statutory ambiguity of *Kent*. The *Gault* Court stated in reference to its decision in *Kent*: "We emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in waiver proceedings." *Id.* at 12. Therefore, *Kent* should be viewed as being of constitutional proportions. See Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DEPAUL L. REV. 23, 27 (1976) (hereinafter cited as Vitiello); Comment, *Transfer of Jurisdiction Under the New Kentucky Juvenile Court Act*, 4 N. KY. L. REV. 141, 145 (1977) (hereinafter cited as *New Kentucky Act*). But see *Sending to Criminal Court*, *supra* note 23, at 320 (despite *Gault* decision, *Kent* involved only the statutory construction of waiver statute).

31. 383 U.S. at 557. The Court explained that it was not requiring the hearing to "conform with all of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment." *Id.* at 562.

32. *Id.* at 557. The court noted that counsel's right of access to the juvenile's social records would be meaningless unless the attorney is given an opportunity to function at a hearing on the transfer issue. *Id.* at 561.

33. *Id.* at 577. The statement of reasons must set out the basis of the transfer order with sufficient specificity to permit meaningful review. *Id.* at 580.

34. *New Kentucky Act*, *supra* note 30, at 144. Cases after the *Kent* decision continued to expand the due process rights of a juvenile in the juvenile justice system. The major decisions in this area include *Breed v. Jones*, 421 U.S. 519 (1975) (jeopardy attaches at the commence-

specifically articulate the substantive criteria upon which the juvenile judge should base his waiver decision. In the appendix to the opinion, the Court delineated the standards utilized by the District of Columbia; these were selectively adopted in some subsequent state judicial decisions and in some state statutes adopted to conform with *Kent*.³⁵ By not enunciating substantive criteria the *Kent* Court appeared willing to let the states individually develop their own governing criteria. As a result, the states have been delegated a difficult task, in that waiver laws must be carefully drafted if they are to remain compatible with *parens patriae*.³⁶ Waiver attacks the basic philosophy of the juvenile system because it is an admission that the system cannot or does not want to help one member of the class of individuals for which it was created.³⁷ If only those juveniles who are beyond the help of the juvenile court are waived to adult criminal court, then *parens patriae* and waiver are compatible. However, overly-broad waiver laws, which allow juveniles who are amenable to treatment to be transferred, conflict with the rehabilitative philosophy of the juvenile justice system.³⁸ The waiver process should operate so that the processes and sanctions of criminal justice will not be imposed upon a juvenile who can be helped within the juvenile system.³⁹

In summary, the *Kent* Court's confrontation with *parens patriae* yielded procedural safeguards for a juvenile facing the possibility of transfer to a criminal court.⁴⁰ Nonetheless, following that decision state juvenile systems still retained a high degree of discretion in the waiver context. Uniformity between jurisdictions on that subject has not been achieved, in part because the individual states were left with the duty of formulating the sub-

ment of the adjudicatory hearing so that a transfer decision must be made in a separate hearing prior to adjudication of the offenses charged); *In re Winship*, 397 U.S. 358 (1970) (a delinquency adjudication requires proof beyond a reasonable doubt); and *In re Gault*, 387 U.S. 1 (1967) (right to notice of charges, counsel, cross-examination of witnesses and privilege against self-incrimination in delinquency adjudicatory proceedings) (see note 30 *supra*). One due process guarantee which the Court has declined to extend to the juvenile is the right to a jury trial. See *McKeiver v. Penn.*, 403 U.S. 528 (1971).

35. See Vitiello, *supra* note 30, at 26. The standards are set out in note 76, *infra*.

36. See Note, *Waiver in Indiana - A Conflict with the Goals of the Juvenile Justice System*, 53 IND. L. J. 601, 602 (1978) (hereinafter cited as *Indiana Note*).

37. Stamm, *supra* note 29, at 145.

38. See *Indiana Note*, *supra* note 36, at 602.

39. Stamm, *supra* note 29, at 131. The waiver decision is important to the whole community. Upon waiver, no attempt at rehabilitation will be made and the community may lose a potentially productive citizen. On the other hand, if the juvenile court retains jurisdiction when there is no chance for rehabilitation, the community may be subject to a dangerous influence sooner than necessary. Note, *Juvenile Waiver Hearings and the Hearsay Rule - The Need for Reliable Evidence at the Critical Stage*, 12 VAL. U. L. REV. 397, 406 (1978) (hereinafter cited as *Reliable Evidence*).

40. See text accompanying notes 27-33, *supra*.

stantive criteria on which to base a decision to waive juvenile jurisdiction.⁴¹

B. Iowa Waiver Cases: Developments After Kent

The following Iowa Supreme Court cases reveal the status of a juvenile before the enactment of the new Juvenile Justice Act. Additionally, these cases aid in predictions concerning the Iowa Supreme Court's probable interpretation of the new statute.

1. *Mallory v. Paradise*⁴²

Theodore Mallory was indicted by a grand jury for assault with intent to commit great bodily injury. When he appeared for arraignment in the district court, it was discovered for the first time that he was a seventeen year old juvenile. Mallory petitioned for removal to juvenile court, but after a hearing on his petition the transfer was denied. The Iowa Supreme Court granted certiorari to determine the correct procedure to be followed by the Iowa courts when a juvenile commits an offense punishable as a crime.⁴³

The *Mallory* court noted that Iowa Code section 232.62 provided for concurrent jurisdiction between the juvenile and criminal courts.⁴⁴ This code section⁴⁵ was interpreted as constituting legislative approval of prior Iowa Supreme Court decisions⁴⁶ which had allowed a county attorney to bring a district court criminal action against a juvenile by information, or allowed a grand jury to indict a juvenile without first transferring the juvenile to juvenile court.⁴⁷ In short, these cases provided the prosecutor and the grand jury with the discretion to determine the court which would conduct the proceedings against the juvenile.⁴⁸

An earlier decision, *State v. Stueve*,⁴⁹ was also examined by the *Mallory* court. In *Stueve*, section 232.62 provided the basis for the court's continued holding that a juvenile could be taken to district court to answer for a crime without being first transferred to a juvenile court. In reaching its decision, the *Stueve* court distinguished section 232.61 which provided:

Any child taken before any justice of the peace or police court charged

41. See text accompanying notes 35 & 36, *supra*.

42. 173 N.W.2d 264 (Iowa 1969).

43. *Id.* at 265.

44. *Id.* See IOWA CODE § 232.62 (1977).

45. IOWA CODE § 232.62 (1977).

46. Those cases are: *Ethridge v. Hildreth*, 253 Iowa 855, 114 N.W.2d 311 (1962); *State v. Reed*, 207 Iowa 557, 218 N.W. 609 (1928).

47. 173 N.W.2d at 266. Once the indictment or information was filed in the district court, the juvenile's only possibility of transfer was after a guilty verdict had been reached and the district court elected to refer the juvenile to juvenile court for disposition. *Id.* See IOWA CODE § 232.72 (1977).

