

Chapter 6

Transfer to and from Criminal Proceedings

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§ 6-1 Transfer to and from Criminal Proceedings in General

Transfer to Criminal Proceedings

In addition to excluding a number of offenses from initial juvenile court jurisdiction, the Juvenile Act gives juvenile court judge's discretion to transfer some other petitioned delinquency cases for criminal prosecution if "the public interest" would be served thereby. Before turning to a detailed examination of the statutory requirements for discretionary transfer and the specific issues that must be resolved in transfer proceedings, it may be worthwhile to explore the broader considerations that ought to influence a decision of this kind.

First, for a variety of reasons, including the structure and history of the Juvenile Act itself, transfer of juveniles for criminal prosecution should be deemed appropriate only after consideration of the extensive body of research that addresses the developmental stages of youth, with attention to brain development and adolescent immaturity.¹ Before 1995, when juvenile courts in Pennsylvania exercised original jurisdiction over all offenses committed by juveniles, with the sole exception of murder, discretionary case-by-case judicial transfer was the only possible mechanism for disposing of difficult cases involving serious offenders who could neither benefit from services nor be held accountable by sanctions available to the juvenile court. That is not the case today. As was explained more fully in a previous section (see "The Boundaries of Delinquency Jurisdiction," § 4-5), the border between juvenile and criminal jurisdiction has since been redrawn, so as to place a number of the most serious juvenile offenses initially on the criminal side of the line. In effect, the legislature has already "transferred" many of the difficult cases. Consequently, judicial transfers are much rarer following the 1995 amendments to the Juvenile Act.²

Consideration of the public interest should also induce juvenile court judges to exercise extraordinary caution in granting requests for transfer to criminal proceedings. While the transfer law enumerates no fewer than 15 factors and sub-factors to be taken into account

in determining the public interest in transfer proceedings (see the discussion under “Hearing on Request for Transfer to Criminal Proceedings,” § 6-4), the Pennsylvania Supreme Court has made it clear that in a broader sense “the purpose of the amended [Juvenile] Act itself provides guidance as to the meaning of ‘public interest.’”³ Given the very limited opportunities for appropriate treatment, rehabilitation, learning and growth in the adult criminal justice system, a juvenile court judge should be extremely reluctant to transfer a juvenile for criminal proceedings. Arguably, this will sometimes be unavoidable, if a juvenile is to be held accountable for serious offenses. But real accountability—in the sense that involves acknowledging responsibility for wrongdoing and making amends for it—may often be more readily imposed by a juvenile court with a flexible array of victim- and community-oriented sanctions, than by a criminal court with only prison terms to hand down. And if the net effect of criminal processing and incarceration of juveniles is simply to produce untreated, unrehabilitated, but younger and more able-bodied ex-convicts, then even the apparent public safety benefits of transfer may prove illusory as well.

Transfer from Criminal Proceedings

A juvenile who has been charged with murder or another excluded offense in a criminal proceeding may request a discretionary transfer to juvenile court.⁴ In such a case, the issue to be decided in the hearing on the motion is the same as in a hearing requesting transfer to criminal proceedings— whether “the transfer will serve the public interest,” taking into consideration the juvenile’s amenability to treatment and the other factors enumerated in the Juvenile Act provision governing transfer to criminal court—except that the juvenile must bear the burden of establishing by a preponderance of the evidence that transfer is in the public interest.⁵ If the court finds that the juvenile has met this burden, the Juvenile Act requires that the court make findings of fact, including specific references to the evidence, and conclusions of law in the transfer order.

The statute providing for transfers from criminal proceedings— sometimes referred to as “reverse” transfers or “decertifications”— states that requests for transfer are

Requests for transfer from criminal to juvenile court should be heard by judges with broad knowledge of the juvenile system.

to be heard by “the court in a criminal proceeding.”⁶ However, as a practical matter, the public interest determination called for cannot be properly made by a judge who is unfamiliar with the juvenile justice system, its available services and dispositional alternatives, and the juveniles’ rehabilitative prospects within it. Accordingly, where

possible, the best practice would be to entrust decertification decisions to experienced juvenile court judges sitting in criminal court for that purpose. At minimum, a judge familiar with the juvenile justice system should conduct the proceeding.