48. See 173 N.W.2d at 266.

49. 260 Iowa 1023, 150 N.W.2d 597 (1967).

with a public offense shall, together with the case, be at once transferred by said court to the juvenile court.⁵⁰

The *Stueve* court construed section 232.61 as being analagous to a bindover procedure,⁵¹ and found the section therefore did not compel referral to juvenile court before criminal charges could be entered.⁵²

However, in *Mallory*, the court terminated the prosecutor's and grand jury's discretion as to the choice of forum. The court concluded that this result was mandated by the legislative response to its *Stueve* decision.⁵³ One month after *Stueve*, the legislature repealed the section *Stueve* had construed as being simply a bindover procedure and enacted section 232.64, which provided that any court other than a juvenile court must transfer juveniles appearing before it to the juvenile court of the county.⁵⁴ The *Mallory* court announced that 232.64 was not a bindover statute and was a "direct requirement that a juvenile *must* be transferred to juvenile court if he appears in any other court charged with a public offense not exempted from the operation of Chapter 232."⁵⁵

Mallory signified the Iowa Supreme Court's awareness of the serious likelihood that the criminal process would ensnare a juvenile capable of rehabilitation if the prosecutor was given wide latitude in determining the forum. The speed in which the prosecutor's decision is made, the total absence of standards to guide his decision and the potential for political manipulation could too easily result in arbitrary decision making.⁵⁶ It is unrealistic to assume that a person generally concerned with "bringing the guilty to justice" can dispassionately weigh the interests of the child and the state at the same time.⁵⁷ As *Mallory* recognized, simple logic dictates that a juvenile under the jurisdiction of the system established for his benefit should have, in the first instance, an opportunity to benefit from the processes of that juvenile system.

50. IOWA CODE § 232.61 (1966).

51. A bindover procedure is equivalent to a preliminary hearing. This procedure results in the defendant being "held to answer in further proceedings" if the evidence at the hearing reveals there is probable cause to believe that an offense has been committed and that the defendant committed it. The defendant is also "held to answer in further proceedings" if he waives a preliminary hearing. See IOWA R. CRIM. PRO. 2.

52. 260 Iowa at 1030, 150 N.W.2d at 601.

53. 173 N.W.2d at 268.

54. *Id.* at 266, 268. See IOWA CODE § 232.64 (1977).

55. *Id.*

56. Mylniec, *Juvenile Delinquent or Adult Convict - The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 36 (1976) (hereinafter cited as Mylniec).

57. See Stamm, *supra* note 29, at 139. For a statute allowing the prosecutor to choose whether the action will be adjudicated in criminal or juvenile court, see NEB. REV. STAT. § 43-202.1 (1978).

2. *State v. Halverson*⁵⁸

Marcus Halverson was brought before juvenile court on a petition alleging delinquency resulting from the crime of arson. At the hearing on the petition, the court questioned the county attorney as to whether he intended to bring criminal charges in the event that the juvenile court waived jurisdiction. The county attorney indicated that he would do so.⁵⁹ However, the court's subsequent announcement that "it is the court's view that this is a regular hearing on a petition charging delinquency"⁶⁰ was followed by a comprehensive hearing on the merits.⁶¹ After the hearing the juvenile court did not rule on the merits of the delinquency petition, but instead entered an order waiving jurisdiction to the criminal court. The district court sustained Halverson's plea of former jeopardy and dismissed the indictment.⁶² On appeal, the Iowa Supreme Court faced the issue of whether a hearing separate from a hearing on the merits is required on the question of transferring a juvenile from juvenile to criminal court.⁶³

In resolving the issue, the *Halverson* court declined to base its decision on the constitutional aspect of double jeopardy, and grounded it instead on section 232.72 of the Iowa Code.⁶⁴ That section authorized transfer of a juvenile to criminal court when, among other requirements, the juvenile court has conducted a hearing. The court relied on the fact that section 232.72 had been promptly enacted after the *Kent* decision, which required a hearing,⁶⁵ and construed the statute to mandate a separate hearing on the issue of transfer.⁶⁶ While recognizing the importance of a hearing on the merits, the court indicated that "a transfer hearing may be even more critical."⁶⁷

The *Halverson* court also supported its requirement of a separate hearing by noting that a transfer hearing and a delinquency hearing have different objectives. Therefore, the evidence and the court's inquiry at the two hearings are different.⁶⁸ Additionally, criteria for a waiver decision were enumerated for the first time by the *Halverson* court. The amenability of the

58. 192 N.W.2d 765 (Iowa 1971). For a thorough discussion of the *Halverson* case, see 22 DRAKE L. REV. 213 (1972).

59. 192 N.W.2d at 765-66.

60. *Id.* at 766.

61. *Id.* The court heard testimony from seventeen witnesses and examined twenty-nine exhibits. The bulk of the evidence concerned the fires and Halverson's alleged connection with their having been set. Also submitted to the court was a psychiatric evaluation and a social investigation report. *Id.*

62. *Id.*

63. *Id.* at 765.

64. *Id.* at 768. See IOWA CODE § 232.72 (1977) (entire text of section included in note 19, *supra*).

65. See text accompanying notes 23-39, *supra*.

66. 192 N.W.2d at 768.

67. *Id.* at 769.

68. *Id.*

child to the rehabilitative measures of the juvenile court, the necessity of protecting the public from the child and the heinousness of the alleged offense were listed as relevant issues in a transfer hearing. These issues were contrasted with the juvenile court's probe for the truth on the ultimate issue of guilt or innocence in a hearing on the merits.⁶⁹

Finally, the court concluded that simple fairness supported a statutory interpretation that a juvenile confronted with a delinquency petition and sent to a hearing "is entitled to be apprised of the purpose of the hearing at the outset of it."⁷⁰ The court stated that a juvenile can assume that a hearing will be one on the merits unless the county attorney moves for transfer or unless the court, *sua sponte* after hearing the county attorney's opening statement, proclaims the hearing to be restricted to the issue of transfer. However, the court's announcement must be made before the juvenile's counsel makes his preliminary statement or, in the absence of such statement, before the first evidence is introduced. If the hearing progresses without a motion by the county attorney and without a declaration of the court's intent to limit the hearing to the transfer issue, the juvenile cannot subsequently be transferred to criminal court for the crime forming the basis of the delinquency petition.⁷¹

In *Halverson*, the Iowa court officially recognized the critical nature of a decision to waive jurisdiction, and gave juveniles the invaluable right to a hearing dealing solely with that crucial question. *Halverson* also provided juvenile judges Iowa's first set of guidelines for use in making the waiver decision by enumerating as criteria amenability to treatment, public protection and the nature of the offense. However, the court failed to recognize the juvenile's need for adequate time to prepare for a hearing concerned with transfer. By allowing the juvenile judge the discretion to restrict the hearing to transfer as late as after the county attorney's preliminary statement, the court forced juveniles and their attorneys to be prepared with evidence and arguments relevant to both the merits and the transfer question. This resulted in a waste of valuable time, and the court could better have required that notice that the hearing was to be on the issue of transfer be given to the juvenile and his attorney within a reasonable amount of time before the hearing.