In any event, motions requesting the transfer of a case from criminal proceedings must be dealt with quickly. Because the juvenile may well be detained among adult criminals pending a “decertification hearing,”⁷ the mere passage of time may severely compromise his rehabilitative prospects in the juvenile system. It should also be noted that if the court does not make its finding regarding whether a child has met the burden of establishing that the transfer from criminal proceedings would serve the public interest within **20 days** of the hearing on the petition to transfer, the law provides that a juvenile’s transfer request is automatically denied.⁸

§ 6-2 Best Practices

- A system should be developed within each jurisdiction to promptly identify juveniles that have been charged with “direct-file” offenses in the adult criminal justice system, to ensure compliance with Pa.R.Crim.P. 595-598. For example, the president judge may direct magisterial district judges to provide notification to the juvenile probation department when a “direct-file” case comes before them, or request the jail warden to provide notification to the juvenile probation department whenever a juvenile is admitted to the facility.
- Judges presiding in hearings governing transfer to and from criminal proceedings should have broad knowledge of the juvenile and criminal justice systems and the treatment options available in each.
- Experts retained to address a juvenile’s amenability to treatment should be psychologists or psychiatrists with specialized training in adolescent brain development, and broad knowledge of the juvenile and criminal justice systems and the treatment options available in each.
- The court should not hesitate to engage its own independent expert to provide an assessment of the juvenile’s amenability to treatment.
- Courts should not grant a juvenile’s own request to be transferred for criminal prosecution, unless the case meets the statutory offense requirements for transfer, with respect to offense grading, age, and public interest criteria.

- Judges presiding in transfers from criminal proceedings shall ensure that status conferences are conducted in accordance with Pa.R.Crim.P. 595 (mandatory status conference).

§ 6-3 Statutory Requirements for Discretionary Transfers to Criminal Proceedings

After the filing of a delinquency petition but before any hearing on the merits, the Juvenile Act authorizes the discretionary transfer of the case for prosecution in a criminal proceeding if the court finds all of the following:⁹

- **Age.** The juvenile must have been at least 14 at the time of the alleged offense.
- **Offense level.** The offense alleged must be one that would be considered a felony if committed by an adult.
- **Prima facie case.** There must be a prima facie case that the juvenile committed the alleged offense.
- **Absence of mental health/retardation issues requiring commitment.** The court must find “reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.”¹⁰
- **Public interest.** The court must also find “reasonable grounds to believe that the public interest is served by the transfer,”¹¹ following mandatory consideration of fifteen enumerated factors and sub-factors (see discussion under “Hearing on Request for Transfer to Criminal Proceedings,” § 6-4). In this regard, it is a best practice for the court to appoint a psychologist or psychiatrist to evaluate the juvenile and make a recommendation regarding amenability. The psychologist or psychiatrist selected to perform the evaluation must have a broad knowledge of both the juvenile and criminal justice systems, and be familiar with the service and treatment options available in each system and how they relate to the juvenile’s assessed needs.

Written notice of a request for transfer must be served at least **3 days** in advance of the transfer hearing.¹² Filing and service of a notice of a request for transfer must ordinarily occur after the filing of the petition but before the first scheduled adjudicatory hearing. Those entitled to notice of a request for transfer include the juvenile, the juvenile’s

guardian, the juvenile’s attorney, the juvenile probation department, and the attorney for the Commonwealth.¹³

§ 6-4 Hearing on Request for Transfer to Criminal Proceedings

Before a juvenile may be transferred for criminal proceedings, the Juvenile Act calls for a hearing, which—in view of the stakes as well as the variety of issues that must be considered—is often a lengthy and wide-ranging one.¹⁴ A transfer hearing must be presided over by a juvenile court judge—not a juvenile court hearing officer.¹⁵ Although the Juvenile Act does not go into detail regarding the prescribed conduct of transfer hearings, a juvenile facing transfer is entitled as a matter of constitutional law to “the essentials of due process and fair treatment.”¹⁶ These essentials include the right to counsel and to “access by the child’s counsel to the social records of the child,” but apparently not to immunity from prosecution based on testimony at the transfer hearing.¹⁷ While the best practice is for the juvenile to be present at the hearing, advanced communication technology (ACT) may be utilized if the parties consent.¹⁸