3. *State v. Speck*⁷²

John Speck, a seventeen year old juvenile charged with robbery with aggravation, was transferred to the criminal court for prosecution when the juvenile court granted the county attorney's motion for transfer. The juve-

69. *Id.*

70. *Id.*

71. *Id.*

72. 242 N.W.2d 287 (Iowa 1976).

nile court enunciated the following reasons as the basis for the jurisdictional waiver:

(1) there was a prima facie case defendant committed, by force, violence, and putting into fear, a robbery with a gun with intent to kill or maim if resisted; (2) Speck, a school dropout, had previously appeared in juvenile court, had been committed to the Boys Training School and upon violation of a probationary release, had been returned to Eldora; and (3) since the crime was a premeditated and violent one not normally committed by youths and one which would endanger the mental health and life of other persons, it was in the best interest of the child and state to transfer the matter.⁷³

Speck appealed the jury's guilty verdict arguing that the standard of section 232.72, "best interests of the minor or the public,"⁷⁴ was unconstitutionally void for vagueness. He contended that because the statutory standard was capable of so many interpretations it constituted no standard at all.⁷⁵ Therefore, the issue of the facial validity of the statutory waiver standard was before the Iowa Supreme Court for the first time.⁷⁶

The majority stated that although the *Kent* Court had not expressly adopted the eight criteria appended to its opinion, the fact the criteria were included suggested that they are appropriate guidelines for juvenile waiver proceedings.⁷⁷ The *Speck* court then contrasted the guidelines of its

73. *Id.* at 288-89.

74. See IOWA CODE § 237.72 (1977) (entire text of section included in note 19, *supra*).

75. 242 N.W.2d at 291.

76. "The question of this statute's unconstitutionality is one of first impression in this jurisdiction." *Id.* at 289.

77. The *Kent* criteria are:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

383 U.S. at 566-67.

Halverson decision⁷⁸ with the *Kent* criteria and concluded that in *Halverson* the court had recognized five of the *Kent* criteria.⁷⁹ In a similar comparison, the majority noted that *Speck's* juvenile court had included seven of the eight *Kent* criteria⁸⁰ in its waiver order.⁸¹

In holding that the statute was not unconstitutionally vague, the court concluded that the juvenile judge's discretion was limited and guided by the structure and purpose of the juvenile system itself. The *Speck* majority considered the statutory section⁸² declaring that the purpose of Chapter 232 is to "secure for each child within its provisions such care, guidance and control that will conduce to his welfare and the best interests of the state"⁸³ to be one standard guiding the juvenile judge. The second standard enunciated as guiding the juvenile judge was the identical "best interests" language of section 232.72, which *Speck* was challenging as vague. The court added that the implementation of the above two standards could be guided by the *Kent* criteria "as well as any others which may arise under the particular facts."⁸⁴

Speck allowed juvenile judges to continue making waiver decisions with few guidelines and enormous discretionary powers. The court placed undue emphasis on the fact that *Speck's* waiver order had contained most of the *Kent* criteria, instead of realistically evaluating the enormous potential for abuse in the "best interests" language found in both section 232.1 and section 232.72. While the *Speck* court's admonition to use the *Kent* criteria as a guide in determining "best interests" could have narrowed judicial discretion slightly, the court's language allowing the judge to consider "any other criteria" effectively destroyed any restriction which might have resulted from the application of the *Kent* criteria.

4. *Interest of Clay*⁸⁵

Anthony Clay, a seventeen year old juvenile, was brought under the juvenile court's jurisdiction for allegedly operating a motor vehicle without the owner's consent. The state motioned for transfer, and after a contested hearing the juvenile court ordered transfer to the criminal court. Clay appealed his transfer order, forcing the Iowa Supreme Court to decide whether it had jurisdiction to entertain Clay's direct appeal.⁸⁶

Initially, the *Clay* court noted that the juvenile court is a division of the

78. See 192 N.W.2d at 769 (amenability to treatment, public protection, and the heinousness of the offense).

79. The five criteria were numbers 1, 2, 3, 7, and 8 of note 76, *supra*.

80. These included all but number 5 in note 76, *supra*.

81. 242 N.W.2d at 293.

82. See IOWA CODE § 232.1 (1977).

83. 242 N.W.2d at 293.

84. *Id.* at 294.

85. 246 N.W.2d 263 (Iowa 1976).

86. *Id.* at 264.

unified "Iowa District Court," and that an order transferring a cause from one state court to another is ordinarily deemed to be interlocutory. The court also characterized transfer orders as preliminary procedural mechanisms which did not constitute any determination as to guilt or innocence.⁸⁷ Finally, section 232.58,⁸⁸ dealing with appeals from juvenile courts, was construed so as to not require appeals of juvenile transfer orders as a matter of right.⁸⁹

The court's statutory construction was achieved by determining that the first sentence of section 232.58, "[a]n interested party aggrieved by any order or decree of the [juvenile] court may appeal to the supreme court for review of questions of law and fact,"⁹⁰ was qualified by the next sentence, "[t]he procedure for such appeals shall be governed by the same provisions applicable to appeals from the district court"⁹¹ Therefore, juvenile appeals were held to follow the district court appeal procedure set out in former rule 331 of the Iowa Rules of Civil Procedure. That rule allows appeals from interlocutory rulings when the aggrieved party has applied to the supreme court or any supreme court justice to grant an appeal in advance of final judgement and the application has been granted.⁹² Because Clay's transfer order was interlocutory and no permission had been given to appeal in advance of the final determination of guilt or innocence, his case was dismissed for lack of jurisdiction.

The *Clay* decision, based on a literal interpretation of the appeal statute, was a serious setback for juveniles in Iowa. Without direct appeal, a waiver order that is founded on mistake or is arbitrary will not be reviewed until *after* the juvenile has been exposed to criminal court jurisdiction.⁹³ It is irrelevant that the decision was unintentionally arbitrary or caused by oversight or mistake because the juvenile will have already have been subjected to the evils of the adult process.⁹⁴ The juvenile will have undergone the stigma and publicity of an adult criminal trial and possibly will have spent some time incarcerated with adult felons.⁹⁵ In view of the extreme importance of the waiver proceeding and of the highly subjective nature of the juvenile judge's decision, it is crucial that immediate review of the decision to deprive a juvenile of further protections of the juvenile court system

87. *Id.*

88. IOWA CODE § 232.58 (1977).

89. 246 N.W.2d at 264.

90. *Id.*; 246 N.W.2d at 265.

91. 246 N.W.2d at 265-6.

92. IOWA R. CIV. PRO. 331. This rule was subsequently stricken by order of the supreme court.

93. Comment, *Juvenile Court and Direct Appeal from Waiver of Jurisdiction in Ohio*, 8 AKRON L. REV. 499, 518 (1975) (hereinafter cited as AKRON L. REV.).

94. Illinois Comment, *supra* note 5, at 518.

95. Missouri Comment, *supra* note 1, at 56.

be allowed.⁹⁶

The cases previously examined illustrate the situation of the juvenile in Iowa prior to the enactment of the new 1979 Juvenile Justice Act. The juvenile was entitled to appear before the juvenile court when first apprehended⁹⁷ and was additionally entitled to a transfer hearing separate from a hearing on the merits and limited to the issue of waiver before he would lose the protective benefits of the juvenile court system.⁹⁸ However, the juvenile judge had tremendous discretion in determining whether or not to retain jurisdiction⁹⁹ and the judge's discretionary order was deemed interlocutory, which foreclosed the juvenile from direct appeal.¹⁰⁰

III. AN EXAMINATION OF THE WAIVER PROVISION OF THE IOWA JUVENILE JUSTICE ACT OF 1979

The new Juvenile Act has many provisions indicating that the legislature continued to recognize the special nature of juvenile proceedings. For example, a child adjudicated to have committed a delinquent act is not deemed to have been convicted of a crime, and the delinquency adjudication does not impose any civil disabilities or disqualify the juvenile from civil service positions.¹⁰¹ Explicit sections provide for the confidentiality of juvenile court records¹⁰² and prohibit the evidence given and the disposition reached in a delinquency proceeding from being used as evidence in other court proceedings.¹⁰³ The special conditions which allow a juvenile to be fingerprinted and photographed after being taken into custody are also included within the new Act.¹⁰⁴ These statutory sections illustrate the continuing influence of the doctrine of *parens patriae* in the juvenile justice area, and the differences between proceedings under the Juvenile Act and those in adult criminal court. The link between these two distinct court processes, the waiver procedure, was extensively rewritten by the legislature. The procedural rights and the substantive criteria that had developed in Iowa case law concerning waiver were incorporated into the new waiver statute, section 232.45,¹⁰⁵ a discussion of which follows.

96. See Sorrentino, *supra* note 3, at 519; Stamm, *supra* note 29, at 176.

97. See text accompanying notes 42-54 *supra*.

98. See text accompanying notes 55-70 *supra*.

99. See text accompanying notes 71-83 *supra*.

100. See text accompanying notes 84-94 *supra*.

101. See IOWA CODE § 232.55(1) (1979).

102. See IOWA CODE § 232.147 (1979).

103. See IOWA CODE § 232.55(2) (1979) (this information may be used in a sentencing proceeding following a felony conviction).

104. See IOWA CODE § 232.148 (1979).

105. IOWA CODE § 232.45 (1979).

A. Procedural Aspects of the Waiver Hearing

1. Jurisdiction

The new Act provides that the juvenile court has "exclusive original jurisdiction,"¹⁰⁶ and omits the old provision stipulating concurrent jurisdiction between juvenile and criminal courts.¹⁰⁷ The *Mallory* case law principle¹⁰⁸ is codified by language requiring that a juvenile within the jurisdiction of the juvenile court¹⁰⁹ but appearing before any other court "shall immediately be transferred to juvenile court."¹¹⁰ Therefore, a prosecutor or a grand jury does not have the power to bypass a waiver hearing by instigating adult criminal court processes when the juvenile has committed an act which places him under juvenile court jurisdiction.¹¹¹ Once under juvenile court jurisdiction, the Act specifies that a juvenile must be fourteen years of age or older before the court can waive its jurisdiction.¹¹² The waiver processes are not limited to the more serious felonies but potentially encompass any act within juvenile jurisdiction.

However, the court apparently has no jurisdiction to order a transfer to adult court once an adjudicatory hearing on the merits has been held.¹¹³ This provision prevents the juvenile from being placed in double jeopardy by having a determination on the merits reached in both adult and juvenile court. Additionally, the court has no authority to invoke the waiver processes *sua sponte*, only the child or county attorney may file motions requesting waiver.¹¹⁴ This is an improvement over the language of *Halverson* which allowed the judge to restrict a hearing to the waiver issue by his own independent action.¹¹⁵ By restricting the judge's power the new Act preserves the role of the judge as an arbitrator. The judge will therefore be more easily perceived by the juvenile as an impartial trier of fact, rather

106. See IOWA CODE § 232.8 (1979).

107. See IOWA CODE § 232.62 (1977).

108. For a detailed explanation of this case, see notes 42-54, *supra* and accompanying text.

109. Violations of specified chapters of the Iowa Code which would be simple misdemeanors if committed by an adult, violations of curfew or traffic ordinances, and violations of § 123.47 of the Liquor Control Act are specifically excluded from the jurisdiction of the juvenile court and are prosecuted as simple misdemeanors. See IOWA CODE § 232.8(b) (1979).

110. See IOWA CODE § 232.8(2) (1979).

111. Compare IOWA CODE § 232.73 (1977).

112. IOWA CODE § 232.45(6)(a) (1979). Iowa's minimum of fourteen is lower than most states and is contrary to a noticeable trend towards increasing the minimum age limit so that transfer focuses upon older juveniles. See Sorrentino, *supra* note 3, at 504. See also N.D. CENT. CODE § 27-20-34 (1979) (16 year minimum); WIS. STAT. ANN. § 48.18 (1979) (16 year minimum).

113. See IOWA CODE § 232.45(1) (1979).

114. *Id.*

115. For a detailed explanation of this case, see notes 55-70, *supra* and accompanying text.

than as a prosecutor.¹¹⁶

2. Procedures Guaranteeing Adequate Preparation for the Waiver Hearing

Along with the requirement that the court hold a hearing on all waiver motions,¹¹⁷ which apparently represents a codification of the *Halverson* concept of a separate hearing, are several provisions ensuring that the juvenile will have an opportunity to prepare for the hearing. First, the juvenile and his guardian ad litem must be given notice of the hearing which includes the time, place, and purpose of the waiver hearing.¹¹⁸ Such notice must be given not less than five days before the hearing date.¹¹⁹ Second, the juvenile has the right to be represented by counsel at the waiver hearing.¹²⁰ The legislature apparently deemed this right to counsel to be so crucial that the child is not allowed to waive his right to counsel, and the court will therefore appoint counsel if necessary.¹²¹

Before the hearing commences, the juvenile's counsel must be given access to all written material which the court will consider in making its waiver determination. This includes access to the report of the juvenile probation officer or other person who was assigned by the court the duties of investigating the case, collecting information relevant to the waiver decision, and making recommendations concerning waiver.¹²² As a result, the juvenile's counsel will have access to the information necessary to prepare an effective rebuttal. Additionally, the juvenile has the right to subpoena witnesses to testify at the hearing and to compel the production of papers at the hearing.¹²³ This is an improvement over the old Act which gave the juvenile no independent power to subpoena and only allowed subpoenas for those persons the court deemed to be necessary or for those persons subpoenaed by the juvenile's parent or guardian.¹²⁴

116. See Browne, *supra* note 6, at 488.

117. IOWA CODE § 232.45(2) (1979).

118. IOWA CODE § 232.45(3) (1979) (emphasis added).

119. *Id.* See IOWA CODE § 232.37(4) (1979).