Prior to the transfer hearing, the court may order that a social study and report be prepared and submitted “concerning the child, his family, his environment, and other matters relevant to disposition of the case.”¹⁹ Typically, this report is prepared by the juvenile probation department to provide additional information regarding the juvenile’s background and amenability to treatment. However, this report should not replace the assessment of an appropriately trained psychologist or psychiatrist. (See § 6-3 previously mentioned)

Transfer hearings call for detailed inquiry into the juvenile’s amenability to treatment in the juvenile system.

Factors to Be Considered in Public Interest Determinations

Apart from determining whether the Commonwealth has established a prima facie felony case against the juvenile and ruling out the necessity of a mental health or mental retardation commitment, the main business of the transfer hearing is to decide whether “the public interest is served” by a transfer.²⁰ The law directs the court to consider 15 enumerated factors and sub-factors in making its determination regarding the public’s interest in the transfer decision.²¹ The seven primary factors to be weighed are the following:

- The offense’s impact on the victim(s)
- The offense’s impact on the community
- The threat posed by the juvenile to the safety of the community or any individual
- The nature and circumstances of the offense
- The juvenile’s degree of culpability
- The “adequacy and duration” of available juvenile dispositional alternatives in comparison with criminal sentencing options
- The degree to which the juvenile is “amenable to treatment, supervision or rehabilitation as a juvenile.”

While no specific weights are assigned to the above factors, and none is singled out as determinative, it is clear that a particularly detailed inquiry into the juvenile’s amenability to treatment, supervision or rehabilitation is called for, since the law specifies no fewer than eight sub-factors that must be considered in the course of this amenability determination. Specifically, the sub-factors that must be considered as bearing on the juvenile’s amenability include, but are not limited to:

- The juvenile’s age
- The juvenile’s mental capacity
- The juvenile’s maturity
- The juvenile’s degree of criminal sophistication
- The juvenile’s previous record as a delinquent
- The “nature and extent” of the juvenile’s court history and whether previous rehabilitation attempts have succeeded or failed
- Whether the juvenile’s rehabilitation is possible in the time left before juvenile court jurisdiction over him expires
- Any probation or institutional reports regarding the juvenile
- Any other relevant factors

An accurate analysis of amenability requires judges and attorneys to be familiar with the treatment and service options available. Any resources that are recommended for the care or rehabilitation of the juvenile, such as a placement facility, should be well-researched. Attorneys should be able to articulate why a resource option is appropriate and how it will address the juvenile’s specific needs.

Burden of Proof

Generally, the Commonwealth bears the burden of establishing by a preponderance of evidence that the public interest is served by the transfer of the case to criminal court,

which includes determining whether the child is amenable to treatment, supervision or rehabilitation as a juvenile.²² However, the burden on these issues shifts to the juvenile when a prima facie case is made that the juvenile has committed one of the enumerated felonies listed below *and* either (1) was 14-years old and used a deadly weapon²³ or (2) was at least 15-years-old and had previously been adjudicated delinquent for any felony-grade offense. The enumerated felonies are as follows:

- Attempted murder
- Voluntary manslaughter
- Rape
- Involuntary deviate sexual intercourse
- First degree felony aggravated assault
- Aggravated indecent assault
- First degree felony robbery
- Robbery of a motor vehicle
- Kidnapping
- Any attempt, conspiracy, or solicitation to commit any of these offenses.

Prosecution under the criminal law and procedures is mandatory, under 42 Pa.C.S. §6355(e), in those cases meeting the statutory criteria for exclusion—that is, cases in which the petition alleges murder or other acts excluded from juvenile court jurisdiction,²⁴ unless a criminal court has already considered the matter and transferred the case to juvenile court pursuant to 42 Pa.C.S. §6322. As previously discussed (See § 6-1) a criminal court, under 42 Pa.C.S. §6322, may transfer a case where the juvenile is alleged to have committed murder or other statutorily excluded acts, from criminal court to juvenile court if the juvenile establishes by a preponderance of the evidence that the transfer will serve the public interest.²⁵

Victim and Community Interests in Transfer Decisions

A victim of a juvenile offense has the right to notice of any hearings related to the transfer of a juvenile to and from criminal proceedings and may decide to participate in the proceedings.²⁶ As noted above, in making its “public interest” determination in a transfer proceeding, the court is required to give careful consideration to victim impact evidence. The extent to which the victim has been harmed by the offense is one basic measure of its seriousness. Moreover, the degree of harm suffered by the victim should have considerable bearing on the court’s assessment of the adequacy of a juvenile disposition to meet the case. Accordingly, in the course of the transfer hearing, evidence should be presented on the physical, emotional, and financial impact of the offense on the victim, and such evidence

should be weighed appropriately in the court’s decision. Where necessary, as in a disposition hearing, the court should make its own inquiries regarding the victim’s feelings, concerns, and wishes regarding transfer.

On the other hand, the court should avoid the simplistic assumption that cases involving serious harm to victims can only be resolved in the criminal justice system. Accountability to victims and victim restoration are among the Pennsylvania juvenile justice system’s primary goals. If anything, balanced attention to victim interests may be more likely in the juvenile system than outside it, particularly for victims who are willing to participate fully in the disposition process.

It is true that a victim will sometimes favor transfer to criminal proceedings, and may be disappointed by a decision to keep the case in the juvenile justice system. Under these circumstances, the court has a responsibility to make use of the opportunity presented by the transfer hearing to educate the victim regarding the true basis of the transfer decision. Time should be taken not only to solicit the victim’s views during the hearing, but to explain the reasons for a difficult decision at its conclusion. Above all, if the court has declined to transfer a case for criminal prosecution, the victim should be helped to understand that the harm suffered by the victim was not overlooked and will be an important consideration in subsequent delinquency proceedings.

Some of these same general considerations apply to the community interest in transfer proceedings. The law requires the court, in weighing a request for transfer to or from criminal proceedings, to take into account any impact the offense has had on the community and any threat to the community’s safety that may be posed by the juvenile. Especially in high-profile cases, community sentiment in favor of prosecuting the juvenile in adult court may be intense—and the general public cannot ordinarily be excluded from these hearings.²⁷ Here the court’s responsibility must be to give due weight to the legitimate community interest in the case, without simply surrendering to public clamor.²⁸ In difficult cases, the best course is to use the hearing to educate the public regarding the transfer issue, and to explain the grounds for the transfer decision.

Granting or Declining Transfer to Criminal Proceedings

If the court finds that transfer is not warranted, it must schedule an adjudicatory hearing on the delinquency petition. Otherwise, it must “transfer the case to the division or a judge of the court assigned to conduct criminal proceedings for prosecution.”²⁹

While the Juvenile Act is silent concerning the written findings that must accompany and support a transfer order, as a matter of constitutional law the juvenile is entitled to “a

statement of reasons or considerations” for transfer that is “sufficient to demonstrate that . . . the question [of certification] has received the careful consideration” of the court, and that sets forth the basis for the order “with sufficient specificity to permit meaningful review.”³⁰ The court need not provide “detailed or intricate explanations of the rationale for certification,” and its statement of reasons need not contain conventional findings of fact.³¹ While the court must consider all the enumerated factors in 42 Pa.C.S. §6355(a)(4)(iii) in determining whether to certify a juvenile, the Juvenile Act is silent as to the weight assessed to each factor. The court “need not address, *seriatim*, the applicability and importance of each factor and fact in reaching its final determination.”³² On the other hand, supporting a transfer order with a mere “bald reference” to the juvenile’s file is clearly inadequate.³³