120. IOWA CODE § 232.11(c) (1979).

121. IOWA CODE §§ 232.11(2), (3) (1979).

122. IOWA CODE § 232.45(4) (1979). In Polk County this report is always prepared by a probation officer who has a college degree in the social science field. The report contains the same information as is included in a social summary for a child in need of assistance or in a predispositional report after a child has been adjudicated delinquent. The report is a background check including such information as grades, school attendance and arrest records. Information about parents and siblings as well as hearsay evidence from teachers, doctors, social workers and probation officers is also included. Interview with Judge R. A. Strickler, Judge of the Polk County Juvenile Court, in Des Moines, Iowa (March 20, 1980).

123. IOWA CODE § 232.37(3) (1979).

124. See IOWA CODE § 232.6 (1977).

3. *Evidence at the Waiver Hearing*

The judge is given a high degree of discretion in determining what evidence will be admitted at the waiver hearing. The applicable statutory provision states that "all relevant and material evidence shall be admitted."¹²⁵ This is much broader than the provision describing the evidence to be admitted in delinquency adjudicatory proceedings, which allows the introduction of "[o]nly such evidence which is admissible under the rules of evidence applicable to the trial of criminal cases."¹²⁶ Another example of a restriction on the type of evidence admitted is the standard used in the child in need of assistance hearings, which provides that "[o]nly evidence which is admissible under the rules of evidence applicable to the trial of civil cases"¹²⁷ shall be admitted. Hearsay evidence can therefore be admitted in a waiver hearing as long as it is material and relevant. In fact, the juvenile probation officer's report made prior to the hearing will undoubtedly contain a significant amount of hearsay information. The juvenile will need to utilize his subpoena power to refute hearsay statements made in such reports. Sources of information which he believes to be biased or deficient in their reporting techniques, as well as authors of inaccurate statements, should be called into court and questioned by the juvenile.¹²⁸ Unfortunately, if any of those people are beyond the subpoena power of the court, the evidence will likely be admitted anyway, as long as it fits into the broad "relevant and necessary" category.

Police testimony concerning the alleged act may constitute hearsay if the policeman was not an eyewitness. The statute could be improved by requiring each and every eyewitness or victim upon whom the prosecution intends to rely in proving the necessity for waiver to testify under oath and in the presence of the juvenile.¹²⁹ All the police officer can do is recite what others told him; therefore, if he is the only person available for cross-examination the juvenile has no chance to expose the possibilities of biased witnesses, witnesses who exaggerated in relating their story to the officer, or witnesses who were confused.¹³⁰

A further shortcoming of the waiver statute is its failure to specify any standard which the evidence must support before waiver can be ordered. Other sections of the new Act provide for various standards at the different types of hearings and there is no reason why the judge's discretion in a waiver determination should not be restricted by a standard of evidence. In the delinquency adjudicatory hearings, the state must prove beyond a rea-

125. IOWA CODE § 232.45(5) (1979).

126. See IOWA CODE § 232.47(5) (1979).

127. See IOWA CODE § 232.96(3) (1979).

128. See *Reliable Evidence*, *supra* note 39, at 418.

129. *Id.* at 407.

130. *Id.* at 408.

sonable doubt that the juvenile engaged in the alleged misconduct.¹³¹ Clear and convincing evidence is required before a dispositional order entered pursuant to a delinquency adjudication can be modified or replaced by a more restrictive order.¹³² Also, in child in need of assistance proceedings the juvenile judge may enter an order only when he concludes that facts sufficient to sustain the petition were established by clear and convincing evidence.¹³³ The strict "reasonable doubt" standard is not necessary in waiver situations, but the legislature should at least require the state to prove by clear and convincing evidence that a transfer is necessary, and should prohibit the juvenile judge from entering a waiver order unless the evidence has met this standard.¹³⁴

One excellent provision in the waiver statute prohibits statements made by the juvenile at the waiver hearing from being admissible as "evidence in chief" in subsequent criminal proceedings when the juvenile objects to their admission.¹³⁵ This section is consistent with the usual practice of preserving the confidentiality of juvenile proceedings. Additionally, at a transfer hearing the juvenile would therefore be allowed to express his contrition and indicate the manner in which he would cooperate with a juvenile court plan for his rehabilitation without fear of being trapped by such statements in a later criminal proceeding focused on guilt.¹³⁶ Logically, the juvenile at a transfer hearing should be able to testify regarding the transfer criteria without fear of compromising his right to remain silent at a prosecution on the merits, and section 232.45(9) supports this logic.¹³⁷

4. Post-Waiver Procedures

It should be noted that case law prior to the new Juvenile Justice Act had established that a juvenile is "held to answer for a public offense" when he is transferred for prosecution as an adult.¹³⁸ Therefore, the state had

131. See IOWA CODE § 232.47(10) (1979).

132. See IOWA CODE § 232.54(5) (1979).

133. See IOWA CODE § 232.96(9) (1979).

134. Wisconsin utilizes the clear and convincing evidence standard in waiver proceedings. See WIS. STAT. ANN. § 48.18(6) (1979).

135. See IOWA CODE § 232.45(9) (1979).

136. See Browne, *supra* note 6, at 489. However, because the legislature used the language "evidence in chief" the evidence would probably be allowed in a criminal proceeding for impeachment purposes. Interview with Judge R. A. Strickler, Judge of the Polk County Juvenile Court, in Des Moines, Iowa (March 20, 1980). For a provision without the restrictive "evidence in chief" language see N.D. CENT. CODE § 27-20-34(4) (1979).

137. Browne, *supra* note 6, at 489; IOWA CODE § 232.45(9) (1979) (section also requires that statements made by juvenile, other than statements made in the waiver hearing, be voluntary and in some instances be made after waiver of right to counsel before they are admissible in subsequent criminal proceedings).

138. See *Bergman v. Nelson*, 241 N.W.2d 14, 15 (Iowa 1976); *State v. White*, 223 N.W.2d 173, 176 (Iowa 1974).

thirty days after the transfer order to indict the juvenile or the criminal court would dismiss the prosecution. The only exception which would allow the prosecution to continue was a situation where the state could show good cause for the delay.¹³⁹ This case law appears to be relevant under the new Act; however, the new criminal code has expanded the state's time limit to forty-five days.¹⁴⁰ Therefore, a juvenile who is not indicted within forty-five days after his transfer should automatically enter a motion to dismiss once he is indicted and force the state to show good cause for the delay.

Another important option for the juvenile after waiver has been ordered is his statutory right to a different judge in subsequent proceedings connected with his transferred prosecution. If the juvenile enters an objection, he will not be prosecuted in adult court under the judge who waived his case to that court.¹⁴¹ This section recognizes the different types of evidence and the different goals of waiver and merit hearings. The judge presiding over the criminal prosecution should not have been exposed to evidence which was admissible under the more relaxed waiver hearing standards but would not be admissible in the criminal prosecution. Also, the juvenile's right to prevent statements made in his waiver hearing from being used as part of the prosecution's "evidence in chief" in the criminal prosecution¹⁴² would be a meaningless right in a criminal prosecution before a judge who had evaluated the statements at the waiver hearing. The juvenile's right to object and obtain a new judge will preserve the fairness and impartiality that is crucial in any criminal prosecution.