§ 6-5 Transfer to Criminal Proceedings at the Juvenile’s Request

Although transfers for criminal prosecution are generally requested by the Commonwealth, the Juvenile Act permits transfers at the request of juveniles as well.³⁴ There is nothing in the law to suggest that a juvenile’s request for transfer should be handled differently from the Commonwealth’s request for transfer. The best practice is to assume that the legislature, having defined a narrow category of transfer-eligible cases, intended to place all others under juvenile court jurisdiction, regardless of the forum preferences of the juveniles themselves.³⁵ Thus, juvenile court judges should deny transfer requests in cases that do not meet the statutory requirements for transfer outlined above. That is, even a juvenile who is willing to be transferred—presumably for strategic reasons of some kind—should meet age and offense requirements for transfer, and the case should otherwise be one in which transfer will serve the public interest. A request for transfer involving a youth who was under 14 at the time of the offense, or one who is not accused of a felony, should not be granted.

Juveniles who request transfer for criminal prosecution should be required to satisfy statutory transfer requirements.

§ 6-6 Consequences of Transfer to Criminal Proceedings

An order of transfer not only “terminates the applicability” of the Juvenile Act with respect to the offenses alleged in the petition,³⁶ opening the way for a criminal trial of the juvenile, it also sweeps away confidentiality protections that would otherwise be applied to the juvenile’s records and files,³⁷ and permits him to be detained “in accordance with the law governing the detention of persons charged with crime.”³⁸ At the conclusion of the transfer hearing, the juvenile court judge “shall determine bail for the juvenile,” under the ordinary bail rules applicable to adults.³⁹ However, it should be noted that 42 Pa.C.S. §6327 specifically provides that the court, in making the transfer order, may order continued detention of a juvenile if the “child” is unable to provide bail. Because the transfer hearing serves as the “preliminary hearing” required under the Pennsylvania Rules of Criminal Procedure, the attorney for the Commonwealth may file an information as soon as the transfer order is issued.⁴⁰

If the juvenile is found guilty of a non-summary offense in a criminal proceeding following transfer, the juvenile court will have no

An order of transfer to criminal proceedings will have far-reaching implications.

jurisdiction over him in the future for crimes that would otherwise be considered delinquent acts. In connection with any subsequent allegations, regardless of their nature, the juvenile will be charged, detained, and tried as an adult.⁴¹

¹ Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg. (2015) *The Supreme Court and the Transformation of Juvenile Sentencing*. John D. and Catherine T. MacArthur Foundation. <http://www.modelsforchange.net/publications/778>

² In fact, transfers of juvenile cases to criminal courts have declined considerably since 1996. In 2016, Pennsylvania juvenile courts transferred only 62 juvenile cases, accounting for just 0.3% of the year’s juvenile court dispositions. Juvenile Court Judges’ Commission. Pennsylvania Juvenile Court Dispositions 2016. Shippensburg, PA: Juvenile Court Judges’ Commission.

³ Commonwealth v. Cotto, 562 Pa. 32, 753 A. 2d 217 (2000).

⁴ 42 Pa.C.S. §6322.

⁵ 42 Pa.C.S. §6322.

⁶ 42 Pa.C.S. §6322(a).

⁷ Pursuant to §6327(c.1), a juvenile who is charged with a “direct-file” offense and seeks to transfer to juvenile proceedings, may be detained in a secure juvenile detention facility *if* the attorney for the Commonwealth consents and the court orders the detention.

⁸ 42 Pa.C.S. §6322(b).

⁹ 42 Pa.C.S. §6355.

¹⁰ 42 Pa.C.S. §6355(a)(4)(iv).

¹¹ 42 Pa.C.S. §6355(a)(4)(iii).

¹² 42 Pa.C.S. §6355(a)(3). Given the breadth and importance of the issues to be determined at the transfer hearing, the statutory three days' notice hardly seems adequate. See McCarthy, Pa. Juvenile Delinquency Prac. & Proc. (4th Ed.), § 10-3.

¹³ Rule 390, Pa.R.J.C.P.

¹⁴ 42 Pa.C.S. §6355(a)(2).

¹⁵ Rule 187(B), Pa.R.J.C.P.

¹⁶ Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966).

¹⁷ See McCarthy, Pa. Juvenile Delinquency Prac. & Proc. (4th Ed.), § 10-3.

¹⁸ Rule 394, Pa.R.J.C.P.; Rule 129, Pa.R.J.C.P. Advanced Communication Technology may be utilized for the appearance of a witness at a transfer hearing, unless good cause is shown otherwise.

¹⁹ 42 Pa.C.S. §6339.

²⁰ Prior to October 1, 2012, the Commonwealth was also required to prove by a preponderance of the evidence that the child was not amenable to treatment, rehabilitation, or supervision. Effective, October 1, 2012, Pa.R.J.C.P. 800(17) suspends 42 Pa. C.S. §6355(g) insofar as it is inconsistent with Rule 394. Section 6355(g) provides that the attorney for the Commonwealth has the burden of establishing by a preponderance of the evidence that the transfer of the case to criminal proceedings serves the public interest *and* that the child is not amenable to treatment, supervision or rehabilitation as a juvenile unless the exceptions of (g)(1) and (2) apply. Rule 394 provides that the attorney for the Commonwealth has *only* the burden of establishing by a preponderance of the evidence that public interest is served by the transfer of the case to criminal proceeding because §6355(a)(4) provides that in determining whether “the public interest is served” by the transfer, the court must consider “whether the child is amenable to treatment, supervision or rehabilitation as a juvenile” based on criteria set forth in the statute.

²¹ Many of these factors are loosely based on those suggested by the United States Supreme Court for determinations of this kind in Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966).

²² Rule 394, Pa.R.J.C.P.; see also 42 Pa.C.S. §6355(a)(4). Rule 800(17), Pa.R.J.C.P.

²³ “Deadly weapon” is defined in 18 Pa.C.S. §2301: “Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.”

²⁴ See 42 Pa.C.S. §6302 definition of “delinquent act”

²⁵ In so evaluating the public interest, the criminal court shall consider the factors contained in 42 Pa.C.S. §6355(a)(4), as discussed above.

²⁶ 18 Pa.C.S. §11.213(f)(5)); See also Comment to Rule 390, Pa.R.J.C.P., suggesting that before the case gets to the transfer hearing, the attorney for the Commonwealth should notify the victim of any request for transfer

²⁷ See 42 Pa.C.S. §6336(E), which among other things requires open hearings in proceedings involving 14-year-olds accused of felonies—a provision that by itself covers all juveniles eligible for discretionary transfer. All criminal proceedings are open to the public.

²⁸ See Code of Judicial Conduct, Canon 3: “A judge should be unswayed by partisan interests, public clamor, or fear of criticism.”

²⁹ Rule 394, Pa.R.J.C.P.

³⁰ Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966), cited in Commonwealth v. Broome, 317 Pa. Super. 1, 463 A. 2d 1053 (1983). Cf. 42 Pa.C.S. §6322(b), which requires a court ordering a transfer from a criminal proceeding to “make findings of fact, including specific references to the evidence, and conclusions of law in support of the transfer order.”

³¹ Commonwealth v. McDonald, 399 Pa. Super. 250, 582 A.2d 328 (1990).

³² Commonwealth v. Jackson, 555 Pa. 37, 722 A.2d 1030 (1999).

³³ Commonwealth v. Broome, 317 Pa. Super. 1, 463 A. 2d 1053 (1983).

³⁴ 42 Pa.C.S. §6355(c).

³⁵ See McCarthy, Pa. Juvenile Delinquency Prac. & Proc. (4th Ed.), § 10-4.

³⁶ 42 Pa.C.S. §6355(b).

³⁷ 42 Pa.C.S. §6308.

³⁸ 42 Pa.C.S. §6327(d).

³⁹ Rule 396, Pa.R.J.C.P.

⁴⁰ Rule 395, Pa.R.J.C.P.

⁴¹ 42 Pa.C.S. §6302.