Even if the juvenile pleads guilty or is found guilty in another court, he is not automatically subject to adult sanctions. Section 232.8(3) provides that the court, with the child's consent, may defer judgment and place the juvenile on probation for a minimum of one year. If the juvenile fulfills the conditions of his probation, he will then be discharged without judgment being entered.¹⁴³ In this section, the philosophy of helping and rehabilitating

139. *Id.*

140. See IOWA R. CRIM. PRO. 27.

141. IOWA CODE § 232.45(10) (1979).

142. See note 127 *supra*, and accompanying text.

143. IOWA CODE § 232.8(3) (1979). Other adult sanctions that a Polk County judge can select from include: street probation, restitution, community services, placement in the Women's Residential Facility, placement in the Fort Des Moines Men's Residential Facility or a county jail sentence. The maximum security prison options are the Women's Reformatory at Rockwell City, and for males, the Anamosa Facility for Young Adults or the Fort Madison Penitentiary. In contrast, the options available to the juvenile court judge in determining the disposition of a delinquent are enumerated in section 232.52 of the new Act. See IOWA CODE § 232.52 (1979). These include work and restitution, probation with release to parents or a special care and treatment order for the emotional or mental health of the juvenile, for example, services available at the Child Guidance Center for Mental Health. The judge also has the power to order the legal custody of the child transferred to a relative or other adult while placing the child on probation, or to transfer custody to a child placing agency, or to transfer custody to the department of social services for placement in a foster home. When necessary, a juvenile

the juvenile is carried over to and becomes an option of courts other than the juvenile court.

The new Act also provides less stringent sanctions for the juvenile waived to adult court in connection with certain drug offenses. A juvenile convicted of delivering, manufacturing, or possessing with the intent to deliver or manufacture a controlled substance except marijuana, will not be punished by the mandatory minimum sentences set out for adults. The juvenile, however, will be confined for a minimum of thirty days in a secure facility.¹⁴⁴ Further, provision is made for sealing the records of a juvenile charged or convicted of the above offenses. The records will be sealed if two conditions are met after the final discharge of the juvenile.¹⁴⁵ First, five years must have elapsed, and second, subsequent to the discharge the juvenile must not have been "convicted of a felony or an aggravated or serious misdemeanor, or adjudicated a delinquent for an act which if committed by an adult would be a felony, or an aggravated or serious misdemeanor"¹⁴⁶ These types of provisions preserve to the juvenile some of the privileges of juvenile status even though jurisdiction has been transferred.

B. *Substantive Criteria for Waiver of Juvenile Court Jurisdiction*

The new waiver statute¹⁴⁷ establishes criteria to guide the juvenile court and the parties in the waiver hearing. These criteria should improve the ability of the juvenile courts to decide the waiver issue fairly and uniformly, and should improve the ability of the parties to present relevant evidence since they now have statutory guidelines delineating the factors the judge must consider.

The statute sets out three prerequisites to an order waiving jurisdiction.¹⁴⁸ First, the juvenile must be fourteen years of age or older.¹⁴⁹ However,

can be committed to an appropriate mental health institute. The most severe penal sanction available is an order transferring guardianship of the juvenile to the department of social services for placement in the Iowa Training School for Girls at Mitchellville or the Iowa Training School for Boys at Eldora. The juveniles at these facilities live in cottages which are locked at night and attend classes during the day on the campus of the respective facility. Vocational education is stressed. Interview with Judge R. A. Strickler, Judge of the Polk County Juvenile Court, in Des Moines, Iowa (March 20, 1980). See IOWA CODE § 232.52 (1979). See also notes 174-76 *supra* and accompanying text.

144. See IOWA CODE § 232.45(11) (1979).

145. *Id.*

146. IOWA CODE § 232.45(11)(b) (1979).

147. See IOWA CODE § 232.45 (1979).

148. The statute provides:

At the conclusion of the waiver hearing the court may waive its jurisdiction over the child if:

a. The child is fourteen years of age or older; and
b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute a public offense; and

once this minimum has been established two other statutory sections prevent age from being a factor unduly pressuring the court to transfer jurisdiction. In some instances a person who was a juvenile at the time of the delinquent act has turned eighteen and is therefore an adult when brought before the juvenile court. To prevent his present adult status from being given undue consideration, leading to automatic waiver, the legislature has provided that juvenile courts can enter dispositional orders regarding these delinquent adults.¹⁵⁰ These orders expire one year after the last date on which the juvenile court could attach jurisdiction,¹⁵¹ so the fact that the juvenile is eighteen does not prevent him from attempted rehabilitation via the juvenile courts dispositional order.

A second potential problem eliminated by the legislature occurs when a young juvenile, for example fifteen, commits a delinquent act which, if sanctioned by adult criminal penalties, would result in a short period of incarceration. This fifteen year old juvenile would then prefer transfer rather than being subjected to a juvenile dispositional order controlling him for three years until he reaches eighteen. However, Iowa provides that a dispositional order which transfers guardianship of the juvenile to the commissioner of the department of social services for placement in a juvenile home or training school cannot remain in force longer than the maximum possible sentence which could be imposed upon an adult for the same act or crime.¹⁵² Therefore, the potential disparity causing longer incarceration under juvenile jurisdiction has been remedied by the legislature.

The second prerequisite to an order waiving jurisdiction is a determination that there is probable cause to believe the juvenile committed a delinquent act constituting a public offense.¹⁵³ The addition of probable cause as a requirement is an improvement over the previous law which did not include any similar requirement. The juvenile system's focus on helping the juvenile indicates that a juvenile court should not undertake the drastic measure of waiving jurisdiction until it has determined there are reasonable

c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child in the event the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed a delinquent act, and that waiver of the court's jurisdiction would be in the best interest of the child or the community.

IOWA CODE § 232.45(6) (1979).

149. See IOWA CODE § 232.45(6)(a) (1979).

150. See IOWA CODE § 232.53(2) (1979).

151. *Id.* An adult is a person 18 years of age or older. See IOWA CODE § 232.2(3)(4) (1979). The juvenile court has jurisdiction over an adult who allegedly committed a delinquent act prior to becoming adult when the adult is taken into custody or a delinquency petition is filed: (1) less than one year after an act which would be a simple misdemeanor if committed by an adult and (2) less than two years after an act constituting an offense other than a simple misdemeanor if committed by an adult. See IOWA CODE § 232.8 (1979).

152. See IOWA CODE § 232.53(2) (1979).

153. See IOWA CODE § 232.45(6)(b) (1979).

grounds to believe the child committed the offense.¹⁵⁴

The final prerequisite to waiver incorporates part of the "best interests" language from the old waiver provision but expands and improves upon the old standard.¹⁵⁵ The juvenile court must now determine whether the state has established that there is no reasonable prospect of rehabilitating the juvenile and that a waiver of jurisdiction would be in the best interests of the child or the community.¹⁵⁶ The addition of language placing the burden on the state is reasonable since the juvenile system exists for the benefit of the juvenile. Therefore, the state is the logical party to bear the burden of showing that a particular individual would not benefit from treatment within the system.¹⁵⁷ However, as suggested earlier,¹⁵⁸ the statute could be improved by language establishing a standard of proof so that the state would be required to meet its burden by producing clear and convincing evidence that the juvenile is not amenable to treatment.¹⁵⁹

The new requirement that there be no reasonable prospect of rehabilitation should be the crux of any waiver determination. The respective philosophies and objectives of juvenile and criminal justice demand that a strict scrutiny of the rehabilitation potential of the juvenile occur prior to forcing the juvenile into the jeopardies of adult justice.¹⁶⁰ Transfer should be viewed as a last resort and should be restricted to only those juveniles who are completely beyond the rehabilitation power of the juvenile court.¹⁶¹

However, the statute adds "the best interests of the child or community" as a second part of the state's burden. Problems arise because the best interests of the child are often in conflict with the best interests of the community. The community's interest might best be furthered by incarcerating a potential criminal, but a prison term for a malleable juvenile will not provide the rehabilitation which is in his best interest.¹⁶² Additionally, since the statute specifies "child or community"¹⁶³ it appears that if waiver promotes the interests of the community the child's interest can be subrogated. Yet, it is unclear from the statute what would result if the community interests favored waiver but the first part of the state's burden was not met because the child had rehabilitative potential. Whether the "and" connecting potential rehabilitation and best interests¹⁶⁴ allows a balancing test between those

154. See Sorrentino, *supra* note 3, at 515. For a discussion urging that a probable cause hearing separate from the transfer hearing be mandated see Browne, *supra* note 6, at 485-86.

155. See IOWA CODE § 232.72 (1977).

156. See IOWA CODE § 232.45(6)(c) (1979).

157. See Sorrentino, *supra* note 3, at 516.

158. See note 126 *supra* and accompanying text.

159. See Browne, *supra* note 6, at 494; Indiana Note, *supra* note 36, at 613.

160. See Stamm, *supra* note 29, at 132.

161. *Id.* at 150.

162. See *Inconsistent Standard*, *supra* note 29, at 342.

163. See IOWA CODE § 232.45(6)(c) (1979) (emphasis added).

164. *Id.*

two requirements or whether both sides of the equation must favor transfer before the court can waive jurisdiction is unclear from the statutory language. If both factors must support waiver before the court transfers jurisdiction, then in effect the potential for rehabilitation is the sole test of waiver since this potential could not be balanced away by a community interest favoring waiver. The *parens patriae* philosophy would support eliminating any reference to the community's interest,¹⁶⁵ but the Iowa legislature's intent is unclear. The problem needs to be resolved by an amendment expressing the legislature's desire in clear and unambiguous terms.

Even though the relationship between the potential for rehabilitation and the best interests language is ambiguous, the legislature did provide three factors for the courts to consider in determining the best interests and the child's rehabilitation potential. It should be noted however, that the court is not limited to the following three factors, but that they must be taken into consideration.¹⁶⁶

1. *The Nature and Circumstances of the Act*¹⁶⁷

A juvenile who commits a heinous offense may legitimately be beyond the juvenile system's capacity to rehabilitate him.¹⁶⁸ However, it must be remembered that an offender may be capable of rehabilitation despite having committed a very serious offense.¹⁶⁹ Extenuating circumstances may exist, all of which could be resolved by treatment within the juvenile system.¹⁷⁰

165. See *New Kentucky Act*, *supra* note 30, at 157.

166. The Act provides:

In making the determination required by subsection 6, paragraph "c", the factors which the court shall consider include but are not limited to the following:

a. The nature of the alleged delinquent act and the circumstances under which it was committed.

b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

IOWA CODE § 232.45(7) (1979).

167. See IOWA CODE § 232.45(7)(a) (1979).

168. See Browne, *supra* note 6, at 484.

169. See Vitiello, *supra* note 30, at 33; *Comment, Wisconsin's New Juvenile Waiver Statute: When Should We Wave Goodbye to Juvenile Court Protections?* 1979 WIS. L. REV. 190, 212 (hereinafter cited as *Wisconsin Waiver Statute*). A study has indicated that juvenile murderers are model prisoners and are low rate recidivists. This indicates that juvenile offenders should be categorized by the motivational need the crime fills, and not by the seriousness of the offense. See Vitiello, *supra* note 19, at 39.

170. *Comment, Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U.L.J. 604, 611 (1972) (hereinafter cited as *Questionable Validity*).

The emphasis should not be on the crime alone but rather on why the juvenile acted as he did.¹⁷¹ To abandon a juvenile just because he commits a single serious offense is contrary to the juvenile court philosophy of rehabilitation.¹⁷² Therefore, judges should be cautioned against giving undue weight to the specifics of the crime while abandoning or reducing their evaluation of the juvenile's rehabilitation potential.

2. *Prior Juvenile Court Contacts and Response to Attempted Rehabilitation*¹⁷³

By using the language "the nature and extent" of the juvenile's previous contacts with juvenile authorities the legislature has instructed the courts to undertake a searching, not a surface, inquiry. The nature of the contact is important when, for example, in the past the juvenile needed the services of a remedial institution but was unable to get in because of overcrowding and was therefore not sufficiently helped with his problem. In these types of situations, the fact that the past treatment the juvenile received did not prevent him from being before the juvenile court again may not indicate that he is not amenable to treatment, because he never received the treatment he needed.¹⁷⁴ A juvenile judge should not lightly undertake a course of conduct transfer since the juvenile's conduct might be attributable to a lack of resources within the juvenile system.¹⁷⁵ Additionally, the problem with predicting dangerousness based on past contacts is not merely the fact that it cannot be done with an acceptable degree of accuracy, but also that there exists a very substantial tendency to over predict.¹⁷⁶ Therefore, juveniles have been identified as potentially dangerous who upon subsequent treatment and release would forego any further criminal or violent behavior.¹⁷⁷

A judge's conviction that the juvenile treatment programs have not reformed the juvenile may be the determining factor in his waiver decision. However, one commentator contends that if a "hopeless" label is tagged on a juvenile who has not responded favorably to rehabilitative measures then the adequacy of the measures needs to be reassessed.¹⁷⁸

3. *Programs and Facilities of the Juvenile Court Compared with Pro-*

171. See Alers, *supra* note 29, at 521.

172. See Stamm, *supra* note 29, at 154.

173. See IOWA CODE § 232.45(7)(b) (1979).

174. See Vitiello, *supra* note 30, at 35. Judge Strickler stated that in his three years in the juvenile court Iowa's two training schools have never refused a child because of overcrowded conditions. Interview with Judge R. A. Strickler, Judge of the Polk County Juvenile Court, in Des Moines, Iowa (March 20, 1980).

175. See Browne, *supra* note 6, at 484.

176. See Feld, *supra* note 29, at 542.

177. *Id.*

178. See Peuler, *supra* note 4, at 358.

*grams and Facilities of the Criminal Court*¹⁷⁹

The legislature's language defining the third factor as programs, facilities and personnel *available* to the juvenile court could provide a convenient subterfuge for jurisdictions which choose to provide only meager resources for treatment and rehabilitation.¹⁸⁰ The key determination of whether a juvenile can be rehabilitated through the juvenile system places a heavy burden on the juvenile court and on the state to provide the facilities necessary to facilitate the principle of rehabilitation through the doctrine of *parens patriae*.¹⁸¹ Juvenile courts which are allowed to waive jurisdiction because the system does not have the programs necessary to aid the juvenile illustrate the mockery of a benevolent statute unbacked by adequate facilities.¹⁸² The legislature should instead direct courts to actively explore alternatives to waiver and a juvenile should be transferred only if there is no recognized and proven program capable of treating him.¹⁸³

Secondly, a juvenile court's interest in rehabilitation will rarely if ever be benefitted by sending the juvenile to adult court. No matter how poorly the goal of rehabilitation is achieved within the juvenile system, it is generally an improvement over the options available in the adult criminal system.¹⁸⁴ A comparison between juvenile and adult facilities is pointless from the standard of rehabilitation. The youngest are the victims in a prison setting because the weak are the ones hurt by the strong and the innocent are the ones defiled by the depraved.¹⁸⁵ Even if the juvenile is not exploited, he will become more aggressive from his need for self-protection. Generally the best lesson taught in prison is how to be a better offender, therefore using prisons for anything other than the permanent removal of a person from society is ill-advised.¹⁸⁶

C. Appellate Review of a Waiver Hearing Determination

The new section dealing with appeal from juvenile court orders, section 232.133,¹⁸⁷ is very similar to the appeal section of the old juvenile code.¹⁸⁸

179. See IOWA CODE § 232.45(7)(c) (1979).

180. See Stamm, *supra* note 29, at 158.

181. *Id.* at 137.

182. See Pauler, *supra* note 4, at 360.

183. See 60 MINN. L. REV. 1097, 1103, (1976).

184. See Stamm, *supra* note 29, at 152.

185. *Id.* at 146.

186. *Id.*

187. That section provides in part as follows:

1. Any interested party aggrieved by any order or decree of the juvenile court may appeal from the court for review of questions of law or fact.
2. The procedure for such appeals shall be governed by the same provisions applicable to appeals from the district court provided that when such order or decree affects the custody of a child the appeal shall be heard at the earliest practicable time.

Aside from modernization of the language however, there are two changes which may lead the Iowa Supreme Court to revert from its holding in *Interest of Clay*,¹⁸⁹ and hold instead that a juvenile does have a right of direct appeal from a waiver order. One change is that the first provision now reads "[a]ny interested party aggrieved"¹⁹⁰ may appeal instead of "an interested party."¹⁹¹ This change could reasonably be interpreted as broadening the statute and therefore including the juvenile who desires to appeal from a waiver decision. The second change is that the new section has been divided into four separately numbered parts instead of retaining the form of two unnumbered paragraphs.¹⁹² It should be remembered that the *Clay* court based its holding in part on its statutory construction concluding that the second sentence, requiring the appeal procedure to be governed by district court procedure, limited the language that an interested party may appeal which constituted the first sentence.¹⁹³ The fact that the legislature has physically separated the two sentences instead of including them both in one provision may foreclose the court from reaching a similar construction of the new statute.

Additionally, section 232.45(8) places a new requirement upon the juvenile judge. For the first time, he is obligated to make and file written findings revealing his reasons for waiving jurisdiction.¹⁹⁴ This record would allow meaningful review and is another factor indicating that direct appeal may be possible under the new Act.

A construction allowing direct appeal for a juvenile who has been transferred is certainly preferable since statutory criteria for judicial decision making is not in itself an adequate guarantee against arbitrary waiver determinations.¹⁹⁵ Juvenile judges still retain a high degree of discretion in making a waiver decision under the new statute, and the tremendous impact of their decision should support a procedure which would keep the potential for error in waiver as small as possible.¹⁹⁶

In *Cohen v. Beneficial Industrial Loan Corp.*,¹⁹⁷ the Supreme Court wrote of giving finality a practical rather than a technical construction. A waiver order which relinquishes the exclusive jurisdiction of the juvenile court has the practical effect of leaving nothing unfinished or incomplete regarding the relinquishment, and it should be remembered that guilt or

IOWA CODE § 232.133 (1)(2) (1979).

188. See IOWA CODE § 232.58 (1978).

189. See note 84 *supra* and accompanying text.

190. See IOWA CODE § 232.133 (1) (1979).

191. See IOWA CODE § 232.58 (1977).

192. Compare IOWA CODE § 232.133 (1979) with IOWA CODE § 232.58 (1978).

193. See note 89 *supra* and accompanying text.

194. See IOWA CODE § 232.45(8) (1979).

195. See Illinois Comment, *supra* note 5, at 306.

196. See *Reliable Evidence*, *supra* note 39, at 406.

197. 337 U.S. 541, 546 (1949).

innocence is not the issue at the waiver hearing.¹⁹⁸ Appellate review shortly after the waiver decision is imperative if the juvenile is to be permitted to return to the juvenile system while he remains eligible for its benefits.¹⁹⁹

IV. CONCLUSION

While the *parens patriae* doctrine has been accepted as the philosophy supporting the treatment and rehabilitation of the juvenile in a separate system of justice, it has also been recognized that not every juvenile can be helped within this system. Waiver of jurisdiction to adult courts became the appropriate procedure for handling juveniles who were unable to benefit from the juvenile system's programs and facilities. The Iowa legislature's first waiver statute lacked sufficient procedural guidelines and also contained no substantive criteria on which to base a waiver decision. Based on this imprecise law, the cases of *Mallory*, *Halvorsen*, *Speck*, and *Clay* considered questions of jurisdiction, separate hearings and criteria, vagueness, and the right to appeal.

Iowa's new waiver statute codifies the case law demand for procedural due process. The statute includes the right to notice, the right to counsel, the right to a hearing restricted to waiver before an adjudication on the merits, the right of access to written materials the court will rely on, and the right to subpoena witnesses. However, one needed improvement is the establishment of the standard that clear and convincing evidence must be presented before jurisdiction can be waived.

The new statute, though a major improvement over the total lack of substantive criteria which characterized its predecessor, still contains several problem areas. The confusing language of the "best interest of the child or the public" is combined with a determination of amenability to treatment. However, it is impossible to tell whether the combination of those two waiver criteria allows a balancing, or whether both criteria must support waiver before the court can relinquish jurisdiction. It is urged that a clarification be made, and that any change favor increased weight being given to the determination of rehabilitative potential.

The juvenile's ability to appeal an adverse waiver decision is uncertain, but two changes in the section concerning appeal could and should be interpreted to allow direct appeal of an order waiving jurisdiction.

Despite the need for minor amendment, Iowa's new waiver statute is unquestionably a major improvement over the law it replaced. With a few minor revisions this new law could easily become a model statute and serve as a guidepost for other jurisdictions whose waiver procedures are outdated

198. See AKRON L. REV., *supra* note 93, at 515, 517.

199. See Note, *Review of Improper Juvenile Transfer Hearings*, 60 VA. L. REV. 818, 839 (1974).

and imprecise.

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